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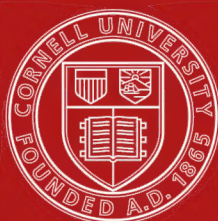
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WOOD ON RAILWAY LAW.

VOLUME II.

SECOND EDITION.

A TREATISE
ON
THE LAW OF RAILROADS.

BY
H. G. WOOD,
AUTHOR OF "THE LAW OF LIMITATIONS," "NUISANCES," ETC.

Second Edition.

BY H. D. MINOR,
OF THE MEMPHIS BAR.

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LAW OF RAILROADS.

CHAPTER XIV.

EMINENT DOMAIN.

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SEC. 232. **Right of, Defined.** — The right of the sovereign to take the property of private persons for public purposes is an important and essential right, and one which is conceded under all forms of government, and has always existed. In this country, however, a limitation is placed upon the power by both the Federal and State

Constitutions, and it can only be exercised for *public* purposes,¹ and upon just compensation being made to the owner of the property taken.² The right is possessed by the State as a necessary attribute

¹ The legislature cannot authorize the taking of private property for a private use even upon just compensation made; so also it cannot compel the transfer of one man's property to another without the owner's consent. *Beekman v. Saratoga, &c. R. Co.*, 3 Paige Ch. (N. Y.) 45; 22 Am. Dec. 679; *Scudder v. Trenton*, 1 Saxton (N. J.) 694; 23 Am. Dec. 756; *Embury v. Conner*, 3 N. Y. 511; 53 Am. Dec. 330. But a statute authorizing the taking of private property with consent of the owner is valid though the taking be for a private use, and if a land owner accepts compensation under such a statute his right to object to the taking on the ground that it is for a private use is lost. The constitutional protection against the taking of private property is one which a property owner may waive, it having been made for his benefit. *Embury v. Conner*, 3 N. Y. 511; 53 Am. Dec. 325.

² *Vattel's Law of Nations*, Bk. I., ch. 20. *Pollard v. Hagan*, 3 How. (U. S.) 212; *Brown v. Beatty*, 34 Miss. 227; *McLaughlin v. Charlotte R. Co.*, 5 Rich. (S. C.) L. 583; *Freedle v. North Carolina R. Co.*, 4 Jones (N. C.), L. 89; *Mount Washington Road Co., in re*, 35 N. H. 134; *Hamilton v. Annapolis R. Co.*, 1 Md. Ch. 107; *Nichols v. Somerset, &c. R. Co.*, 43 Me. 356; *Evansville, &c. R. Co. v. Grady*, 6 Bush (Ky.), 144; *Mims v. Macon, &c. R. Co.*, 3 Ga. 333; *Enfield Toll Bridge Co. v. Hartford, &c. R. Co.*, 17 Conn. 40; *Rensselaer, &c. R. Co. v. Davis*, 43 N. Y. 137; *Edgewood R. Co's Appeal*, 79 Penn. St. 257; *Giesy v. Cincinnati, &c. R. Co.*, 4 Ohio St. 308; *Beekman v. Saratoga, &c. R. Co.*, 3 Paige Ch. (N. Y.) 45; *Buffalo, &c. R. Co. v. Brainard*, 9 N. Y. 100; *Lewis on Em. Dom.* § 1; *Dillon on Mun. Corp.* § 582. The right of eminent domain by which the State is authorized to take private property for public use, when the necessities of the country require it, is an inherent right of the State government; although, under the Constitution, compensation must be made to the owner of property so taken. *Young v. Harrison*, 6 Ga. 130. When a State grants a tract of land an estate in fee passes, as much as if a private individual grants it; but in each case it is subject to the power of being taken for public use on compensation being made. The right rests upon the principle that individual interests must be subservient to those of the public, and must yield when the public exigency requires, but then only upon ample compensation. This doctrine holds in respect to a corporate franchise. *Enfield Toll Bridge Co. v. Hartford, &c. R. Co.*, 17 Conn. 40. All grants of land made by a State, although irrevocable, are subject to the right of eminent domain, unless it is expressly relinquished. A grant to a railroad company of the right of way over lands before granted to the trustees of a canal company, does not violate the grant made by the State to those trustees. The effect likely to be produced by the opening of the railroad in diminishing the revenues of the canal, is no violation of the contract between the State and the trustees. *Illinois, &c. Canal v. Chicago, &c. R. Co.*, 14 Ill. 314. It is a power essentially different from that of *taxation*, in regard to which there is no constitutional restriction, and no guaranty for its just exercise, except in the discretion of the legislature. *People v. Mayor of Brooklyn*, 4 N. Y. 419; *Cincinnati, &c. R. Co. v. Clinton Co. Com'rs*, 1 Ohio St. 77; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330. See *Richardson v. Vermont Central R. Co.*, 25 Vt. 465; *Bennett v. Boyle*, 40 Barb. (N. Y.) 551; *Young v. Buckingham*, 5 Ham. (Ohio) 485; *Works v. Junction R. Co.*, 5 McLean (U. S.), 425; *Bailey v. Philadelphia, &c. R. Co.*, 4 Harring. 389; *People v. City of St. Louis*, 11 Ill. 351; *Spooner v. McConnell*, 1 McLean (U. S.), 337; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. (U. S.) 518; *Attorney-General v. Hudson River R. Co.*, 9 N. J. Eq. 526; *American Print Works v. Lawrence*, 23 N. J. L. 9. The exercise of this power does not infringe the constitutional provision designed to protect

of sovereignty, and may be exercised not only in its own behalf, but also in favor of any corporation or individual *for a public purpose*.¹ The right is not derived from the Constitution, *but is inherent in the State, and a natural and necessary incident of sovereignty*. The Constitution is merely a limitation upon the right, and except for such limitation, compensation would be discretionary with the legislature.² The question as to the manner in which it shall be

the obligation of contracts; and neither the fact that the property is held under a mortgage, nor that it belongs to a corporation chartered by a State law, exempts it from the operation of this principle. *Alabama, &c. R. Co. v. Kenney*, 39 Ala. N. S. 307. It is not restricted by any disability of the owner of the land appropriated. When, therefore, the State authorizes the appropriation of private property for the public good, the *consent* of the owner is not necessary. The owner has the right, alone, to demand in the mode pointed out by law, the compensation secured by the constitution, as a condition precedent to the vesting of the fee in the company; but has no power of resistance. *East Tenn., &c. R. Co. v. Love*, 3 Head (Tenn.), 63. The right rests upon the public necessity, and can only be exercised where such necessity exists. *But this necessity relates rather to the nature of the property and the uses to which it is applied than to the exigencies of the particular case*; and it is no objection to the exercise of the power, that lands equally feasible could be obtained by purchase. *Giesy v. Cincinnati, &c. R. Co.*, 4 Ohio St. 308. A statute authorizing one railroad corporation to acquire by purchase all the property of another railroad corporation, with a proviso that nothing in the act contained should in any wise affect any right whatever of any stockholder in the latter, and that such purchase should be made with the consent of the stockholders of the latter company, was held to require the consent of all the stockholders to the transfer.

¹ *Weir v. St. Paul, &c. R. Co.*, 18 Minn. 155; *Leisse v. St. Louis, &c. R. Co.*, 2 Mo. App. 105. In the exercise of the power of eminent domain the legislature are the exclusive judges of the degree and quality of interest

which are proper to be taken and dedicated to the public use, as well as of the necessity of taking it. *De Varaigne v. Fox*, 2 Blatchf. (U. S.) 95. The propriety of taking private property for a public use is not a judicial question; but one of political sovereignty, to be determined by the legislature, either directly or by delegating the power to public agents, proceeding in such a manner and form as it may prescribe. *People v. Smith*, 21 N. Y. 595. The principle that no action can be maintained for private injuries done by persons in the execution of a public trust, acting with due skill and caution, and within the scope of their authority, does not apply to a private corporation authorized by the legislature to construct works of public improvement by private capital for private emolument. *The grantee of a franchise for private emolument may be vested with the sovereign power to take private property for public use on making compensation, but is not clothed with the sovereign's immunity from resulting damages*. The power conferred leaves the common-law liability for injuries done in the exercise of the authority precisely where it would have stood if the land had been acquired in the ordinary way. *Tinsman v. Belvidere Delaware R. Co.*, 26 N. J. L. 148. The State has the constitutional power and right to authorize the taking of private property for the purpose of making railroads or other public improvements of the like nature, paying the owners of such property a full compensation therefor, whether such public improvements are made by the State itself, or through the medium of a corporation or joint stock company. *Bloodgood v. Mohawk, &c. R. Co.*, 18 Wend. (N. Y.) 9.

² *Central Branch Un. Pac. R. Co. v. Atchison, &c. R. Co.*, 28 Kan. 453.

exercised addresses itself to the legislature as a question of propriety, fitness, expediency, rather than as a question of power. It is competent for the government, in its discretion, to exercise it through its public officers, or agents, or through public or private corporations, or private individuals.¹ The right exists in the States as an incident of sovereignty, whether it is expressly conferred by the Constitution or not;² and in the exercise of this right they are not

¹ *Ash v. Cummings*, 50 N. H. 591; *Seacombe v. Railway Co.*, 23 Wall. 108; *Weir v. St. Paul, &c. R. Co.*, 18 Minn. 155.

² *Boom Co. v. Patterson*, 98 U. S. 403; *Brown v. Beatty*, 34 Miss. 227; *Harvey v. Thomas*, 10 Watts (Penn.), 63. No principle is better established than that the right of eminent domain is inseparably attached to national empire and sovereignty; and that, by the exercise of this right, a nation may surrender the rights of individual subjects or citizens. *Jones v. Walker*, 2 Paine (U. S.), 688. And that article of the Constitution, which prohibits the taking of private property for public use without just compensation, restrains the power of the general government, and was not intended to apply to the States. *Withers v. Buckley*, 20 How. (U. S.) 84. Every State has the right to make public roads through United States lands lying within it, under its power of eminent domain. The United States have no power to interfere with this right, the State legislatures having exclusive jurisdiction. *United States v. Railroad Bridge Co.*, 6 McLean (U. S.), 517. The general rights of eminent domain within the limits of a State are vested in the State government, in which the ultimate title to all the land within the State may be said to be. Since the State has the general power to take private property for "public use," in any particular case it devolves upon one objecting to such taking to show that it is an exception to the general power. The State itself, in taking private property for "public use," may make the application itself, or may make it through the agency of others, whether domestic or foreign corporations, or *a fortiori*, foreign governments, or a member of the domestic government, or even the Federal government itself. A

State may exercise a power primarily for her own benefit, — that being a public use, — through the agency of the Federal government, although the Federal government is to receive by the agency assistance in executing its own general duties. Such a law is constitutional where it provides a certain and adequate remedy, by which the owner of the property taken can obtain his compensation without unreasonable delay; and in this case the act providing for the impanelling of a jury to assess the damages, and for an order for the payment of the amount found due into the treasury, to be paid to the owner of the land upon proof of his ownership, was held to provide for a taking by due process of law. *Gilmer v. Lime Point*, 18 Cal. 229. It is incident to the sovereignty of every government that it may take private property for public use, of the necessity or expediency of which the government must judge; but the obligation to make just compensation is concomitant with the right. *Cooper v. Williams*, 7 Me. 273; *Spring v. Russell*, 3 Watts (Penn.), 294; *Henry v. Underwood*, 1 Dana (Ky.), 247; *O'Hara v. Lexington, &c. R. Co.*, 1 Dana (Ky.), 232; *Perry v. Wilson*, 7 Mass. 395; *De Varaigne v. Fox*, 2 Blatchf. 95; *Parkham v. Decatur County*, 9 Ga. 341; *Donnaher v. State*, 10 Miss. 649; *Brown v. Beatty*, 34 Miss. 227; *Coster v. Tide Water Co.*, 15 N. J. L. 54; *Varick v. Smith*, 5 Paige (N. Y.) 137; *Harris v. Thompson*, 9 Barb. (N. Y.) 350; *Bailey v. Miltenberger*, 31 Penn. St. 37; *Harding v. Goodlett*, 3 Yerg. (Tenn.) 41; *Stark v. McGowen*, 1 Nott. & M. (S. C.) 387; *Lindsay v. Commissioners*, 2 Bay (S. C.), 38; *Ford v. Chicago, &c. R. Co.*, 14 Wis. 609. The legislature cannot itself exercise or delegate the power of seizing and appropriating, *without compensation*, the land of one person for the private

subject to the control of the general government.¹ But the general government possesses the power, and may exercise it in any of the States so far as is necessary for the execution of its constitutional powers,² or it may exercise it through the State. Indeed, from the time of the formation of the government it has been in the habit of using, with the consent of the States, their officers, tribunals, and institutions as its agents; and their use has not been regarded as violative of any principle, or as in any manner derogating from the sovereign authority of the Federal government.³ But there is very

benefit of another. *Hall v. Boyd*, 14 Ga. 1. *Royston v. Royston*, 21 Ga. 161; *Nesbitt v. Trumbo*, 39 Ill. 110; *Burning v. New Orleans, &c. Banking Co.*, 12 La. An. 541; *Hoye v. Swan*, 5 Md. 237; *Dickey v. Tennison*, 27 Mo. 373; *Concord R. R. v. Greely*, 17 N. H. 47; *Dunham v. Williams*, 36 Barb. (N. Y.) 136; *Grim v. Wissenberg S. Dist.*, 37 Penn. St. 433. The provision in the Constitution, declaring that "private property shall not be taken for public uses without just compensation," does not prohibit the legislature from authorizing a temporary exclusive occupation of the land of an individual, as the incipient proceeding to the acquisition of a title to it, or to an easement in it for a public use, although such occupation may be more or less injurious to the owner. But such occupation becomes unlawful, unless the title or the easement is acquired within a reasonable time; otherwise the occupiers become trespassers *ab initio*. In the case of temporary occupation by a railroad company two years, it was held, under the circumstances of the case, not an unreasonable time. *Nichols v. Somerset, &c. R. Co.*, 43 Me. 356. The provision in the Constitution, that the people are deemed to be the original owners of the land, declares an absolute and uncontrollable rule of political sovereignty, and not a presumption of present title available to the people in an ejectionment. *People v. Trinity Church*, 22 N. Y. 44. The title to property is always held upon the implied condition that it must be surrendered to the government either in whole or in part when the public necessities evinced according to the established forms of law demand. *People v. New York*, 32 Barb. (N. Y.) 102. The authority to exercise the right of eminent

domain, being in derogation of private right, is to be strictly construed. The use of property which has been taken by right of eminent domain must be held in accordance with and for the purposes which justified its taking. The right of the State to take private property without the owner's assent, on compensation made, exists in her sovereign right of eminent domain, and can never be lawfully exercised unless supposed and intended to benefit the public. *Lance's Appeal*, 55 Penn. St. 16. The right to take land under this power is not restricted by any disabilities of the owner. *East Tenn., &c. R. Co. v. Love*, 3 Head (Tenn.), 63.

¹ *Boom Co. v. Patterson*, 98 U. S. 403.

² *Kohl v. United States*, 91 U. S. 367; *Matter of United States*, 96 N. Y. 227; *Darlington v. United States*, 82 Penn. St. 382; *People v. Humphrey*, 23 Mich. 471.

³ *FIELD, J.*, in *United States v. Jones*, 109 U. S. 513; *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 531-532; *Matter of United States*, 96 N. Y. 227; *Burt v. Merchants' Ins. Co.*, 106 Mass. 365; *Reddall v. Bryan*, 14 Md. 444; *Gilmer v. Lime Point*, 18 Cal. 229. It is well settled that it may lay aside its sovereignty, and as a petitioner enter the State courts and there accomplish the same end through proceedings authorized by the State legislature. If the State may delegate its power to a private corporation of another State, for the benefit of a canal located within its borders, as was held by this court in the *Matter of Peter Townsend*, 39 N. Y. 171, so it may to an independent political corporation where the use is public and the convenience shared by its own citizens. *Gilmer v. Lime Point*, 18 Cal. 229; *Burt v. Merchants' Ins. Co.*, 106 Mass. 366. While private property cannot be taken

strong authority for the view that the right of eminent domain exists in a state only for its own purposes, and that an act of the legislature authorizing the condemnation by State commissioners of land to be turned over to the United States for lighthouse or similar purposes is unconstitutional and utterly void.¹ These cases do not oppose the recognized rule that the Federal government may exercise the power of eminent domain within a State, but they insist, with much reason, that the State cannot exercise the power on behalf of the United States.²

Eminent domain then may be defined as the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand.³ It will be observed that provision for compensation to the individual whose property is taken is no part of the definition, though it is now made a condition precedent to the exercise of the right, by the constitution of every State as well as of the United States. In this country therefore the exercise of the power is limited to taking for a public use and upon just compensation being made.⁴ Territorial governments may exercise the power, but only by virtue of a delegation of it by Congress.⁵

for public purposes without just compensation, this need not be given in all cases concurrently in point of time with the actual exercise of the right of eminent domain. It is enough if an adequate and certain remedy is provided whereby the owner of such property may compel payment of his damages. *Bloodgood v. Mohawk, &c. R. Co.*, 18 Wend. (N. Y.) 9; *Lyon v. Jerome*, 26 Wend. 485; *People v. Hayden*, 6 Hill (N. Y.), 359; *Rexford v. Knight*, 11 N. Y. 308. This means reasonable legal certainty. *Chapman v. Yates*, 54 N. Y. 146; *Sage v. Brooklyn*, 89 N. Y. 189.

¹ In *People v. Humphrey*, 23 Mich. 471; 9 Am. Rep. 94, Judge COOLEY, delivering the opinion of the court, upholds this view with great vigor. The same view is taken in *Darlington v. United States*, 82 Penn. St. 382; 22 Am. Rep. 766; *Jones v. United States*, 48 Wis. 385.

² *Darlington v. United States*, 82 Penn. St. 382; 22 Am. Rep. 766. However, a

contrary view has sometimes been taken. Thus, in *Burt v. Merchants' Ins. Co.*, 106 Mass. 356, 8 Am. Rep. 339, the court held that the legislature of the State might delegate the right of eminent domain to an agent of the United States for the purpose of obtaining land within the State for a postoffice site. See also *Gilmer v. Lime Point*, 18 Cal. 229; *Reddall v. Bryan*, 14 Md. 444.

³ This is Mr. COOLEY's definition. See *Cooley's Const. Lim.* (4th ed.), 652 [524-525]. See also *Pollard v. Hagan*, 3 How. (U. S.) 23; *Vattel's Law of Nations*, c. 20, § 34; *Lewis on Em. Dom.*, § 1.

⁴ *Chicago, &c. R. Co. v. Dunbar*, 100 Ill. 110; *Boston, &c. R. Co. v. Salem, &c. R. Co.*, 2 Gray (Mass.), 1; *Grand Rapids, &c. R. Co. v. Van Driel*, 24 Mich. 409; *Secombe v. Milwaukee, &c. R. Co.*, 23 Wall. (U. S.) 108.

⁵ *Warren v. First Div. of St. Paul, &c. R. Co.*, 18 Minn. 384. The Cherokee Nation is not a sovereign state, and therefore does not possess the power of eminent domain.

SEC. 233. Power may be delegated. — It is now well settled that the power of taking lands for public uses need not be specially conferred in every instance, but may be delegated to corporations or individuals by general laws, making proper provision for compensation and for determining the character of the use to which it is to be applied. But the power must be strictly pursued.¹ The legislature is the judge of the *necessity* of taking lands for public purposes, but it may in its discretion delegate the exercise of such power. But the determination of the corporation, officers, or persons, to whom the power is delegated, as to whether the use is public or not, is not conclusive; yet where it is a public one, the determination as to the *necessity* of the taking is conclusive upon the courts.² The

Cherokee Nation v. Southern Kansas R. Co., 135 U. S. 640. But, immediately on their becoming States they are possessed of the power as an inherent right of sovereignty. *Swan v. Williams*, 2 Mich. 427; *Weber v. Harbor Com'rs*, 18 Wall. (U. S.) 57; *United States v. Railroad Bridge Co.*, 6 McLean (U. S.), 517.

¹ *State v. Jersey City*, 25 N. J. L. 309; *Adams v. Saratoga, &c. R. Co.*, 10 N. Y. 328; *Buffalo, &c. R. Co. v. Brainard*, 9 N. Y. 100; *New York R. Co. v. Young*, 33 Penn. St. 175; *Young v. Buckingham*, 5 Ohio, 485; *Toledo, &c. R. Co. v. Daniels*, 16 Ohio St. 390, 396; *Oregonian R. Co. v. Hill*, 9 Oreg. 377; *Pittsburgh, &c. R. Co. v. Bruce*, 102 Penn. St. 23; *North Mo. R. Co. v. Gott*, 25 Mo. 540; *Vt. Central R. Co. v. Baxter*, 22 Vt. 365; *Alexandria, &c. R. Co. v. Railroad Co.*, 75 Va. 780; *Weir v. St. Paul, &c. R. Co.*, 18 Minn. 155; *Mayor v. Central R. Co.*, 58 Ga. 120. The question of delegation and the extent of the power delegated is one of propriety and not of power. *Buffalo R. Co. v. Ferris*, 26 Tex. 588; *Boston Water Power Co. v. Boston, &c. R. Co.*, 23 Pick. 360; *Brown v. Beatty*, 34 Miss. 227; *Clarke v. Rochester*, 24 Barb. 446; *Mercer v. Pittsburgh, &c. R. Co.*, 36 Penn. St. 99. The right to take private property for a public improvement in the exercise of the right of eminent domain may be delegated to a corporation acting in its own interests, and for purposes of private gain. And in order to constitute a public use, it is not necessary that the improvement should directly benefit the people of the whole State; the direct pub-

lic benefit contemplated may be confined to a particular community; and the legislature is, in any case, the sole judge of what constitutes a public use. *Bloomfield, &c. Co. v. Richardson*, 63 Barb. (N. Y.) 437. An act authorizing a corporation created under the laws of another State to take lands for a public use is not unconstitutional because the instrumentality employed is a foreign corporation; nor because such lands are to be used for the maintenance of a navigable canal, which runs along the border of the State, but without its limits. *Matter of Townsend*, 39 N. Y. 171.

² *Cassoday, J.*, in *Smith v. Gould*, 59 Wis. 631; 61 Wis. 31; *Matter of Fowler*, 53 N. Y. 60. A railroad is regarded as of public utility; therefore a delegation of the power for the construction of a railroad is proper, as it is not the instrumentalities through which land is taken which lays the foundation of the right to take it, but the *uses* for which it is taken. *Ash v. Cummings*, 50 N. H. 591; *Beekman v. Saratoga R. Co.*, 3 Paige Ch. (N. Y.) 45; *Kramer v. Cleveland, &c. R. Co.*, 5 Ohio St. 40; *Rensselaer, &c. R. Co. v. Davis*, 43 N. Y. 137; *Raleigh, &c. R. Co. v. Davis*, 4 Dev. & B. (N. C.) 451; *In re City of Buffalo*, 68 N. Y. 167. A general statute authorizing the creation of an indefinite number of railroad corporations, making such corporations common carriers, and requiring them to be constantly engaged in such public employment, may also constitutionally authorize them to take private property for their roads on making compensation. *Buffalo, &c. R.*

power may be delegated to a foreign corporation, and the circumstance that it derives a pecuniary profit therefrom, or that its works are outside the limits of the State, does not render an act conferring the power unconstitutional, if the use is a public one, and beneficial to the people of the State. Thus, a grant of such power to a corporation to take lands to be used for the maintenance of a navigable canal, along, but just outside, the limits of the State, was held a proper exercise of the power.¹ But where such lands were appro-

Co. v. Brainard, 9 N. Y. 100. The legislature cannot, in the exercise of the right of eminent domain provide for the appropriation of private property to a mere private enterprise, in which the public have manifestly no interest. But railroad companies, when owned by individuals, are not private enterprises merely, and the legislature may authorize such incorporations to take the necessary private property to the use of their roads *in invitum*. Brown v. Beatty, 34 Miss. 227. Although the government has no authority, under the right of eminent domain, to take the property of one citizen and transfer it to another, even for a full compensation, if the public interest will not be promoted by such transfer, yet the legislature is the sole judge as to the expediency of making police regulations interfering with the natural rights of the citizens of the State; and also as to the expediency of exercising the right of eminent domain for the purpose of making public improvements. Varick v. Smith, 5 Paige Ch. (N. Y.) 137. Mount Washington Road Co., 35 N. H. 134. A statute which authorizes the taking a whole lot, where a part only is needed, is unconstitutional and void, in so far as it assumes to authorize the taking of more than is needed, without the owner's consent. Matter of Albany Street, 11 Wend. (N. Y.) 149. And see Embury v. Conner, 3 N. Y. 511. In England it is held that upon questions between railway companies and individuals whose property the former seek to take under compulsory clauses in their acts, the court will not strain the construction of the act in favor of the companies. Gray v. Liverpool & Bury Ry. Co., 9 Beav. 391. On the contrary, the powers given to railway com-

panies to make compulsory purchases of land are to be construed strictly. Webb v. Manchester & Leeds Ry. Co., 4 Myl. & C. 116. It is, however, held that when a company are authorized by their act of incorporation to enter upon and appropriate such lands, buildings, &c., as may be proper to accomplish the objects of their creation, the corporation must be regarded as the proper judges of what lands are necessary for their works. Richards v. Scarborough Public Market Co., 23 Law J. N. s. 110. And although corporations are not to be allowed to act capriciously in regard to the execution of the powers conferred by the act of incorporation, they are the judges of the most feasible mode of carrying forward their own operations, and are not liable to be called to account for the exercise of this discretion, so long as they act *bona fide*, and with common prudence. London & Birmingham Ry. Co. v. Grand Junction Canal Co., 1 Eng. Ry. Cas. 224; Priestley v. Manchester & Leeds Ry. Co., 2 Eng. Ry. Cas. 134. Each of the proprietors through whose lands a public work is constructed has a right to have the power strictly carried into effect, as regards his own lands, and to require that no variation shall be made to his prejudice; but where the act is faithfully carried into execution as regards his lands, he cannot, on the mere ground of a variation which is not injurious to himself, and which was made with the consent of others, obtain from a court of equity an injunction to stay the proceedings. Lee v. Milner, 2 Y. & C. 611; Lee v. Milner, 2 M. & W. 824.

¹ Matter of Townsend, 39 N. Y. 171; Baltimore, &c. R. R. Co. v. Harris, 12 Wall. (U. S.) 65; Southwestern R. R. Co. v. Southern, &c. Tel. Co., 46 Ga. 43;

propriated without authority, or have been injured by the construction of such canal, and a reservoir of water therefor, by flooding, etc., a statute which authorizes the appointment of commissioners to appraise the damages already sustained, and which makes their award and the payment or tender of the sum awarded a bar to any action to recover damages for such injury, is unconstitutional. The cause of action of the owner of such lands for his damages is one to which the right of trial by jury, "in all cases in which it has been heretofore used," as guaranteed by the Constitution, is especially appropriate, and he cannot constitutionally be required, by retroactive legislation, to submit his cause to a tribunal not proceeding according to the course of the common law.¹

Statutes delegating the right of eminent domain to railroad and other corporations for public use, being in derogation of common right, are not to be extended by implication, and must be strictly complied with. They are not to be construed so literally as to defeat the evident purposes of the legislature, but the powers granted will extend no farther than is expressly stated in the act, or than is necessary to accomplish its general scope and purpose. If there remains a doubt as to the extent of the power, after all reasonable intendments in its favor, the doubt will be solved adversely to the claim of power. And the proper limit to the power is the reasonable necessity of the corporation in the discharge of its duty to the public.² A corporation can exercise a delegated power to take

Black v. Delaware, &c. Canal Co., 22 N. J. Eq. 130; *Gilmer v. Lime Point*, 18 Cal. 229; *New York, &c. R. R. Co. v. Young*, 33 Penn. St. 175. But the power is not extended to foreign corporations by implication. *Holbert v. St. Louis, &c. R. R. Co.*, 45 Iowa, 23.

¹ *Matter of Townsend*, 39 N. Y. 171.

² *New York, &c. R. R. Co. v. Kip*, 46 N. Y. 546; *Oregonian R. R. Co. v. Hill*, 9 Oregon, 377; *Southern Pacific R. R. Co. v. Wilson*, 49 Cal. 396; *Mississippi Bridge Co. v. Ring*, 53 Mo. 491; *Webb v. Manchester, &c. Ry. Co.*, 1 Eng. Ry. Canal Cas. 576. A statute authorizing the taking of private property against the owner's consent must be strictly construed; and while the property and the estate to be taken, whether an easement or a fee, and the purpose to which it is to be applied, may be designated in the statute, it

must be by unequivocal words. An act providing for a supply of water in the village of Amsterdam (ch. 101, L. 1881, as amended by ch. 197, L. of 1882) authorized and required the taking of a fee in the lands required for the purposes of the act. *DANFORTH, J.*, said: "As the commissioners in this case might purchase, so no doubt the legislature might empower them to take by eminent domain, a right to enjoy a privilege in or out of the owner's estate which would not give them a right to enjoy the estate itself by exclusive or permanent occupation. Such a right, however acquired, would be an easement; and as no grant is pretended, the question before us concerns the proper construction of the statute, — *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, — and the petition upon which the commissioners have undertaken to proceed. The act itself, in-

private property for public use only so far as the statute delegating such power plainly confers it. Thus, where the charter of a city

asmuch as it authorizes the taking of private property against the owner's consent, is to be strictly construed. *Sweet v. Buffalo, &c. R. Co.*, 79 N. Y. 293; *Adams v. Saratoga, &c. R. Co.*, 10 N. Y. 328. And while the property and the estate which is to be taken, whether an easement or fee, and the purpose to which it is to be applied may be designated in the statute, — *People v. Smith*, 21 N. Y. 595; *Sweet v. Buffalo, &c. R. Co.*, 79 N. Y. 293; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234; 6 Am. Rep. 70, — it must be by unequivocal words, and in pursuing it, all prescribed requirements must be strictly observed. *Matter of N. Y. Central R. Co.*, *supra*; *Matter of Application of City of Buffalo*, 78 N. Y. 362; *Matter of Com'rs of Washington Park*, 52 id. 131. The owner may, if the legislature so declares, be divested of the fee, although the public use is special, and not of necessity perpetual. On the other hand, the entire estate need not be taken, but only that interest which is necessary to accomplish the prescribed purpose. *Sweet v. Buffalo, &c. R. Co.*, 72 N. Y. 330. See also *People v. Haines*, 49 N. Y. 587; *Matter of New York, &c. R. Co.*, 70 N. Y. 191." *Matter of Water Com'rs of Amsterdam*, 96 N. Y. 351. A special authority to take lands against the consent of the owner must be strictly pursued, and must appear to be so on the face of the order. Thus, where a particular notice in writing is prescribed by the act, it is not sufficient to say, "upon proof of due notice having been given," but it should appear on the order what notice was given. *Van Wickle v. Camden, &c. R. Co.*, 3 N. J. Eq. 162. The charter of a railroad company contained the provision that in all cases where any person through whose land the road may run should refuse to relinquish the same, or where a contract between the parties could not be made, it should be lawful for the corporation to give notice to a justice of the peace, etc., who should thereupon summon the owner to appear, and appoint twelve disinterested men, who, on oath, should view the premises, and taking into

consideration the advantage and disadvantage caused to the same by building the road, assess the damage, etc. It was held that the act was against common right, and must be strictly construed, and that to entitle the company to the benefit of its provisions, they must have taken the initiative in assessing the damages; that the act only applied to a case where the land appropriated was part of a tract with which the road came in contact; and if the road was not in such contact at the time the assessment was made, the fact that, under the original laying out, it had been, was of no importance. *Edward v. Lawrenceburg, &c. R. Co.*, 7 Ind. 711. The power of the legislature to authorize the building of a railroad on a street or other public highway may be devolved at discretion upon the local authorities. *Mercer v. Pittsburgh, &c. R. Co.*, 36 Penn. St. 99. Private corporations may be authorized to take private property for the use of the corporation, *where the object of the incorporation is the public benefit, as in the case of railroads, canals, etc.* *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694; 23 Am. Dec. 756. So a private corporation, created for the purpose of making a road open to public travel upon payment of a fixed toll, may be authorized by the legislature to take land for the road without the owner's consent, upon payment of a just compensation, to be determined in some reasonable and convenient method. The fact that the members have a pecuniary interest, such as will give it in law the character of a private corporation, will not prevent the State from using it to accomplish a public object. *Petition of Mount Washington Road Co.*, 35 N. H. 134. It is established by the uniform current of decisions, that the property of individuals, taken by railroad companies and similar corporations under their charters, is, from the public benefits resulting therefrom, to be deemed to be taken for public use within the constitutional provision upon that subject. *Bradley v. New York, &c. R. Co.*, 21 Conn. 294. And the power of govern-

confers authority upon the city to "take private property for opening, altering, and laying out any street, lane, avenue, alley, public square, or other public grounds," it was held that such delegated authority does not confer power to condemn property on which to erect a city prison.¹

Prima facie, the discretion exercised by a railway corporation in selecting land for its purposes is good and binding,² and will not be revised by the courts unless it clearly appears that they have exceeded their powers or acted in bad faith.³ The circumstance that another location would do less damage will not justify the court in attempting to control the discretion.⁴ If the route is not defined in the charter, it may take the most feasible route, and may avoid natural obstacles, although the route taken to avoid them is less direct;⁵ nor can the court compel it to take a fee in the land when it has elected to take only an easement.⁶ A *de facto* corporation may exercise the power, and the regularity of the proceedings cannot be questioned.⁷ But there must be a sufficient conformity to the law to create and maintain corporate existence.⁸ The power is conferred as a personal trust, and cannot be delegated or assigned; consequently neither a lessee of a railroad⁹ nor a person employed to build it¹⁰ can, without express authority, exercise the right. The power is presumed to exist only when required by public necessity; and while such statutes, being in derogation of private rights are to be construed strictly, and are not to be extended beyond their fair import, yet they are to

ment to delegate the exercise of the eminent domain to effectuate such purpose, from the universality of its exercise, is no longer an open question. Swan v. Williams, 2 Mich. 427.

¹ East St. Louis v. St. John, 47 Ill. 463.

² Virginia R. R. Co. v. Elliott, 5 Nev. 358; Cotton v. Boom Co., 22 Min. 372.

³ South Carolina R. R. Co. v. Blake, 9 Rich. (S. C.) L. 228; Fall River Iron Works v. Old Colony R. R. Co., 5 Allen (Mass.), 221; Collins v. Creecy, 8 Jones (N. C.) L. 333; Hentz v. Long Island R. R. Co., 13 Barb. (N. Y.) 646; *Ex parte* Manhattan Co., 22 Wend. (N. Y.) 653; Parke's Appeal, 64 Penn. St. 137; Supervisors v. Gorrell, 20 Gratt. (Va.) 484.

⁴ New York R. R. Co. v. Young, 38 Penn. St. 175.

⁵ Hentz v. Long Island R. R. Co., 13

Barb. (N. Y.) 646; South Minnesota R. R. Co. v. Stoddard, 6 Minn. 150.

⁶ Charleston R. R. Co. v. Blake, *ante*.

⁷ Oregon Cascade Co. v. Bailey, 3 Oregon, 64; Cincinnati, &c. R. R. Co. v. Danville, &c. R. R. Co., 75 Ill. 113; McAuley v. Columbus, &c. R. R. Co., 83 Ill. 348; Reissen v. Strong, 24 Kan. 410; National Docks R. R. Co. v. Central R. R. Co., 33 N. J. L. But see Atlantic, &c. R. R. Co. v. Sullivan, 5 Ohio St. 276; Atkinson v. Marietta, &c. R. R. Co., where it was held that proof of due and legal organization must exist as a condition precedent to the exercise of the power.

⁸ Atlantic, &c. R. R. Co. v. Sullivan, *ante*; Powers v. Hazleton, 33 Ohio St. 429.

⁹ Worcester v. Norwich, &c. R. R. Co., 109 Mass. 103.

¹⁰ St. Peter v. Denison, 58 N. Y. 416.

be construed reasonably, and so as to effectuate the evident intention of the legislature in conferring the power.¹ In order to warrant the exercise of the power, there must be both a necessity and a public use,² but the necessity need not be made certain before it is lawful to proceed with the condemnation.³ The company is not confined exclusively to lands which are necessary, but it may also take lands which are *convenient* to its use,⁴ and those which may be required when its business is more extended.⁵

The *necessity* of taking the land, is *prima facie* a question for the corporation to determine,⁶ and on an application for the appointment of commissioners to estimate the damages on a condemnation of land for railway uses, the only inquiry that, as a general rule, will be made is, whether the applicant has a *prima facie* right. In this summary proceeding contestable questions will not be decided.⁷ Thus, in a proceeding by a railway company before a probate judge, under the statute then existing it was held incompetent for the landowner to prove, for the purpose of defeating the proceeding, that the incorporators procured the incorporation of the company, not for a public use, but for their private purpose merely, and were exercising the corporate privileges in abuse of the law; nor was it competent to prove for that purpose that there was no necessity for the road. These questions were not committed by the law to the determination of the probate judge, or of the jury, but pertained to other proceedings.⁸ Courts have the right to determine whether the use is public in its nature or not; but when the use is public, the judiciary cannot inquire into the necessity or propriety of exercising the right of eminent domain; that right is political in its nature, and to deter-

¹ *Rensselaer & Saratoga R. R. Co. v. Davis*, 43 N. Y. 137; *Boston & Lowell R. R. Co. v. Salem, &c. R. R. Co.*, 2 Gray (Mass.), 1; *Prather v. Jeffersonville, &c. R. R. Co.*, 52 Md. 16; *Glover v. Boston*, 14 Gray (Mass.), 282; *Wilson v. Lynn*, 119 Mass. 174; *Thacher v. Dartmouth Bridge Co.*, 18 Pick. (Mass.) 501; *New York, &c. R. R. Co. v. Kip*, 46 N. Y. 546; *Currier v. Marietta, &c. R. R. Co.*, 11 Ohio St. 228; *New York, &c. R. R. v. Gunnison*, 1 Hun (N. Y.), 496; *Miami Coal Co. v. Wighton*, 19 Ohio St. 560.

² *Tracy v. Elizabethtown, &c. R. R. Co.*, 80 Ky. 259.

³ *Chicago, &c. R. R. Co. v. Dunbar*,

100 Ill. 110; *Bowman v. Venice, &c. R. R. Co.*, 102 id. 459.

⁴ *Ladd v. Maldon, &c. Ry. Co.*, 6 Exchq. 143.

⁵ *Lodge v. Philadelphia, &c. R. R. Co.*, 8 Phila. (Penn.) 345.

⁶ *Dietrichs v. Lincoln, &c. R. R. Co.*, 13 Neb. 361. If, however, the statute refers the question to the commissioners or other tribunal, their decision upon that question is necessary. *Shick v. Pennsylvania R. R. Co.*, 1 Pearson (Penn.), 259. See also *Doe v. North Staffordshire Ry. Co.*, 16 Q. B. 526.

⁷ *State v. Hudson Tunnel R. R. Co.*, 38 N. J. L. 17.

⁸ *Powers v. Hazleton*, 33 Ohio St. 429.

mine when it shall be exercised belongs exclusively to the legislative branch of the government.¹ When the use is public, and the legislature has acted upon the question, the expediency or necessity of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested.² The right lies dormant in the State until legislative action points out the occasions, the modes, the conditions and the agencies for its appropriation; and a legislative act, being the customary mode of determining that fact, must be held for this purpose the law of the land; and no further finding or adjudication is essential, unless it is required expressly by the constitution of the State.³

SEC. 234. *Quantity of Land to be taken.* — Where neither the charter nor general law restricts a railroad company as to the quantity of land to be taken for its roadway and general uses, it is restricted to such a quantity as is reasonably necessary; it is, in a modified degree, permitted to judge for itself as to the amount that is necessary for such purpose. This right is subject to all constitutional and statutory restrictions, and to the further limitation that the courts are clothed with ample power to prevent any abuse of the same.⁴ In a Wisconsin case⁵ the defendant's charter authorized it to take any land along and including the line of its road, not exceeding two hundred feet in width, and any land beyond those limits "which the directors shall, by resolution adopted by them, declare to be necessary for the use of said company," etc. It was held that this provision of the charter must be strictly complied with, before the company can condemn land outside the limit of two hundred feet in width; that the resolution provided for is a corporate act, and must be adopted at a meeting of the directors at which there is present a

¹ *Chicago & Rock Island R. Co. v. Town of Lake*, 71 Ill. 333.

² *Baltimore, &c. R. Co. v. Pittsburgh, &c. R. Co.*, 17 West Va. 812.

³ *Alexandria & Fredericksburg R. Co. v. Alexandria & Washington R. Co.*, 75 Va. 780; 40 Am. Rep. 743; — *Am. & Eng. R. Cas.* —.

⁴ *Smith v. Chicago, &c. R. Co.*, 105 Ill. 511. A railway company will be restrained from taking more land than is

necessary for the purpose for which the taking is authorized. *Webb v. Manchester, &c. Ry. Co.*, 4 M. & Cr. 116. See also *ante*, Chapter IX., section on "*Width of Way*."

⁵ *Stringham v. Oshkosh, &c. R. Co.*, 33 Wis. 471. See also *Johnston v. Chicago, &c. R. Co.*, 58 Iowa, 537, where it was held that where the company was thus restricted it could not condemn additional lands for stations, etc.

quorum competent to do business; and generally, if the statute points out the mode in which the quantity of land necessary is to be determined, such mode must be adopted. Thus, under an act incorporating the Carolina Central Railroad Company, and providing for the condemnation of land for the construction and operation of the road, it was made the duty of the commissioners appointed by the court not only to ascertain the value, but also the quantity, of the land which it was necessary to appropriate; and it was held that the land-owner did not waive his right to insist on the performance of this duty by failing to answer the allegations of the petitioner as to the quantity necessary.¹

In ascertaining the amount of land necessary, the court will accept the evidence of the engineer in the service of the company as conclusive, if the statement has a reasonable appearance of accuracy.² If the statute restricts the company to a roadway of a certain width, but gives the court authority to permit it to condemn more if necessary, the burden of establishing the necessity for taking more is upon the company.³ And if the statute designates the species of necessity which must exist in order to warrant the taking of more, — as, first, on account of wood and water stations, and second, where a greater width is required for excavation, embankment, or depositing waste earth, — it cannot be permitted to increase the width of its roadway upon any other grounds.⁴ If, however, the right of way is not limited to any particular width, it may vary in different localities according to its necessities for the convenient and economical management of its business.⁵

The right of running sidings to private establishments, and of taking the necessary land for the purpose, is clearly within the constitutional power of the legislature to confer, because the public interest is thereby subserved, by reason of the increased facilities afforded for developing the resources of the State, and promoting the general wealth and prosperity of the community.⁶ Where a railway company had a side track for many years before, connecting its main

¹ *Carolina Central R. R. Co. v. Love*, 81 N. C. 434.

² *Kemp v. South-Eastern Ry. Co., L. R. 7 Ch. 364.*

³ *Wisconsin Central R. R. Co. v. Cornell University*, 52 Wis. 537; *Jefferson & Ponchartrain, &c. R. R. Co. v. Hazem*, 7 La. An. 182. The fact that it has constructed its road in accordance with the maps and

surveys filed does not prevent it from taking more land if necessary. *Virginia & Tomkee R. R. Co. v. Lovejoy*, 8 Nev. 100.

⁴ *Jackson v. Chicago, &c. R. R. Co.*, 58 Iowa, 537.

⁵ *Chicago, Rock Island, &c. R. R. Co. v. People*, 4 Bradw. (Ill.) 468.

⁶ *Getz's Appeal*, 3 Amer. & Eng. R. R. Cas. (Penn.) 186.

track with a public warehouse and elevator in a town, over the land of another, but without having the right of way therefor except by the mere consent or license of the owner, it was held that the company had the right to institute proceedings to condemn the land over which such branch ran, for right of way.¹

One railway company cannot, by agreement, condemn property for its own use and the use of other companies. Each company must proceed for itself.² But while a railway company may not have the legal authority to condemn a right of way for a lateral line, yet it may cause another company of its own stockholders to be organized so as to have that power; and when such subsidiary company has condemned the right of way, it may lease its line to the former company; and in this there will be no fraud upon those whose lands have been condemned.³

SEC. 235. Public use, What is: How determined.—As we have seen, the right of eminent domain can only be exercised for a public use. To constitute a public use authorizing the exercise of the right of eminent domain, it is not required that the entire community, or even, a considerable portion of it, should directly participate in the benefits to be derived from the property taken.⁴ The clause in the Constitution prohibiting the taking of private property for public uses without compensation does not prohibit the legislature from authorizing an exclusive occupation of private property, temporarily, as an incipient proceeding to the acquisition of a title to, or an easement in the land taken.⁵ The mode and manner in which the owner of land taken for public use is to be compensated for the land so taken; are to be determined by the legislature. When it is not required that compensation be made before entering upon the land taken, and it is provided that the owner of the land may cause his damages to be ascertained in

¹ *Fisher v. Chicago & Springfield R. R. Co.*, 104 Ill. 323.

² *Swinney v. Fort Wayne, Muncie, & Cincinnati R. R. Co.*, 59 Ind. 205.

³ *Lower v. Chicago, Burlington, & Quincy R. R. Co.*, 59 Ia. 563. To the petition of a railway company to take lands, the owner answered asking an injunction upon the alleged grounds that the plaintiff had no valid organization, did not intend to build the proposed line, and had organized simply in the interest of another company, which grounds were being

tested in a *quo warranto* proceeding then pending against such company.* It was held that the answer was insufficient. *Aurora & Cincinnati R. R. Co. v. Miller*, 56 Ind. 88.

⁴ *Talbot v. Hudson*, 16 Gray (Mass.), 417; *Lumbard v. Stearns*, 4 Cush. (Mass.) 60; *Holt v. Somerville*, 127 Mass. 408; *Bancroft v. Cambridge*, 126 id. 438; *Denham v. County Comm'rs*, 108 Mass. 202; *Gilmer v. Lime Point*, 18 Cal. 229.

⁵ *Cushman v. Smith*, 34 Me. 247.

the same manner as in the case of land taken for highways, such owner cannot maintain trespass for such taking, within the time limited for an assessment of damages, and without any application for such assessment.¹

It is not necessary for us to state what uses have been regarded as public, within the meaning of the term as employed in the Constitution; it is sufficient for our purposes that railways have always been regarded as such public improvements as to justify the legislature in conferring upon corporations established for their construction and operation, this prerogative privilege.² The circumstance,

¹ *Cushman v. Smith*, 34 Me. 247; *Nichols v. Som. & Ken. R. R. Co.*, 43 id. 356; *Davis v. Russell*, 47 id. 443; *Cairo & Fulton R. R. Co. v. Turner*, 31 Ark. 494; 25 Am. Rep. 564. *Riche v. Bar Harbor Water Co.*, 72 Me. 148.

² *San Francisco, &c. R. R. Co. v. Caldwell*, 31 Cal. 367; *New York & Harlem R. R. Co. v. Kip*, 46 N. Y. 546; *Secombe v. Milwaukee, &c. R. R. Co.*, 23 Wall. (U. S.) 108; *Newby v. Platte & Co.*, 25 Mo. 258; *Walther v. Warner*, 25 id. 277; *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507; *O'Hara v. Lexington, &c. R. R. Co.* 1 Dana (Ky.), 232; *Arnold v. Covington Bridge*, 1 Duv. (Ky.) 372; *Buffalo R. R. Co. v. Ferris*, 26 Tex. 588; *Swan v. Williams*, 2 Mich. 427; *Raleigh R. R. Co. v. Davis*, 2 D. & B. (N. C.) 451; *Brown v. Beatty*, 34 Miss. 227; *Pine Grove v. Talcott*, 19 Wall. (U. S.) 666. Acts authorizing railroad companies to take private property for the purposes of the road, upon the payment of a fair compensation, are constitutional, and the mode of ascertaining the damages of the owners of the land taken for the road, by commissioners appointed by the legislature or the governor, is not repugnant to the Constitution. The provision of a State constitution which declares that the right of the trial by jury in all cases in which it has heretofore been used shall remain inviolate forever, relates to the trials of issues of fact in civil and criminal cases in courts of justice. The right of eminent domain remains in the government, or in the aggregate body of the people in their sovereign capacity; and they can resume the possession of private property, not only

where the safety, but also where the interest or even the convenience of the State is concerned; as where the land is wanted for a road, canal, or other public improvement. The only restriction upon the power of the people to resume the possession of property for the purpose of an internal improvement in which the public, or the inhabitants of any particular section of the State, as citizens merely, have an interest, is that the property cannot be taken for such public use without just compensation to the owner, and in the mode prescribed by law. It belongs to the legislature to determine whether the benefit to the public from such improvement is of sufficient importance to justify their exercise of the right of eminent domain, in thus interfering with the private rights of individuals. In cases of public improvements, from which a benefit would result to the public, this right of eminent domain may be exercised either directly by the agents of the government, or through the medium of corporate bodies, or by means of individual enterprise. Railroads are public improvements, from which the public derive a benefit; and the legislature can appropriate the private property of an individual for the purpose of such improvements, or may authorize an individual or a corporation thus to appropriate it, upon paying a just compensation to the owner for the same. The privilege of making a railroad and taking tolls thereon, when granted to an individual or a company, is a franchise. The public have an interest in the use of the road, and the owners of the franchise are liable to respond in damages, if they

that they are built, owned, and operated by a private corporation, and that but comparatively few people are benefited thereby, does

refuse to transport an individual or his property upon such road, without any reasonable excuse, upon being paid the usual rate of fare. The legislature may regulate the use of the franchise and limit the amount of the tolls, unless they have deprived themselves of that power by a legislative contract with the owners of the road. The sovereign power has no right to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will not be promoted thereby. *Beekman v. Saratoga, &c. R. Co.*, 3 Paige (N. Y.) Ch. 45; 22 Am. Dec. 679. That a railroad is in general such a public use as affords just ground for the taking of private property and appropriating it to that use, see *Concord R. Co. v. Greely*, 17 N. H. 47; *Contra Costa R. Co. v. Moss*, 23 Cal. 324; *Louisville, &c. R. Co. v. Chappell*, Rice (S. C.), 333; *Baltimore, &c. R. Co. v. Van Ness*, 4 Cranch (U. S.), 595; *Aldridge v. Tusculumbia, &c. R. Co.*, 2 S. & P. (Ala.) 199; 23 Am. Dec. 307; *Beekman v. Saratoga, &c. R. Co.*, 3 Paige (N. Y.) Ch. 45; 22 Am. Dec. 679; *Bloodgood v. Mohawk, &c. R. Co.*, 14 Wend. (N. Y.) 52, also 18 id. 9; 31 Am. Dec. 313; *Buffalo, &c. R. Co. v. Brainard*, 9 N. Y. 100; *Weir v. St. Paul, &c. R. Co.*, 18 Minn. 155; *Whiteman v. Wilmington, &c. R. Co.*, 2 Harr. (Del.) 514; 33 Am. Dec. 411; *Bradley v. New York, &c. R. Co.*, 21 Conn. 294; *Bonaparte v. Camden, &c. R. Co.*, 1 Baldw. (U. S.) 205. The taking of land for a ditch to drain a public highway is a taking for public use, and eminent domain proceedings can be instituted therefor. In *Norton v. Peck*, 3 Wis. 723, *Whitton, C. J.*, said: "There can be no doubt that land taken and used for a common highway is taken for a public use. The proposition we deem so clear that no argument is required to prove it." The mere fact that the land taken for the drain in question was outside of the limits of the highway sought to be improved did not prevent its being taken for a public use, if such was the result of the taking. The right to obtain materials outside of the limits of the highway, to construct or

repair the same, upon making compensation, we apprehend would not be questioned on the ground that it was not for a public use. There can be no essential difference in principle from going outside to obtain such material to be used upon the highway, and going outside to construct drains to draw water from the highway. The distance from the highway to the place where the lands of the plaintiffs were excavated may raise a doubt as to the necessity of such entry; but as indicated, the right to so take is by the statute made dependent upon the necessity. The question recurs, however, — is the necessity to be determined by the court or the legislature, and if the latter, then may they delegate such right to the town supervisors or overseer of highways? In *Pittsburgh v. Scott*, 1 Penn. St. 314, it was observed by the court "that the right of eminent domain or inherent sovereign power gives the legislature the control of private property for public use. . . . As a general rule it rests in the wisdom of the legislature to determine what is a public use, and also the necessity of taking the property of an individual for that purpose. . . . The right of eminent domain, as has been repeatedly held, may be exercised by the government through its immediate officers or agents, or indirectly through the medium of corporate bodies or private individuals." It is there in effect conceded, however, that courts may interfere where it clearly appears that the right has been abused by the legislature in authorizing the taking for a private use instead of a public use. In *Talbot v. Hudson*, 16 Gray (Mass.), 407, it was held that "the determination of the legislature is not conclusive that a purpose for which it directs private property to be taken is a public use, but is conclusive, if the use is public, that a necessity exists which requires the property to be taken. In *Williams v. School District*, 33 Vt. 271, it was held, in effect that the taking of land for a school-house was for a public use, and that the quantity of land allowed to be taken was not limited to the mere site of the school-house, but included such adjacent land for the purpose of a yard, etc., as the

not deprive them of their public character.¹ To be public, the user must concern the public, but it is not at all essential that all should be benefited thereby;² nor that the public should own the property, or have any pecuniary interest therein. The question is, whether it is of so much benefit or advantage to the community, either directly or indirectly, that it cannot be said to be wholly private in its effect and operation.³ Thus, under general railroad laws, land may

selectmen or commissioners might think requisite. As to the necessity of such taking, it was there said by POLAND, J., for the court, "that where the use is a public one, it rests wholly with the legislature to say whether sufficient necessity exists to justify granting the power to take private property therefor, and that courts will not interfere with their discretion, at least, not unless the entire absence of any necessity is shown." In *Beekman v. Saratoga R. R. Co.*, 3 Paige (N. Y.) Ch. 73, Chancellor WALWORTH said: "But if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit of the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose." See *Matter of Ryers*, 72 N. Y. 8, under a similar act. If the owner of land taken can by a method provided by statute resort to taxable property of a town for damages sustained, he receives compensation within the meaning of the Constitution. It has been frequently held in New York, in effect, that where an individual's land is taken for a public highway, such individual obtains the just compensation to which he is entitled, on being provided with a sure and legal remedy for its collection; and that it is not essential that the amount of such compensation should be actually paid or ascertained before the land is taken or appropriated. *Chapman v. Gates*, 54 N. Y. 143. The same rule has been sanctioned in other States. *Pittsburgh v. Scott*; *Mercer v. McWilliams*, 1 Wright (Ohio), 132; *Shearers v. Commissioners*, 13 Kan. 145; *Jackson v. Main*, 4 Litt. (Ky.) 322; *Smeaton v. Martin*, 57 Wis. 364.

¹ *Talbot v. Hudson*, 16 Gray (Mass.),

417; *Gilmer v. Lime Point*, 18 Cal. 229. The right of eminent domain has been exercised in favor of grist mills, *Olmstead v. Camp*, 33 Conn. 532; and mills generally, *Tyler v. Beacher*, 44 Vt. 648; *Boston Mill Dam v. Newman*, 12 Pick. (Mass.) 467; the draining of marshes, *Henry v. Thomas*, 119 Mass. 583; *Willson v. Blackbird Creek Marsh*, 2 Pet. (U. S.) 245; the erection of school-houses, *Township Board v. Hackman*, 48 Mo. 243; *Peckham v. School Dist.*, 7 R. I. 545; burying grounds, *Edgecombe v. Burlington*, 46 Vt. 214; *Edwards v. Stonington Cemetery*, 20 Conn. 466; public parks, *Higginson v. Nahant*, 11 Allen (Mass.) 520; reservoirs, *Kane v. Baltimore*, 15 Md. 240; *Thorn v. Sweeney*, 12 Nev. 251; and a multitude of uses which were not contemplated when the Constitution was framed, but which, by reason of the benefits flowing from them, come within the power therein given. *Pattinson v. Boom Co.*, 3 Dill. (U. S. C. C.) 465; *N. O. Tel. Co. v. Southern Tel. Co.*, 53 Ala. 211; *Memphis Freight Co. v. Memphis*, 4 Cold. (Tenn.) 419; *Finney v. Somerville*, 80 Penn. St. 59; *Cotton v. Boom Co.*, 22 Minn. 372; *Orr v. Quimby*, 54 N. H. 590; *Clarke v. Blackmer*, 44 N. Y. 150; *Lawler v. Baring Boom Co.*, 56 Me. 443; *Tipton v. Miller*, 3 Yerg. (Tenn.) 423; *Dayton Mining Co. v. Seawell*, 11 Nev. 394; *Bankhead v. Brown*, 25 Iowa, 540.

² *Gilmer v. Lime Point*, *ante*; *Sherman v. Buick*, 32 id. 241; *Warren v. Bunnell*, 11 Vt. 600; *Shaver v. Starett*, 4 Ohio St. 404; *Killbuck v. Private Road*, 77 Penn. St. 39; *Sadler v. Langham*, 34 Ala. 311.

³ *Olmstead v. Camp*, 33 Conn. 532. In *State v. American, &c. Tel. Co.*, 43 N. J. L. 381, it was held that the supplement of 1880 to the act in relation to telegraph companies, authorizing the condemnation of the right of way, is constitutional. The

be taken by a railway company for the construction of side tracks, and branches to mines,¹ mills, manufacturing establishments, or to its own workshops, coal-sheds, engine-houses, stock-yards, elevators, etc.;² and it is no objection to the exercise of such right that the land so taken constitutes a private way, as it is not the special use made of the land taken which characterizes it, *but its convenient necessity to that part which is for public use.*³ Therefore turn-outs, depots, side tracks, turn-tables, etc., being necessary conveniences in conducting the business of a railroad, are included under the word "appendages" in an act authorizing the taking of lands for the construction of a railroad with such "appendages" as may be necessary.⁴ But under the power of an incorporated railway company to condemn land necessary for side tracks, turn-outs, or switches, it has no right to take land for the construction of an independent branch road to subserve only mere private interests. But it is no valid objection to the condemnation of a strip of land for a switch or a side track of a railway corporation, that the proposed track may serve private use, if in addition to serving such use it is also necessary for the successful and convenient operations of the main line of the railroad. Where a railway corporation is limited by the authorities of an incorporated village or town to thirty feet in the centre of a public street in which to locate its main track, and it becomes necessary to construct a switch or side track, it is no objection to the condemnation of land for that purpose that it runs perpendicular to

use contemplated by the supplement is a public and not a private use. *Lumbard v. Stearns*, 4 Cush. (Mass.) 60; *Scudder v. Delaware Falls Co.*, Saxe, 729. The term "public use" is flexible, and cannot be confined to public use known at the time of framing the Constitution. *All improvements that may be made, if useful to the public, may be encouraged by the exercise of eminent domain.* Any use which will satisfy a reasonable public demand for facilities of travel, for transmission of intelligence or of commodities, would be a public use. *Concord R. R. Co. v. Greely*, 17 N. H. 47; *New Orleans Tel. Co. v. Southern Tel. Co.*, 53 Ala. 211. Companies in accepting the benefits of this law, lay themselves under obligation to the public to permit the use of their lines by all persons, under reasonable regulations. This obligation upon a company

need not be imposed in express words; it may rest upon implication.

¹ *Harvey v. Thomas*, 10 Watts (Penn.), 63. But in Pennsylvania and Maryland, there are special statutes authorizing the construction of branch roads to mines, etc. *Harvey v. Lloyd*, 3 Penn. St. 331; *Shoenberger v. Mullhollan*, 8 id. 134; *Northern Central Coal Co. v. Coal & Iron Co.*, 37 Md. 537. But in the absence of statutes conferring such right, it could not be exercised. Such branches are not such incidents of the trunk line that they can be built under the charter for a main line.

² *Philadelphia, &c. R. R. Co. v. Williams*, 54 Penn. St. 103.

³ *Ladd v. Maldon, &c. Ry. Co.*, 20 L. J. N. s. 102.

⁴ *Hannibal, &c. R. R. Co. v. Muder*, 49 Mo. 165.

the main track, there not being room enough in the right of way along the street for the side track in addition to its two main tracks. To deny a petition of a railway company for the condemnation of land for a side track, it should appear that the object thereby sought is clearly an abuse of power; and a taking of private property for an object not required for the convenient operation of the road.¹

The running of a side track by a railroad company to a private manufacturing establishment, to connect the business of such establishment with the main line of the railroad is a public use for which land may be appropriated. These establishments are very numerous, especially in Pennsylvania, along and near lines of railroad. They serve to develop the resources of the State, they give employment to vast numbers of citizens, and constitute a most important element in the general wealth and prosperity of the community. Convenience and consequent cheapness of transportation are in most cases essential, and in many vital to their maintenance. Moreover, considerable portions of the general public are directly interested in the traffic which goes to them, and in that which comes from them. Hence they cannot be regarded as merely private interests, and therefore without the pale of that public use for which private property may be taken in the construction of railroads lawfully established and actually used for public purposes.²

¹ Matter of Boston, &c. R. Co., 53 N. Y. 574; N. Y. Central R. Co. v. M. G. L. Co., 63 N. Y. 326; Chicago, &c. R. Co. v. Lake, 71 Ill. 333; Smith v. Chicago, &c. R. Co., 105 id. 511; Cleveland, &c. R. Co. v. Speer, 56 Penn. St. 325; 94 Am. Dec. 84; *in re* N. Y. Central R. Co., 77 N. Y. 248; South Chicago, &c. R. Co. v. Dix, 109 Ill. 237. The following instructions given in a case were held correct: "That the railroad company, under its articles of incorporation, can only take property for the purpose of a railroad and telegraph line, and having once condemned property, it can use it for any purpose connected with its enterprise. It can use the property condemned of appellant for its main or side track. It can build a depot, freight-house, engine-house, or warehouse, upon it at any time it chooses, or appropriate it for any railroad purpose it chooses." Curtis v. St. Paul, &c. R. Co., 20 Minn. 28. Where a building erected on land expropriated for the

purpose of a railroad station is used as such, but a private business is carried on in certain rooms by one who is the agent of the railroad and receives his compensation in being allowed the use of these rooms, in which railroad freight is, however, stored when necessary, it is not such a diversion by the railway from the use for which the land was expropriated as to authorize an action for damages. Hoggatt v. Vicksburg, &c. R. Co., 34 La. An. 624.

² Getz's Appeal (Penn.), 3 Am. & Eng. R. Cas. 186. In N. Y. Central R. Co. v. Manhattan Gas Light Co., 5 Hun (N. Y.), 201, 6 id. 149, 68 N. Y. 326, it was held that a railway company may take lands, under the general law, for the purpose of laying tracks from its main line to its stock-yards. "It hardly needs an argument," said DAVIS, P. J., "to establish that in a city like New York, depots for freight, and for vast number of cattle and other live stock that are constantly being

Under a statute authorizing the taking of lands "for the location, construction, and convenient use of the road," land cannot be taken

transported to the city, are as much within the purposes for which railroads are constructed, and as necessary to their operation as depots for the accommodation of passenger traffic. The argument indeed is more strongly in favor of the former, for while a railroad company might, with safety to itself, leave its passengers upon a public street to take care of themselves upon their individual responsibility, it could not do so with respect to the animals it transported, but must securely keep them from injuring and annoying the public, until proper delivery to owners or consignees. For the purpose of performing their duty in this respect with greater facility and safety to the public, and convenience to themselves, the respondents have obtained title to the large tract of land between Fifty-ninth and Sixty-fifth streets by purchase, and without resorting to the exercise of the right of eminent domain. Upon a large portion of this land they have erected extensive cattle depots and yards, and the buildings necessarily connected with such structures, and it is said their design is also to build an elevator, of sufficient dimensions to receive 1,500,000 bushels of grain, and an abattoir sufficient to meet the requirements of the city, in which business is to be carried on by other companies or persons, to whom such establishments are to be leased. If all this be so, the authority of the respondent to acquire by voluntary purchase land for these purposes, is within the power granted by the act, as was held by the court of appeals in *Rens. & Saratoga R. R. Co. v. Davis*, 43 N. Y. 137, and the respondents are not seeking to obtain title by these proceedings to any lands for such purposes. They do not propose to erect an elevator or an abattoir on the appellant's land, but to use it for laying tracks, upon which their cars will run for the purposes of approach to their cattle depots and yards, and to the other structures mentioned; and the use for the public purpose of approaching structures for which lands might have been taken *in invitum*, is none the less so because their cars will at the same time approach structures not within

the application of the law of eminent domain. A railroad corporation cannot take land under the right of eminent domain for the purpose of founding a town or city on the plea that when founded it will furnish business to the road of the company. But it is quite another question if the company be the lawful owner of lands on which it has founded and erected a city, whether it may not lawfully acquire, under eminent domain, the lands necessary to connect its tracks, being within its lawful route, with that city. *A fortiori* would the same reasoning apply where the track to be laid was primarily to erections within the rule of necessity, and only incidentally to those which fall within the class of business conveniences. We are therefore of opinion that the appellants are not protected by the rule that lands cannot be taken "for subsidiary and extraordinary purposes," but that this case is clearly covered by the ruling of the Court of Appeals in the matter of the Petition of the New York & Harlem R. R. Co. *v. Kip*, 46 N. Y. 546. Upon the point, that the lands proposed to be taken are not necessary, because it might be practicable for the respondents to lay their tracks upon their own lands by adopting another curve, we are not prepared to concur with the appellants' counsel. It is not a question of possibilities nor of strict practicabilities within the opinion of engineers. No route was ever surveyed for a railroad which was not open to such objections, and if the right to take lands was to be determined by conflicting evidence whether, after all, the tracks might not, with greater or equal convenience, be laid elsewhere, the construction of a road would be attended with the most serious embarrassments. Reasonable necessity must be shown, but a reasonable discretion must be allowed to the officers who locate the tracks of a railroad, for it cannot be presumed that the corporation is unnecessarily incurring heavy expenses in obtaining lands, when those it already has would answer its purposes. We think enough was shown to bring this case within the rule of the authorities in respect to this question.

for the general uses of the road in addition to the uses specified in the statute,¹ — as, for dwellings for operatives,² for a temporary

Matter of N. Y. & Harlem R. R. Co. v. Kip, 43 N. Y. 446; Matter of Boston & Albany R. R. Co., 53 id. 574. It is not sought to interfere with 'the franchise of the gas company.' That will remain intact, although some portion of the property on which it is exercised be taken for a public use. It may be quite sound to say that the right of eminent domain does not attach to corporate franchises, and yet be quite unsound to insist that lands held by a corporation are exempt from its exercise. The doctrine insisted upon would create a distinction between the real estate of artificial and natural persons, to the great prejudice of the public. Such distinction does not, and ought not to exist. All lands in the State are subject to its right of eminent domain, whenever the exigency for its exercise arises, and no exemption grows out of the mere fact of the ownership and use of property by a corporate body. A banking-house, however valuable and useful, must give way before that power, whenever it stands as a barrier in the path of some necessary public avenue. It is another question how far lands already devoted to public uses and held for that purpose, can be taken under the right of eminent domain for another public use. Even upon that question I am not prepared to say that a use of inferior necessity must not yield to one of clearly superior necessity; as for instance, a horse railway to the imperious necessity of rapid transit, or a chartered coach line or turnpike to the necessities of a railroad. It was held, in *White River Turnpike Co. v. Vermont Central R. R. Co.*, 21 Vt. 590, that there is no implied contract by the State, in a charter of a turnpike or other private corporation, that their property, or even their franchise itself, shall be exempt from the common liability of the property of individuals to be taken for public use. *Matter of Kerr*, 42 Barb. (N. Y.) 119. But I do not think

there is any occasion to decide that question in this case. The appellants, by their charter, are not clothed with power to exercise the right of eminent domain. They do not hold the lands in question under the exercise of any such power, but as a mere private manufacturing corporation. They are claimed to be *quasi public*, because they furnish light to a portion of the public streets, but they would be none the less so if the contract under which they light the streets was taken from them and given to another. Their public character springs out of the nature of the article they manufacture, and the manner in which they deliver it to their customers, through mains and pipes in the public streets, and the legal obligation they are under to furnish to all who desire and who pay for it along the street where their mains are laid. These facts in themselves do not make the defendants a public corporation, within the sense of that term when applied to that class of corporations which is clothed by constitutional legislation with power to exercise the right of eminent domain. I think, therefore, they have no more right to claim that they are shielded from the exercise of that right, from the nature of the article manufactured by them, and the convenience or necessity of its use by the public generally, than any other private corporation, created to make and vend to the public any other articles of prime necessity, — a corporation to manufacture cheap bread, for instance, or an ice company in midsummer. 'The fact that the public have an interest in the works, or the property, or the object of a corporation, does not make it a public corporation.' *Ten Eyck v. Delaware & Raritan R. R. Co.*, 18 N. J. L. 200; *Firsman v. The Belvidere & Delaware R. R. Co.*, 26 N. J. L. 148.³ The courts will act circumspectly and only on strong necessity, in allowing property devoted to uses of great public benefit to be taken; but where such

¹ *Spofford v. Bucksport, &c. R. R. Co.*, 66 Me. 26.

² *Rensselaer, &c. R. R. Co. v. Davis*, 43

N. Y. 137; *Nashville, &c. R. R. Co. v. Cawarden*, 11 Humph. (Tenn.) 348; *State v. Mansfield*, 23 N. J. L. 510.

right of way,¹ for gravel-banks,² for a wharf,³ nor for the purpose of a ferry.⁴ It may take lands for its stations, and for necessary and convenient approaches thereto,⁵ and also for its necessary workshops;⁶ but it has been held that the manufacture of railroad cars is not so necessarily connected with the management of a railroad as to authorize a railroad company, by virtue of the right of eminent domain, to take lands compulsorily for the purpose of erecting such a manufactory thereon. So also in respect to dwelling-houses to rent to the employes of the company. But otherwise as to the land taken for storing temporarily lumber used on the road.⁷

Under the provisions of a railroad charter authorizing the company to take land contiguous to the line of their road for depots, shops, etc., provided the amount so taken does not exceed five acres, the company cannot take without the consent of the owner, as a site for a warehouse, a parcel of land four hundred yards from the line of their road, and build a narrow track from their road to such parcel of land, although the whole quantity required for the site of the warehouse, and the road leading to it, would not exceed five acres.⁸ Under the power conferred upon a railroad corporation only "to enter upon any land, to survey, lay down, and construct its road ;"

necessity is shown to exist, the power to act seems entirely clear. In this case the property sought to be taken is not, and has never been, in actual use for the purposes of the gas company. Doubtless, the use of their lands in the future, when the appellants come to need them, as they anticipate, will be more convenient without the additional tracks of the railroad than with them; but the railroad now crosses their land with several tracks, and the addition of two or three more, on land adjoining the present tracks, does not strike us as necessarily destructive of the uses to which the appellants wish to put their lands. The injury cannot be, as it seems to us, so greatly enhanced beyond what is already done, that their remaining land becomes useless to them. It is to be presumed that they will be protected to the extent that the act provides for, in their facilities of crossing and enjoying access to and from the divided parcel of their land, by the commissioners, or by the court on the coming in of their report; and this, we

think, is all, under the circumstances, they are entitled to claim."

¹ *Currier v. Marietta, &c. R. R. Co.*, 11 Ohio St. 228.

² *New York, &c. R. R. Co. v. Gunnison*, 1 Hun (N. Y.), 496.

³ *Iron R. R. Co. v. Ironton*, 19 Ohio St. 299.

⁴ *Sandford v. Martin*, 31 Iowa, 67.

⁵ *Nashville, &c. R. R. Co. v. Cawardin*, 11 Humph. (Tenn.) 348; *Giesy v. Cincinnati, &c. R. R. Co.*, 4 Ohio St. 308; *Cather v. Midland Ry. Co.* 17 L. J. N. S. 235; *Hamilton v. Annapolis, &c. R. R. Co.*, 1 Md. 553; *New York & Harlem R. R. Co. v. Kip*, 46 N. Y. 546.

⁶ *Chicago, Burlington, &c. R. R. Co. v. Wilson*, 17 Ill. 123; *Low v. Galena, &c. R. R. Co.*, 18 id. 324; *Hannibal, &c. R. R. Co. v. Muder*, 49 Mo. 165. It may also take a location wide enough to admit of a telegraph line. *Prather v. Jeffersonville, &c. R. R. Co.*, 52 Ind. 16.

⁷ *Eldridge v. Smith*, 34 Vt. 484.

⁸ *Bird v. Wilmington & Manchester R. R. Co.*, 8 Rich. (S. C.) Eq. 46.

"to locate and construct branch roads from the main road to any town or places in the several counties through which the said road may pass;" to appropriate land for "necessary side tracks," and "a right of way over adjacent lands sufficient to enable such company to construct and repair its road," — such company, having located and being engaged in the construction of its permanent main road along the north side of a town, is not authorized to appropriate a temporary right of way, for a term of three years, along the south side of the town, to be used as a substitute for the main track while the same is in course of construction.¹

It is no objection that there are other lands in the vicinity which would answer the purpose equally well, which might be acquired by purchase; as the location of the road, its buildings, and appendages is within the discretion of the corporation and its managers, and the courts will not, except in rare instances, supervise it.² The company is not confined to its present necessities, but may take such lands as may be rendered necessary by the demands of a growing traffic; and if it acts in good faith, and there is no evidence of malice or carelessness, the courts will not revise the exercise of its discretion.³ But under this pretence, it cannot acquire lands for the purposes of speculation, or to prevent interference by competing lines, or in aid of collateral enterprises remotely connected with the operations of the road.⁴ Where the charter or general statute gives a railway authority to take lands for the purpose of widening its road, the limitation upon such power is the reasonable necessity of the road.⁵ And authority given to condemn lands "adjoining their road as constructed on their right of way as located" does not apply to lands which merely adjoin a side track.⁶ It need only take the surface of the land, and is not obliged to take the mines and minerals.⁷ Where the statute prohibits the taking of a quarry for railroad purposes within two hundred feet of a dwelling-house, a shanty put up for the sole purpose of preventing the land from being condemned will not operate as a protection.⁸ The stones and gravel taken from one

¹ *Currier v. Marietta, Cincinnati, &c. R. R. Co.*, 11 Ohio St. 228.

² *New York, &c. R. R. Co. v. Kip*, 46 N. Y. 546.

³ *Lodge v. Philadelphia, &c. R. R. Co.*, 8 Phila. (Penn.) 345.

⁴ *Rensselaer & Saratoga, R. R. Co. v. Davis*, 43 N. Y. 137.

⁵ *Beek v. United New Jersey R. R. Co.*, 39 N. J. L. 45.

⁶ *State v. United New Jersey, &c. R. R. Co.*, 43 N. Y. L. 110.

⁷ *In re Huddlesfield v. Jacomb, L. R.* 10 Ch. 92.

⁸ *Morris v. Schallsville Branch of Winchester, &c. R. R. Co.*, 4 Bush (Ky.), 448.

part of the roadway may be employed upon another part,¹ and where a person conveys land to a railway company "for materials . . . for the use and purposes of the railroad, and for no other or different purpose," he cannot prevent the company from excavating the land to procure such materials, although as a consequence the owner's adjoining land caves into the pit, nor can he recover any damages therefor.² Lands lying outside the location may be condemned for materials, where the statute authorizes it, but the petition must disclose the use for which the lands are sought;³ but where the statute merely authorizes a railway company to take and use such of the land specified in its location as may be necessary for the purposes of constructing its road, it does not have authority to take compulsorily and permanently land required only for the purpose of excavating materials therefrom.⁴

SEC. 236. Public Use: Legislative or Judicial Question. — The question as to whether or not a use is public, so that private property may be taken for its promotion, is a purely political question, and therefore is for the determination of the legislature.⁵ The passage of an act extending the right of eminent domain in behalf of any institution is itself a determination that such an institution is a public use, and this determination is conclusive in the absence of

¹ Chapin v. Sullivan R. Co., 39 N. H. 561; 85 Am. Dec. 207, 237.

² Ludlow v. Hudson River R. Co., 4 Hun (N. Y.), 239.

³ Valley R. Co. v. Bohm, 34 Ohio St. 114.

⁴ Evensfield v. Mid-Sussex Ry. Co., 3 De G. & J. 286. See also N. Y. & C. R. Co. v. Gunnison, 1 Hun (N. Y.), 496.

⁵ Cooley's Const. Lim. (4th ed.) [538] 672; Beekman v. Saratoga, & C. R. Co., 3 Paige Ch. (N. Y.) 45; 22 Am. Dec. 679, 686 note; 4 Minor's Insts. (2nd ed.) 27; Whitman v. Wilmington, & C. R. Co., 2 Harr. (Del.) 514; Buffalo, & C. R. Co. v. Brainard, 9 N. Y. 100; Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475; Boom Co. v. Patterson, 98 U. S. 403; People v. Smith, 21 N. Y. 595; Coster v. Tide Water Co., 18 N. J. Eq. 54; Ford v. Chicago, & C. R. Co., 14 Wis. 609; 80 Am. Dec. 791; New Central Coal Co. v. George's Creek & C. Co., 37 Md. 537; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234; 6 Am. Rep. 70; Tyler v. Beacher, 44 Vt. 648; *In re Deanville*

Cemetery Assoc., 66 N. Y. 569. Compare Chicago, & C. R. Co. v. Wiltse, 116 Ill. 449; 24 Am. & Eng. R. Cas. 261.

"The authority to determine in any case whether it is needful to permit the exercise of this power (of eminent domain) must rest with the State itself; and the question is always one of a strictly political character, not requiring any hearing upon the facts or any judicial determination. . . . On general principles the final decision rests with the legislative department of the State, and if the question is referred to any tribunal for trial, the reference and the opportunity for being heard are matters of favor and not of right. The State is not under any obligation to make provision for a judicial contest upon that question. And where the case is such that it is proper to delegate to individuals or to a corporation the power to appropriate property, it is also competent to delegate the authority to decide upon the necessity for the taking." Cooley's Const. Lim., (4th ed.) p. 673.

special constitutional provision otherwise.¹ The power of the legislature in this respect, except when restricted by the Constitution, is not subject to the revision of the courts;² and it may delegate this power to the corporation,³ or it may specifically designate the land and the estate therein to be taken.⁴ But the legislature rarely designates the exact property to be taken; such matters of detail are usually left to a delegated authority, generally the railroad company itself in the cases with which we are here concerned. And where this agent of the legislature attempts to appropriate private property its conclusions are always open to review by the courts.⁵ It is not only the right but the duty of the court to interfere when an abuse of the right granted by the legislature is contemplated whereby the land of an individual will be forcibly taken for a private use.⁶ The legislature is also the exclusive judge of the agencies it will employ in carrying its will into effect,⁷ and is the proper body

¹ *People v. Smith*, 21 N. Y. 595; *Iron R. Co. v. Ironton*, 19 Ohio St. 299. See also cases just cited.

² *Lehmickie v. St. Paul, &c., R. Co.*, 19 Minn. 464; *Weir v. St. Paul, &c. R. Co.*, 18 Minn. 177; *Wilkin v. St. Paul, &c. R. Co.*, 16 Minn. 271; *Kramer v. Cleveland, &c. R. Co.*, 5 Ohio St. 146; *De Varaigne v. Fox*, 2 Blatchf. (U. S.) 95; *Charleston, &c. R. Co. v. Blake*, 6 Rich. (S. C.) 634; *Raleigh, &c. R. Co. v. Davis*, 2 Dev. & B. (N. C.) 451; *Malone v. Toledo*, 34 Ohio St. 541; *People v. Smith*, 21 N. Y. 595; *Hingham, &c. Co. v. Norfolk Co.*, 6 Allen (Mass.), 353; *Philadelphia, &c. R. Co. v. Williams*, 54 Penn. St. 103; *Toledo, &c. R. Co. v. Daniels*, 16 Ohio St. 390.

³ *Charleston, &c. R. Co. v. Blake*, 6 Rich. (S. C.) 634; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755.

⁴ *Brooklyn Park Com'rs v. Armstrong*, 3 Lans. (N. Y.) 429; *affirmed*, 45 N. Y. 234; 6 Am. Rep. 70; *Rexford v. Knight*, 11 N. Y. 308; *Heywood v. New York*, 7 N. Y. 314; *Stockton, &c. Ry. Co. v. Brown*, 9 H. L. Cas. 246; *In re Gilbert Elevated R. Co.*, 70 N. Y. 361; *In re New York Elevated R. Co.*, 70 N. Y. 327; *Iron R. Co. v. Ironton*, 19 Ohio St. 299; *Chicago, &c. R. Co. v. Lake*, 71 Ill. 333; *Cleveland, &c. R. Co. v. Speer*, 56 Penn. St. 325; 94 Am. Dec. 84; *Parke's Appeal*, 64 Penn. St. 137; *Com. v. Franklin Canal*

Co., 21 Penn. St. 117; *New York, &c. R. Co. v. Young*, 33 Penn. St. 175; *In re N. Y. Central R. Co.*, 66 N. Y. 407.

⁵ See *Smith v. Chicago, &c. R. Co.*, 105 Ill. 511; 14 Am. & Eng. R. Cas. 384; *Chicago, &c. Co. v. Wiltse*, 116 Ill. 449; 24 Am. & Eng. R. Cas. 261; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475.

⁶ *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475. In *Pittsburgh, &c. R. Co. v. Benwood Iron Works*, 31 W. Va. 710; 36 Am. & Eng. R. Cas. 531, it is held that whether any use is of a private or public character is a judicial question; that a railroad to be constructed to a private establishment, a steel mill, in order solely to haul freight therefrom, is not a public use for which the power of eminent domain may be exercised. Compare *Toledo, &c. R. Co. v. East Saginaw R. Co.*, 72 Mich. 206. In the case of *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461; 40 Am. & Eng. R. Cas. 449, it is said that the question of whether any railroad is a public or private use depends upon the right of the public to use the road and to require the company, as a common carrier, to transport freight or passengers; that the actual amount of business done by the road is immaterial.

⁷ *Deanville Cemetery Assoc.*, 66 N. Y. 569; *Matter of Fowler*, 53 N. Y. 62.

to determine as to the necessity or fitness of taking private property for public use, and as to the extent and manner of the appropriation.¹

In New York a general statute authorizes the exercise of the right of eminent domain by all railroad companies properly incorporated under that act. In construing this act the court holds that when any company seeks to condemn land it must be able to show a legislative warrant, and it must be further able to establish, if the right is challenged, that the particular scheme in which it is engaged is a railroad enterprise within the true meaning of the decisions which justify the taking of private property for railroad purposes, or that the business which it is authorized to carry on is public, so that the proposed taking is for a public use.² "The general principle is now well settled," said the court, "that when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to be used and the extent to which such right shall be delegated, are questions appertaining to the political and legislative branches of the government; while, on the other hand, the question whether the uses are, in fact, public, so as to justify the taking *in invitum* of private property therefor, is a judicial question to be determined by the courts."³

¹ *People v. Smith*, 21 N. Y. 595; *Brooklyn Park Com'rs. v. Armstrong*, 45 N. Y. 244; 6 Am. Rep. 70; *Water Works Co. v. Burkhardt*, 41 Ind. 364; *Holt v. Somerville*, 127 Mass. 408; *Bloomfield, &c. Co. v. Richardson*, 64 Barb. (N. Y.) 437; *Brayton v. Fall River*, 124 Mass. 95; *Haverhill Bridge v. County Com'rs*, 103 Mass. 120; 4 Am. Rep. 518; *Eastern R. Co. v. Boston, &c. R. Co.*, 111 Mass. 125; *In re Mt. Washington Road*, 35 N. H. 134; *Johnson v. Joliet, &c. R. Co.*, 23 Ill. 202; *Bankhead v. Brown*, 25 Iowa, 540.

² *In re Niagara Falls, &c. R. Co.*, 108 N. Y. 375; 33 Am. & Eng. R. Cas. 101. In this case it was held that a railroad which does not connect with a highway; which can only be reached by passing over State or private lands; which can have no freight traffic over its road; whose sole business is to convey passenger sight-seers along the Niagara River, and the season of whose operation is confined to four months of the year, is not such a railroad corporation as is contemplated by

the New York General Railroad Act of 1850, and is no such public use as will justify the exercise of eminent domain in its behalf.

³ *In re Niagara Falls, &c. R. Co.*, 101 N. Y. 375; 33 Am. & Eng. R. Cas. 101, citing *Beekman v. Saratoga, &c. R. Co.*, 3 Paige Ch. (N. Y.) 45; 22 Am. Dec. 679; *In re Cemetery Assoc.* 66 N. Y. 569; *In re Ferry*, 98 N. Y. 139, 153.

The Constitution of Colorado, Art. II., § 4, declares all railroads within the State to be public highways. It is held that this does not prevent one whose land is about to be taken, from raising the question as to the character of the railroad as a public use in a proceeding by it to condemn the land, since Art. II., § 15 of the constitution specifically provides that the question as to whether or not any use is public shall be a judicial one. *Denver R., &c. Co. v. Union Pac. R. Co.*, 34 Fed. Rep. 386; 33 Am. & Eng. R. Cas. 105 note. See also *Chicago, &c. R. Co. v. Wiltse*, 116 Ill. 449; 24 Am. & Eng. R. Cas. 261.

In some of the States the Constitution leaves the question of the necessity of the use to be ascertained by a jury ;¹ and in such cases, as well as where the act conferring the authority to take the lands makes its exercise conditional upon a jury finding that it is necessary, it must be found by them, not merely that the taking of such lands "was and is necessary for the purpose of constructing and operating said railroad," but also that it is necessary for the benefit of the public.² But where there is no provision in this respect, the necessity for the taking, as well as the selection of the land to be taken, rests in the discretion of the corporation. Thus, where the statute authorizes a railway corporation to acquire real estate, "for the purposes of its incorporation, or for the purpose of running or operating its road," although there are other lands in the same vicinity equally well adapted for the purpose, which possibly might be acquired by purchase, the location of the buildings and structures of the company is within the discretion of its managers, and courts will not ordinarily supervise it.

A usufructuary right, either temporary as to its continuance or limited as to its character, does not give to the company the property which it has a right, under the statute, to acquire. And whenever the proper running and operating of its road, and the interests of the public, require permanent structures, it is no objection to a proceeding to acquire the land in fee, that the company is a lessee of the premises for a term of years.³ And in England, where a railway company has given notice to take land for some object which is clearly within their compulsory powers, the court will not interfere to restrain them merely on the ground that they might obtain the same object in some other way without taking the land.⁴

SEC. 237. What Lands, etc., may be taken. — When authority is given to a railway company to take lands for the construction of its road, and no restrictions are placed thereon, it may take any property necessary for that purpose which has not already been devoted to a public use. And as will appear further on, property already

¹ *Horton v. Grand Haven*, 24 Mich. 465. The constitutional provisions in New York for trial by jury and due process of law, etc., in respect to the mode of ascertaining the compensation to be paid to the citizen, do not apply to the determination of the question of whether it is needed for a public use. That is for

the legislature alone. *People v. Smith*, 21 N. Y. 595.

² *Grand Rapids, &c. R. Co. v. Van Driele*, 24 Mich. 409.

³ *New York, &c. R. Co. v. Kip*, 46 N. Y. 546 ; 7 Am. Rep. 385.

⁴ *Lamb v. North London Ry. Co., L. R. 4 Ch. App. 522.*

devoted to a public use may be taken in cases of necessity, as where the route of one railroad crosses that of another. The mere fact that land proposed to be taken is not needed for the immediate purposes of the petitioner is not necessarily a defence to a proceeding to condemn it. It is sufficient if the proposed use of the land is clearly embraced within the legitimate objects of the power.¹ The company may take or remove dwelling houses on its route,² rights of way,³ even underground,⁴ leasehold estates,⁵ and indeed estates of all descriptions, whether held by persons under a legal disability or not.⁶ It may take lands used for wharves,⁷ land under water,⁸ lands of the State,⁹ or of the United States,¹⁰ or lands belonging to another corporation.¹¹ So it may take materials, as stones, gravel, etc., from

¹ Matter of Staten Island R. Co., 103 N. Y. 251.

² Brackett v. Ohio, &c. R. Co., 14 Penn. St. 241; Wells v. Somerset, &c. R. Co., 47 Me. 345; Cleveland, &c. R. Co. v. Speer, 56 Penn. St. 325; 94 Am. Dec. 84: Unless forbidden to do so by its charter or the general law.

³ Sixth Av. R. Co. v. Kerr, 72 N. Y. 330; Boston Gas-Light Co. v. Old Colony R. Co., 14 Allen (Mass.), 444; Galena, &c. R. Co., 73 Ill. 494.

⁴ Baltimore, &c. R. Co. v. Reaney, 42 Md. 117; Brown v. Corey, 43 Penn. St. 495.

⁵ Cobb v. Boston, 109 Mass. 438.

⁶ East Tenn., &c. R. Co. v. Lane, 3 Head (Tenn.), 63; Alabama, &c. R. Co. v. Kenney, 39 Ala. 307; North Penn. R. Co. v. Davis, 26 Penn. St. 238; Watson v. New York Central R. Co., 47 N. Y. 157.

⁷ Boston, &c. R. Co. v. Old Colony R. Co., 12 Cush. (Mass.) 605.

⁸ In re N. Y. Central R. Co., 77 N. Y. 248.

⁹ Indiana Central R. Co. v. State, 3 Ind. 421.

¹⁰ Grintner v. Kansas Pacific R. Co., 23 Kan. 642; Union Pacific R. Co. v. Burlington, &c. R. Co. 3 Fed. Rep. 106; United States v. Railroad Bridge Co., 6 McLean (U. S.) 517.

¹¹ Bellona Company's Case, 3 Bland (Md.), 442. Although the charter of a corporation is a contract between the State and the corporators, yet it, like other contracts, is made subject to the right of

eminent domain in the State; and the property of a corporation and its franchises may therefore be taken for public uses, like the property of individuals, without violating the obligation of the contract. West River Bridge Co. v. Dix, 6 How. (U. S.) 507; Alabama, &c. R. Co. v. Kenney, 39 Ala. 307; State v. Noyes, 47 Me. 189; Pierce v. Somersworth, 10 N. H. 369; Crosley v. Hanover, 36 N. H. 404; Miller v. New York, &c. R. Co., 21 Barb. (N. Y.) 513; Red River Bridge Co. v. Clarksville, 1 Sneed (Tenn.), 176; Armington v. Barnett, 15 Vt. 745; White River Turnpike Co. v. Vermont, &c. R. Co., 21 Vt. 690; James River, &c. Co. v. Thompson, 3 Gratt. (Va.) 270. Authority to condemn private lands for use by a corporation includes the right to condemn any estate or interest therein for the same object. Heyneman v. Blake, 19 Cal. 579. The right to receive toll for the transportation of travellers and others across a river on a public highway, is, at common law, a franchise of the Crown; and in the State of Georgia it belongs to the people collectively, and may be taken. Young v. Harrison, 6 Ga. 130. So may a dwelling-house be taken. Wells v. Somerset, &c. R. Co., 47 Me. 345. And a mill-privilege. The creation of a great mill-power is a public use, for which private property may be taken under the Constitution; and the decision of the legislature as to whether the use is a public one is presumptively correct. Hazen v. Essex Co., 12 Cush. (Mass.) 475. A franchise to build and maintain a bridge may be taken for a high-

adjoining lands for the construction of its road, and occupy such lands for the preparation of materials taken therefrom, for the road ;¹ and the damages need not be assessed until after the materials are ascertained. So where the charter of a railroad company authorizes it to enter upon lands adjacent to its roadway and occupy them "for any purpose useful or necessary in the construction or repair of such roads," and providing a mode for the assessment of damages, the company by its workmen is entitled to enter upon lands adjacent to its roadway, and erect temporary buildings for the accommodation of its workmen, — including stables, wagon-houses, blacksmith-shops, depots, etc., — provided it takes no more land than is necessary for its purposes. In a Pennsylvania case² which involved these questions, KENNEDY, J., said: "It might in many cases be utterly

way, whenever the legislature deem that the public exigencies require it, reasonable compensation being made. *Central Bridge v. Lowell*, 4 Gray (Mass.), 474. Indeed, the legislature has general power to pass laws providing for measures of internal improvement of the public rivers and other highways within the limits of the State, subject only to the restrictions and limitations in the Constitution. One of these restrictions is, that private property shall not be taken or applied to the public use without just compensation. This clause applies to property of a specific, fixed, and tangible nature, capable of being had in possession and transmitted to another, as houses, lands, and chattels. *Homochitto River v. Withers*, 29 Miss. 21. The right of the owner of a lot in a town or city to the use of the adjoining street is as much property as the lot itself; the owner of the lot cannot be deprived of this right by the obstruction of the street without compensation. It is immaterial in such case whether the owner of the lot owns to the middle of the street or not. *Lackland v. North Missouri R. Co.*, 31 Mo. 180. The legislature are not restricted to taking a mere easement in the land of a citizen; they may take the entire right. *Railroad v. Davis*, 2 Dev. & B. (N. C.) L. 451. An injury to land which deprives the owner of the ordinary use of it is equivalent to a "taking" of the land; and where no compensation is provided for or made to

the owner for the injury sustained, he is entitled to recover damages for such injury. *Hooker v. Canal Co.*, 14 Conn. 146. Injuries by backing water by dams, etc., upon the land of another, seem to be embraced within the constitutional inhibition against injuring property by legislative authority without making compensation. *Wabash Canal v. Spears*, 16 Ind. 441. A divestiture of vested rights may be effected not only by a change or destruction of the title to the property, but also by a destruction of the property itself. *Cash v. Whitworth*, 13 La. An. 401. A partial destruction, or diminution of value, is a taking of private property. *Glover v. Powell*, 10 N. J. Eq. 211. To convert a common highway into a railroad is to impose an additional burden upon the land to the injury of the owner in fee, and is a taking of his property within the meaning of the provision of the Constitution, which forbids such taking without compensation. The State and municipal authorities combined cannot confer upon a railroad company the right to construct their road upon a highway without the consent of the owner of the fee, or making him compensation. *Williams v. New York Central R. Co.*, 16 N. Y. 97.

¹ *Vt. Central R. Co. v. Baxter*, 22 Vt. 365. But see *N. Y., & C. R. Co. v. Gunnison*, 1 Hun (N. Y.), 496.

² *Lauderbrun v. Duffy*, 2 Penn. St. 398.

impracticable to accomplish the construction of a railroad without such authority. The legislature, having granted in express terms the right, with the power and authority to construct the road, must be presumed to have likewise granted every incidental power and authority *necessary to be exercised in order to carry the power expressly granted into effect*, subject however to such qualifications as may be mentioned in the act."¹ So it may take springs near its road for a supply of water for its engines, when it cannot be otherwise obtained.² So it may cross highways³ or a turnpike road.⁴ But without express authority it cannot take a highway longitudinally *unless it is absolutely necessary*; and the presumption is in favor of the public, and against the necessity for the taking; and the question is not one of expediency or of expense, but of practical necessity, to give effect to the grant.⁵ A grant of power to accomplish any particular enterprise of a public nature carries with it, so far as the grantor's own power extends, an authority to do all that is necessary to accomplish the principal object. Thus, under a charter authorizing the construction of a railroad "to the place of shipping lumber" on a tide-water river, the right of location is not restricted to the upland or the shore, but the road may be extended across the flats, and over tide water to a point at which lumber may conveniently be shipped.⁶ A general power to a corporation to construct a road and bridges between given termini, the natural and convenient route of which

¹ Vt. Central R. Co. v. Baxter, 22 Vt. 365.

² Strohecker v. Alabama, &c. R. Co., 42 Ga. 509. But it must have the same condemned, and pay for it; and it has no right, by means of pipes or otherwise, to divert the water of a stream for its uses, to the detriment of a lower mill-owner. Garwood v. New York Cent. R. Co., 83 N. Y. 400; 38 Am. Rep. 452; *post*, § 255. Where a spring is destroyed the owner will be entitled to compensation therefor, although no part of his lands have been actually taken. Peoria, &c. R. Co. v. Bryant, 57 Ill. 473; Winklemans v. Des Moines, &c. R. Co., 62 Iowa, 11; 14 Am. & Eng. R. Cas. 186; Parker v. Boston, &c. R. Co., 3 Cush. (Mass.), 107; 50 Am. Dec. 709; Aldrich v. Cheshire, &c. R. Co., 21 N. H. 359; 53 Am. Dec. 272; Lehigh Valley R. Co. v. Trone, 28 Penn. St. 206.

³ Subject of course to the duty to make compensation to owner of the fee or to any abutting owner whose easement in the highway is impaired. State v. Montclair R. Co., 35 N. J. L. 328; *ante*, Chapter XIII.

⁴ Baltimore, &c. Turnpike Co. v. Union R. Co., 35 Md. 224; 6 Am. Rep. 397. And such crossing cannot be regarded as a condemnation of the franchise of the turnpike company.

⁵ State v. Montclair R. Co., 35 N. J. L. 328; Kaiser v. St. Paul, &c. R. Co., 22 Minn. 149. See also Baxter v. Spuyten Duyvil, &c. R. Co., 61 Barb. (N. Y.) 428; *ante*, §§ 223 *et seq.*, where the subject of railroads in streets and highways is considered.

⁶ Peavey v. Calais R. Co., 30 Me. 498; Babcock v. Western R. Co., 9 Met. (Mass.), 553; 43 Am. Dec. 411.

would pass several navigable streams, authorizes the corporation to construct bridges over such navigable streams, in a manner that will not destroy the navigation of them. The power must, nevertheless, be exercised discreetly, and with a due regard to the privileges of others.¹ So authority to a corporation to construct a canal to the river, and there to build wharves, gives them no right to build wharves so as to cut off a street dedicated to the public, thereby preventing that access to the water which had been previously enjoyed, — the legislature not having given that right in terms.²

Under the charter of a railroad company providing that lands, when required by the company for the purposes of the road, may be taken at a valuation, the corporation alone is not allowed to determine what is required for such purposes; otherwise parcels of land might be obtained, upon payment of compensation, for purposes of speculation or even malicious gratification. Hence an application by it for the appointment of commissioners to assess the value of land should set forth the particular purpose for which it is needed, and should be accompanied with affidavits or other evidence showing that the occasion exists for the appointment. If the land-owner traverses the propriety of the occasion, or its existence, a preliminary trial and decision must be had.³

Where persons have special powers conferred on them by Parliament for effecting a particular purpose, they cannot be allowed to exercise those powers for any purpose of a collateral kind. Therefore, a company authorized to take, upon giving compensation, the lands of any person for a definite object, may be restrained by injunction from any attempt to take them for another object.⁴

It cannot take lands which are held by a municipal corporation for certain specified purposes, as a reservoir, and water-works for supplying a city with water,⁵ nor lands which have been laid out as

¹ Attorney-General v. Stevens, 1 N. J. Eq. 369; *post*, Chapter XV. See also Hughes v. Northern Pac. R. Co., 18 Fed. Rep. 106; 13 Am. & Eng. R. Cas. —.

² Jersey City v. Morris Canal, &c. Co., 12 N. J. Eq. 547.

³ South Carolina R. Co. v. Blake, 9 Rich. (S. C.) L. 228. In Suver v. Chicago, &c. R. Co., 123 Ill. 293, a petition for the condemnation of certain lands averred that "a part of each of said lands

is necessary to petitioner for its right of way, side tracks, depot, and depot grounds, freight yards, shops, and appurtenances, for the construction and operation of its road." *Held*, that this was a sufficient statement of the purposes for which the land was sought to be condemned.

⁴ Galloway v. Mayor of London, L. R. 1 H. L. Cas. 34; 35 L. J. Chan. 477.

⁵ State v. Montclair R. Co., 35 N. J. L. 328.

public parks,¹ unless the power to do so is given in express terms. The rule may be said to be that when property has already been appropriated to public use, and is in fact in such use in the hands of one railroad corporation, it cannot rightfully be taken away from such corporation, even by authority of a statute, for the purpose of subjecting it to the same public use in the hands of another corporation. To warrant the taking of property of one party already appropriated to public use, and placing it wholly or in part in the hands of another party for a public use, it is essential that the new use should be different, and also that the change shall be for the benefit of the public. Whether the new use is different from the present one is a judicial question for the courts to decide; but where such new use may be in its nature a public benefit, whether the change will be for the benefit of the public is a political question to be determined by the law-making power.²

A railroad company was prohibited from holding land, except for the "construction of the road, or for depots, toll-houses, and other necessary works," and was authorized to enter upon and occupy land for the purpose of making the road, the road not to be more than five rods wide, etc. It was held that the company could occupy for the purposes of the road no more than the five rods; and such erections as were necessary for the railroad as such were included by implication; but that such implication did not extend to a warehouse.³

¹ *Boston v. Albany R. Co.*, matter of, 53 N. Y. 574.

² *Lake Shore, &c. R. Co. v. Chicago, &c. R. Co.*, 100 Ill. 21.

³ *Cumberland Valley R. Co. v. McLanahan*, 59 Penn. St. 23. In Maine under the statute the purposes for which a railway company has the power to take lands as for public uses, for the location, construction, and convenient use of its railway, are for necessary tracks, side tracks, depots, wood sheds, repair shops, and car, engine, and freight houses. *Spofford v. Bucksport, &c. R. Co.*, 66 Me. 26. Where the charter of a railroad company authorized the taking of land by the company for their road, not exceeding six rods in width, for a certain period, and by a later act the time for completing the road was extended, and all the rights, etc., of the company were continued, — it was held that during the extended term the company might take six rods in width, not

withstanding the general statute of the State, regulating railroads, allowed only four rods to be taken. *Eaton v. European, &c. R. Co.*, 59 Me. 520. In England, under the statute, where the taking of a part of the premises destroys the value of the remaining portion for the purposes for which it is used, the owner can compel the company to take the whole. Thus a man with his dwelling-house in a piece of ground $2\frac{1}{2}$ acres in extent, and surrounded by brick walls, used a part of the land as a nursery-garden for trade purposes. It was held that he was entitled under § 92 of the land clauses act, 1845, to compel a railway company, proposing, without actually touching the house, to take the green-houses and a part which had been planted and used for ornamental purposes, to take the whole of the land. *Salter v. Metropolitan District Ry. Co.*, L. R. 9 Eq. 432. So a manufactory sometimes worked, or in part worked, by water-

Where a railroad company has authority to condemn only one hundred feet in width, for right of way, it is not necessary that the track should be located in the middle of the strip condemned. Nor will the fact that it owns land adjacent to that which it seeks to condemn restrict its right of condemnation.¹ The corporation may exercise its discretion as to what land it will take, and it is no objection, if it acts in good faith, that other lands in the vicinity could have been obtained by purchase that would have answered its purposes just as well.² If it acts in bad faith, equity will interfere, but only where there is an abuse of its powers.³ The fact that it already has a lease of the lands which it seeks to take is no objection,⁴ but it cannot take lands *in invitum* when it already owns lands equally useful for that purpose.⁵

SEC. 238. **Franchises and Property of one Railroad may be taken for another.** — There can be no such thing as an extinction of the right of eminent domain. If the public good requires it, *all kinds of property are alike subject to it, as well that which is held under it as that which is not. Even contracts and legislative grants, which are beyond the reach of ordinary legislation, are not exempt.*⁶ The legislature may therefore authorize a railroad company to locate its road upon land already appropriated, under a previous and equal authority, by another railroad company.⁷ Property appropriated to a particular public use is not thereby withdrawn from the liability to be taken for a different and inconsistent use, *whenever in the judgment*

power, had a reservoir which was supplied by a goit, into which water was turned out of a natural river at some distance off. At the point where the goit commenced there was a weir in the river; there were shuttles for regulating the flow of water into the goit and a mill-house for the occupation of a man whose duty it was to attend to the shuttles. A railway company proposed to take a part of the weir, shuttles, mill-house, and bed of the stream. It was held that they were bound to take the whole manufactory. *Furniss v. Midland Ry. Co.*, L. R. 6 Eq. 473.

¹ *Stark v. Sioux City, &c. R. Co.*, 43 Iowa, 501; *Dougherty v. Wabash, &c. R. Co.*, 19 Mo. App. 419. See also *Munkers v. Kansas City, &c. R. Co.*, 60 Mo. 334.

² *Eldredge v. Smith*, 34 Vt. 484; *Lodge v. Phila. &c. R. Co.*, 8 Phila. (Penn.), 347; *N. Y. &c. R. Co. v. Kip*,

46 N. Y. 546; *Ford v. Chicago, &c. R. Co.*, 14 Wis. 609; 80 Am. Dec. 791.

³ *Flower v. London, &c. Ry. Co.*, 2 Dr. & S. 330; *Evensfield v. Mid. Sussex Ry. Co.*, 3 De G. & J. 285; *Webb v. Manchester, &c. Ry. Co.*, 4 My. & C. 116; *Norton v. London, &c. Ry. Co.*, 13 Ch. Div. 268; *Gt. Western Ry. Co., L. R.* 7 H. L. 283; *Best v. Howard*, 12 Ch. Div. 1; *Hooper v. Bourne*, 3 Q. B. Div. 258.

⁴ *New York, &c. R. Co. v. Kip*, 46 N. Y. 546; 7 Am. Rep. 385.

⁵ *New Central Coal Co. v. George's Creek Coal, &c. Co.*, 37 Md. 537.

⁶ *Beekman v. Saratoga R. Co.*, 3 Paige (N. Y.) Ch. 45; *New York, &c. R. Co. v. Boston, &c. R. Co.*, 36 Conn. 196.

⁷ *New York, &c. R. Co. v. Boston, &c. R. Co.*, 36 Conn. 196; *Matter of Buffalo*, 68 N. Y. 167.

of the legislature, the public exigency may require. The power of eminent domain is a prerogative of sovereignty. It is not exhausted by use, and can only be limited by the public exigency upon which it is founded.¹ But where land is appropriated, pursuant to legislative authority, to an important public use, a subsequent grant cannot be held to authorize the same land to be taken for a use wholly inconsistent with, and which in the actual circumstances, must necessarily supersede the former use, unless such appears, by express words, or by necessary implication, to be the legislative intent.² A common instance of the condemnation of property, already devoted to a public use, is seen where one railway company condemns a right of way across the road of another. There is no question now as to the right to condemn such a right of way, but the necessity for it must always plainly appear.³ But the right is not confined to such cases. Any

¹ Little Miami, &c. R. Co. v. Dayton, 23 Ohio St. 510;

² Matter of Buffalo, 68 N. Y. 167; Anniston, &c. R. Co. v. Jacksonville, &c. R. Co., 82 Ala. 297; Little Miami, &c. R. Co. v. Dayton, 23 Ohio St. 510; *post*, p. 874 and notes. Where the legislature has power to require one public easement to yield to another more important, the intention to grant such power must appear by express words, or by necessary implication. Such implication can arise only when requisite to the exercise of the power expressly granted; and it can be extended no further than the necessity of the case requires. Hickok v. Hine, 23 Ohio St. 523. A legislative intention to authorize one company to appropriate the land of another cannot be implied from a grant of power to take property couched in general terms. Matter of Buffalo, 68 N. Y. 167. But lands of railroad corporations not actually in use by them, or not absolutely necessary for the enjoyment of their franchises, are subject to be taken under the exercise of the right of eminent domain under legislative authority, the same as lands of individuals, though they may be taken from the actual and profitable use of the owners. Peoria, &c. R. Co. v. Peoria & Springfield R. Co., 66 Ill. 174. In order to authorize condemnation of railroad property for the use of another, the necessity must be made to appear clearly. Mobile, &c. R. Co. v. Alabama,

&c. R. Co., 87 Ala. 501; 39 Am. & Eng. R. Cas. 6; United R. Co. v. National Docks, &c. R. Co., 52 N. J. L. 90; 44 Am. & Eng. R. Cas. 226. And the right of way over side tracks constructed on adjacent land under revocable license can only be acquired on the same terms as where other railroad property is condemned. Barre R. Co. v. Montpelier, &c. R. Co., 61 Vt. 1; 39 Am. & Eng. R. Cas. 17.

³ Mobile, &c. R. Co. v. Alabama, &c. R. Co., 87 Ala. 501; 39 Am. & Eng. R. Cas. 6; United, &c. R. Co. v. National Docks, &c. R. Co., 52 N. J. L. 90. In the absence of express authority a municipal corporation authorized to appropriate lands for streets has no power to take land occupied and used by a railroad company for its track and road-bed, and proceedings to condemn such land may be enjoined. "It is settled beyond controversy," said the court, "that land already appropriated to a public use cannot be appropriated to another public use, unless the statute clearly confers authority to make a second seizure." City of Seymour v. Jeffersonville, &c. R. Co., 126 Ind. 466; 42 Am. & Eng. R. Cas. 39. See, as sustaining the same view, Crossly v. O'Brien, 24 Ind. 325 (appropriation of railroad's right of way longitudinally as in preceding case); Lake Shore, &c. R. Co. v. Cincinnati, &c. R. Co., 116 Ind. 590; 37 Am. & Eng. R. Cas. 430; McDonald v. Payne, 114 Ind. 359; Elliott on Roads and Streets, p. 167.

land acquired by one railway company under a legislative grant, and unnecessary for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of another railroad company.¹

The general power of municipal corporations to lay out streets does not authorize the longitudinal appropriation of the right of way of a railroad. *Valparaiso v. Chicago*, &c. R. Co., 123 Ind. 467; 42 Am. & Eng. R. Cas. 685; *Seymour v. Jeffersonville*, &c. R. Co., 126 Ind. 466; 47 Am. & Eng. R. Cas. 39. See also *Louisville*, &c. R. Co. v. *Phillips*, 112 Ind. 59; 31 Am. & Eng. R. Cas. 432.

In making a railway crossing, the company may, in building a bridge, place temporary scaffolding upon the land of the railway company over whose line the crossing is to be made. *Great North of England Ry. Co. v. Clarence Ry. Co.*, 1 Coll. 507. In this case a mandatory injunction was issued compelling a railroad company to pull down walls which it had built in order to prevent another railway company from crossing its line. *Great North of England, &c. Ry. Co. v. Clarence Ry. Co.*, 1 Coll. 507. And where a railway company was authorized by an act to build its railway to a certain point, and no compulsory power was clearly given for crossing another railway, that had to be crossed to reach the point named in the act, it was held that the crossing could not be effected without consent, even although the failure to obtain consent would prevent the construction of the railway. *Clarence Ry. Co. v. Great North of England Ry. Co.*, 4 Q. B. 46.

But one railway company has no right without compensation to take property of another for the construction of its road; the property-rights of a railway company in its right of way are protected by the same restrictions against appropriation by any other company for railroad purposes or other public uses as is afforded by the constitution and laws in the case of the private property of an individual. *Grand Rapids, &c. R. Co. v. Grand Rapids & Ind. R. Co.*, 35 Mich. 265. Land already acquired by one railroad corporation, and held for the necessary enjoyment of its essential franchises, cannot be condemned

and appropriated in the usual way by another corporation. *Lake Shore, &c. R. Co. v. New York, &c. R. Co.*, 8 Fed Rep. 858; *In re Cleveland, &c. R. Co.*, 2 Pitts. (Penn.) 343. Nor has one horse railway company a right, by proceedings of condemnation, to take for its joint use a part of a previously constructed railway of another company in successful operation. A court of equity will enjoin such a proceeding. *Central City Horse R. Co. v. Fort Clark Horse R. Co.*, 81 Ill. 523.

¹ *North Carolina R. Co. v. Carolina Central R. Co.*, 83 N. C. 489; *Peoria, &c. R. Co. v. Peoria & Springfield R. Co.*, 66 Ill. 174. And although a right of way is limited to the use of the land for the construction and operation of a railroad, this limited use is property, and any interference with it at any point, by condemnation for another railroad, whereby the use is impaired, may be considered in connection with and as affecting its use as an entirety. *Lake Shore, &c. R. Co. v. Chicago, &c. R. Co.*, 100 Ill. 21; 2 Am. & Eng. R. Cas. 454. It is not competent to a later railway company, in the absence of a power for that purpose given in express terms by its special act, to acquire compulsorily the soil and freehold in lands already vested in, and actually used by, an earlier railway company for the purposes of its undertaking; although the land lies within the "limits of deviation" shown by the parliamentary plans of the later company, and its special act confers upon it the usual general power to enter upon and take such of the lands delineated upon the plans as may be required for the purposes of its railway. *Dublin, &c. Ry. Co. v. Navan, &c. Ry. Co.*, 5 Ir. Eq. Rep. 393.

In a proceeding to condemn a part of the property of one railroad for the use of another, leading from other and different points and regions of country, the use is not the same as that of the prior road, but is rather a joint or co-operative use, to be exercised and enjoyed by both railroad

There is no distinction within the scope of these principles between corporeal and incorporeal property, and a franchise is subject to the power of eminent domain as well as any other property. No species of property is withdrawn from it, unless by express provisions of the Constitution.¹ Indeed the legislature cannot contract with a corporation that its property shall not be taken, so as to defeat the exercise of the power of eminent domain by subsequent legislatures,² since to admit such a doctrine would enable the legislature to

companies, so as to furnish the public an additional line of travel and transportation, and may be properly granted by legislative action. *Lake Shore, &c. R. Co. v. Chicago, &c. R. Co.*, 97 Ill. 506; 2 Am. & Eng. R. Cas. 440. In a proceeding to condemn a right of way by one railroad company across the right of way of another company upon certain blocks, the company whose franchise is sought to be taken in part will not be restricted in its compensation to the damage to its right of way or railroad property within the blocks. In such case it will be competent for the defendant to recover for damages it would be subjected to by placing obstructions upon its right of way, in maintaining and operating the proposed new road, whereby access to different parts of its line would be interfered with, and its capacity for the transaction of business destroyed or impaired. And where land has no market value from the fact of its being used as a right of way for a railroad, and devoted to a special use of making railroad transfers, estimates of its value with reference to such use, by those competent to speak in that regard, should be received on the question of compensation to be paid for its condemnation for the use of another railroad company for its right of way, and it is error to refuse such evidence. *Lake Shore, &c. R. Co. v. Chicago, &c. R. Co.*, 100 Ill. 21; 2 Am. & Eng. R. Cas. 454. A statute authorized a railway company to take for its purposes land occupied by another railway company, and provided that all general laws relating to the taking of land for such purposes should govern the proceedings. It was held that the statute was constitutional, although the company whose land was taken was thereby deprived of part of its

business. *Eastern R. Co. v. Boston, &c. R. Co.*, 111 Mass. 125.

¹ *James River Co. v. Thompson*, 3 Gratt. (Va.) 270; *Newcastle R. Co. v. Peru R. Co.*, 3 Ind. 464; *Salem Turnpike v. Lyme*, 18 Conn. 451; *Tuckahoe Canal Co. v. Tuckahoe R. Co.*, 11 Leigh (Va.), 42; *La Fayette Plank Road Co. v. New Albany R. Co.*, 13 Ind. 90; *State v. Canterbury*, 28 N. H. 195; *West River Bridge v. Dix*, 16 Vt. 446; *West River Bridge v. Dix*, 6 How. (U. S.) 507; *Black v. Del. & Rar. Canal Co.*, 22 N. J. Eq. 130.

² *Backus v. Lebanon*, 11 N. H. 19; *Newcastle R. Co. v. Peru, &c. R. Co.*, 3 Ind. 464; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344; *State v. Hudson Tunnel Co.*, 38 N. J. L. 548; *Proprietors of Locks v. Lowell*, 7 Gray (Mass.), 223. In *White River Turnpike Co. v. Vt. Central R. Co.*, 21 Vt. 590, it was held that there is no implied contract by the State in a charter of a turnpike or other private corporation, that their property, or even their franchise, shall be exempt from the common liability of the property of individuals to be taken for the public use; that it may be taken, on proper compensation being made; that a railroad is an improved highway; and that property, taken for its use by authority of the legislature, is property taken for the public use, as much as if taken for any other highway; and that the legislature may delegate its power to a railroad corporation, to take private property for public use in the construction of their railroad, as well as to a turnpike corporation to take the like property for the public use in the construction of a turnpike road. Also, that where there has been a legislative grant to a private corporation to erect a bridge, a turnpike, or other public con-

divest the State of its sovereignty, and would often retard and impede the development of other important enterprises, and is also contrary to sound public policy. It may therefore be said to be well established that *the franchises or property of one railroad may be taken for the construction of another, in all cases where the property of an individual may be taken, upon making proper compensation therefor.*¹

venience, which is not in its terms exclusive, there is no constitutional obligation on the legislature, not to grant to a second corporation the right to erect another bridge, or turnpike, for a similar purpose, to be constructed so near the former, as greatly to impair, or even to destroy, the value of the former, — and this without making compensation to the first corporation for the consequential injury. But so far, as the real estate of such private corporation, or their interest in real estate, is concerned, they are entitled to the same constitutional protection that an individual would be. The property of either may be taken for public use by authority of the legislature, if compensation be made therefor, but not otherwise. Although the charter of the Vermont Central Railroad Company does not in terms empower the corporation to locate their road along the valley of White river, yet it must be taken, in the absence of evidence to show that there was any other practicable route to the proper point on the Connecticut River designated in the charter, or that the route adopted was unsuitable, that the road was properly located in the valley of White river. Under the tenth section of the statute incorporating the Vermont Central Railroad Company, that corporation have power to enter upon and cross a turnpike road, as well as any other highway, making compensation to the turnpike corporation for the injury they should sustain. And the provisions of the charter of that corporation, prescribing a mode for making compensation by appraisal for injuries to land entered upon by them, may be fairly construed to apply to the property and interest of a turnpike corporation in the land embraced by their road, and in the road itself, as tangible property.

¹ MARSTON, J., in *Grand Rapids, &c. R. Co. v. Grand Rapids & Indiana R. Co.*, 35 Mich. 265; 24 Am. Rep. 545; *People*

v. Salem, 20 Mich. 452; 4 Am. Rep. 400. In *Bridgeport v. N. Y. & New Haven R. Co.*, 36 Conn. 255; 4 Am. Rep. 65, BUTLER, J., observed: "Undoubtedly the legislature may . . . authorize another company to appropriate its property and its franchise, upon making just compensation therefor." And in *N. Y., &c. R. Co. v. Boston, &c. R. Co.*, 36 Conn. 196, the court directly held that such power might be exercised; and this was ratified in a later case. *Evergreen Cemetery Ass. v. New Haven*, 43 Conn. 234; *Boston Water Power Co. v. Boston, &c. R. Co.*, 23 Pick. (Mass.) 360; *Springfield v. Conn. R. R. Co.*, 4 Cush. (Mass.) 63. In *Boston Water Power Co. v. Boston, &c. R. Co.*, 23 Pick. (Mass.) 360, a corporation was empowered by its charter to build a dam westerly from Boston to Brookline, over an arm of the sea, and from this main dam to run a cross dam southerly to the shore, so as to make on one side of the cross dam a full basin, and on the other an empty or receiving basin, and to cut raceways from the full basin to the receiving basin, and to have the use of the land in the basins, derived partly from the Commonwealth and partly from individuals, either by purchase or by taking it for public use, at an appraisement; and to use, sell, or lease the water power thus created; and the corporation built the dams accordingly, and erected mills. It was held that it was within the constitutional power of the legislature to authorize a railroad corporation to construct their road across the basins, making compensation to the water-power corporation for the diminution and injury caused thereby to the water power. Also, that the grant of this authority to the railroad corporation could not be considered as annulling or destroying the franchise of the water-power corporation; and the right of the water-power corporation to use the land constituted an interest

This is subject, however, to the limitations which prevail in the taking of all other property; that is, that the taking shall be only for a public use, and that due compensation shall be made.¹ The recognized principle that the charter of a corporation is a

and qualified property therein not larger nor of a different nature from that acquired by a grant of land in fee, and did not necessarily withdraw it from a liability to which all lands in the Commonwealth are subject; to be taken for public use, for an equivalent, when in the opinion of the legislature the public exigency requires it; and that the effect of the railroad act was merely to appropriate to another and distinct public use a portion of the land over which the franchise of the water-power company was to be used. The court also held that if the whole of a franchise should become necessary for the public use, the right of eminent domain would authorize the legislature to take it, on payment of a full equivalent. An act of the legislature, in the exercise of the right of eminent domain, appropriating to public use, on payment of a full equivalent, property or rights in the nature of property granted by the State to individuals, is not a law impairing the obligation of contracts, within the meaning of the Constitution of the United States. It was held that the act authorizing the railroad is not liable to the objection that it does not provide for compensation for the damage done to the franchise of the water-power corporation, for the franchise was not taken but only a portion of the land over which it extended, and for all damages occasioned by the taking of land the act makes provision. The act empowered the railroad corporation to locate and construct a railroad "in or near the city of Boston and thence to any part of the town of Worcester, in such a manner and form as they should deem expedient." It was held that the act sufficiently declared the public necessity and convenience of the railroad, and fixed the general termini, and that the delegation to the corporation of the power to fix the precise termini and the intermediate course between them, and thus to take private property for public use, did not render the act unconstitutional and invalid. Where a corporation

was empowered by the legislature, in general terms, to locate and construct a railroad between certain termini, and between these termini lay an extensive tract of land already appropriated, under the authority of the legislature, to a distinct public use, namely, for mill ponds, by another corporation, and this tract might be crossed by the railroad, with some diminution indeed of the mill-power, and which might be compensated in damages, but without essential injury, — it was considered that there was nothing in the nature of such public use, and in the extent to which it would be impaired or diminished, from which the power of constructing the railroad over it might be presumed to have been restrained by the legislature. It was held that if the water in the basins above mentioned was once a part of the Charles river, it ceased to be so after it was effectually separated by the dam and rendered unfit for the general purposes of navigation; and consequently, that a prohibition to the railroad corporation to build a bridge over the water of Charles river, connected with Boston, or to place any obstruction therein, was not intended to apply to the basins, but only to the waters of Charles river below the dam and open to navigation, and was designed mainly to protect this navigation. *Central Bridge Co. v. Lowell*, 4 Gray (Mass.), 482; *West River Bridge Co. v. Dix*, 6 How. (U. S.) 529; *Matter of Kerr*, 42 Barb. (N. Y.) 119; *Noll v. Dubuque, &c. R. Co.*, 32 Iowa, 66; *Newcastle, &c. R. Co. v. Peru, &c. R. Co.*, 3 Ind. 464; *Peoria, &c. R. Co. v. Peoria & Springfield R. Co.*, 66 Ill. 174; *Northern R. Co. v. Concord, &c. R. Co.*, 27 N. H. 183; *Enfield Toll Bridge Co. v. Hartford, &c. R. Co.*, 17 Conn. 40; *Chicago, &c. R. Co. v. Lake*, 71 Ill. 333; *Backus v. Lebanon*, 11 N. H. 19; *Greenwood v. Freight Co.*, 105 U. S. 13; *Lake Shore, &c. R. Co. v. Chicago, &c. R. Co.*, 97 Ill. 506.

¹ In the case of *Enfield Toll Bridge Co. v. Hartford, &c. R. Co.*, 17 Conn. 40, it

contract which the legislature cannot impair against their assent, does not preclude the legislature from taking their franchise and property for public use upon making compensation.¹ Their powers and privileges, including everything which constitutes their fran-

appeared that in 1798 the General Assembly of Connecticut created a corporation, for the purpose of erecting and maintaining a bridge across Connecticut river between Enfield and Suffield, and granted to such corporation the right of taking certain tolls from persons going over or using the bridge, for the term of one hundred years, or until the cost of erecting the bridge should be reimbursed; and then provided that during said term of one hundred years, no person or persons should have liberty to erect another bridge anywhere between the north line of Enfield and the south line of Windsor. In 1835, the General Assembly created another corporation with power to construct a railroad from the city of Hartford, by the most direct and feasible route, to the northern line of the State, and thence to Springfield. In the charter of this corporation, it was provided that if it should become necessary to erect a bridge across Connecticut river, it should be used exclusively for the railroad travel, and it should not be lawful for the corporation to permit any other passing thereon. It was also provided in the charter that nothing therein contained should be construed to prejudice or impair any of the rights then vested in the Enfield Bridge Company. The bridge company complied with the requirements of their charter, and were in the exercise of the rights granted, which had a pecuniary value; and the cost of erecting the bridge had not been reimbursed. Their bridge, however, was not so constructed or situated as to answer the purpose of a railroad crossing. The railroad company laid out an approved route of their road across the Connecticut river, in the most direct and feasible route from Hartford to the north line of the State and thence to Spring-

field, between the north line of Enfield and the south line of Windsor; and were proceeding to erect a structure over the Connecticut river, at that place, for the purposes of their railroad, and for such purposes only, claiming the right so to do under the provisions of their charter, without making compensation to the bridge company. At this juncture the bridge company brought a bill in chancery against the railroad company, praying for an injunction, or other relief. During the pendency of the bill, the defendants completed the structure, and used it for the transportation of locomotives and cars, with passengers and freight. The plaintiffs then filed a supplemental bill, showing these facts, and praying the same relief as in their original bill. The structure in question was built much in the manner common to railroad bridges, and was adapted to and convenient for the passing of locomotives and cars, but not of common vehicles; though foot-passengers, when upon the railroad, could walk over it, in the daytime; but there was no public road or highway thereto, except the railroad. The defendants purchased the land on each side of the river, where this structure was. This was above tide water, but the river was there navigable for small flat-bottomed steamboats, and other boats of small draft. The erection and use of the bridge by the defendants had a tendency, in some degree, to divert the travel from the plaintiffs' bridge; but very little, however, if any, more than it would, if it had been placed a little above or below the protected part of the river. It was held that the structure of the defendants is a "bridge," and "another bridge," within the meaning of the plaintiffs' charter; that the erection and use of such bridge by the defendants, without

¹ See *Pittsburgh Junction R. Co. v. Allegheny Valley R. Co.* (Penn.), 23 Atl. Rep. 313; 29 W. N. Cas. 227; *Lake Erie, &c. R. Co. v. City of Kokomo*, 130 Ind.

224; *Illinois Central R. Co. v. Chicago*, 141 Ill. 586; *National Docks, &c. R. Co. v. State*, 53 N. J. L. 217.

chise, are held and enjoyed in the same manner and by the like tenure as all other property and rights under our constitution and

compensation to the plaintiffs, was a violation of their grant; and if the charter of the defendants purported to authorize such acts, it was, so far, unconstitutional and void, as impairing the obligation of a contract. But see *contra*; *Lake v. Virginia, &c. R. R. Co.*, 7 Nev. 294; *Bridge Co. v. Hoboken Land, &c. Co.*, 13 N. J. Eq. 81; *aff'd* 1 Wall. (U. S.) 116; *Piatt v. Covington, &c. Bridge Co.*, 8 Bush (Ky.), 31. That a railroad, though granted to a private company, is "for public use," within the meaning of the Constitution; and the taking of private property for that use ought to be accompanied with compensation. That the franchise of a toll-bridge company, is "private property," within the meaning of the Constitution; and a legislative provision authorizing an injury to such franchise, for public use, upon compensation made, is not unconstitutional. That the acts of the defendants in this case were not authorized by the facts that the site of their bridge was above tide water, and that they owned the land on both sides of the river. That these acts could not be vindicated on the ground that the bridge of the defendants was exclusively adapted to, and used for, the passage of their engines and cars; nor on the ground that there was no appreciable damage resulting therefrom to the plaintiffs. That although the court could not restrain the defendants from building the bridge, according to the specific prayer of the original bill, yet it would, under the general prayer, pass a decree in favor of the plaintiffs, affording relief adapted to the whole case.

The authority to take private property for public purposes is a right inherent in the government. *Variék v. Smith*, 5 Paige (N. Y.), Ch. 137; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Backus v. Lebanon*, 11 id. 19. And in this respect corporations, either public or private, have no rights superior to individuals. *Bradley v. N. Y. & New Haven R. R. Co.*, 21 Conn. 306; *Armington v. Barnet*, 15 Vt. 745. *And both their franchises and their property may be taken for the use of another, when the right*

is given either expressly or by necessary implication. *Bridgeport v. N. Y. & New Haven R. R. Co.*, 36 Conn. 255. And the exercise of this right is not, if provision for compensation is made, in any sense a violation of the obligations of a contract. In *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507, DANIEL, J., said: "Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body organized in such mode or exerted in such way as the community or State may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only in the original nature of tenure that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis the law of property would be simply the law of force. Now it is undeniable that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the State, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control as conditions inherent and paramount wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract affected by it, but recognizes its obligation in the fullest

laws, and they can claim no special exemption or privilege therefor. It is subject to the same sovereign right of eminent domain by

extent, claiming only the fulfilment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the Constitution can scarcely, by the greatest violence of construction, be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof. It then being clear that the power in question not being within the purview of the restriction imposed by the 10th section of the first article of the Constitution, it remains with the States to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed commensurate with public necessity. So long as they shall steer clear of the single predicament denounced by the Constitution, — shall avoid interference with the obligation of contracts, — the wisdom, the mode, the policy, the hardship of any exertion of this power are subjects not within the proper cognizance of this court. This is, in truth, purely a question of power; and conceding the power to reside in the State government, this concession would seem to close the door upon all further controversy in connection with it. The instances of the exertion of this power in some mode or other from the very foundation of civil government have been so numerous and familiar, that it seems somewhat strange at this day to raise a doubt or question concerning it. In fact, the whole policy of the country, relative to roads, mills, bridges, and canals, rests upon this single power under which lands have been always condemned; and without the exertion of this power not one of the improvements just mentioned could be constructed. In our country it is believed the power was never, or at any rate rarely, questioned; until the opinion seems to have obtained

that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen, — an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For, as a question of the power to appropriate to public uses the property of private persons resting upon the ordinary foundations of private right there would seem to be room neither for doubt nor difficulty. A distinction has been attempted in argument between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons in the use or enjoyment of their private property to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred than other property. A franchise is property and nothing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating in his second volume, c. 3, p. 26, of the 'Rights of Things.' It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyments. *Vide* Bl. Comm. vol. 3, c. 16, p. 236, as to injuries to this description of private property, and the remedies given for redressing them. A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them granted by the authority of the State, we regard as occupying the same position with respect to the paramount power and duty of the State to promote and protect the public good as does the right of the citizen to the possession and

which the property and rights of all subjects and individuals are liable to be taken and appropriated to a public use, in the manner provided in the Constitution, whenever the legislature shall deem that the public exigencies require it. Thus, a franchise to build and maintain a bridge and take tolls thereon, may be taken for a highway,¹ and a highway may be taken for a railway;² one railway may be taken for the use of another,³ or for the purposes of a highway,⁴ or indeed for any public use.⁵ But the condemnation of lands

enjoyment of his land under his patent or contract with the State, and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the Constitution and no violation of a contract. The power of a State in the exercise of eminent domain to extinguish immediately a franchise it had granted, appears never to have been directly brought here for adjudication, and consequently has not been heretofore formally propounded from this court; but in England this power, to the fullest extent, was recognized in the case of the Governor and Company of the East India Company *v. The Proprietors of the East India Company*, 11 T. R. 794; and Lord KENYON, especially in that case, founded solely upon this power the entire policy and authority of all the road and canal laws of the kingdom." *Central Bridge Co. v. Lowell*, 4 Gray (Mass.), 682; *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.*, 17 Conn. 454; *White River Turnpike Co. v. Vt. Central R. R. Co.*, 21 Vt. 590; *Baltimore Turnpike v. Union R. R. Co.*, 35 Md. 224; *Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co.*, 2 Gray (Mass.), 1; *Richmond R. R. Co. v. Louisiana R. R. Co.*, 13 How. (U. S.) 71; *Red River Bridge Co. v. Clarksville*, 1 Sneed (Tenn.), 176; *Boston Water Power Co. v. Boston R. R. Co.*, 23 Pick. (Mass.), 360; *Barber v. Andover*, 8 N. H. 398; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Eastern R. R. Co. v. Boston & Maine R. R. Co.*, 111 Mass. 125; *Matter of Kerr*, 42 Barb. (N. Y.) 119; *Chicago, &c. R. R. Co. v. Lake*, 71 Ill. 333. The legislature has no power to take the property of one corporation and give it to another, but must in all cases provide for proper compensation to be paid. Thus, a statute authorizing a

telegraph company to set its poles and erect its line upon lands of a railroad, without providing for enforcing payment of damages, was held unconstitutional and void. *South Western R. R. Co. v. Southern Tel. Co.*, 46 Ga. 4.

¹ *Pierce v. Somersworth*, 10 N. H. 370, 11 N. H. 20; *Crosby v. Hanover*, 36 N. H. 404; *James River & Kansas Co. v. Thompson*, 3 Gratt. (Va.), 270; *Newcastle R. R. v. P. & J. R. R.*, 3 Ired. (N. C.) 461; *Tuckahoe Canal Co. v. T. & James River R. R. Co.*, 11 Leigh (Va.), 42; *Bonaparte v. Camden & Amboy R. R. Co.*, 1 Baldw. (U. S. C. C.) 205; *Boston, &c. R. R. Co. v. Salem, &c. R. R. Co.*, 2 Gray (Mass.), 1; *Springfield v. Conn. River R. R. Co.*, 4 Cush. (Mass.) 63; *Central Bridge Co. v. Lowell*, 4 Gray (Mass.), 474; *Northern R. R. Co. v. Claremont, &c. R. R. Co.*, 27 N. H. 183; *Red River Bridge Co. v. Clarksville*, 1 Sneed (Tenn.), 176; *Barber v. Andover*, 8 N. H. 398; *Armington v. Barnet*, 15 Vt. 745; *Backus v. Lebanon*, 11 N. H. 19.

² *Boston Water Power Co. v. Boston, &c. R. R. Co.*, 23 Pick. (Mass.) 360.

³ *Oregon Cascade R. R. Co. v. Bailey*, 3 Oregon, 164; *Northern R. R. Co. v. Concord, &c. R. R. Co.*, 27 N. H. 183; *Eastern R. R. Co. v. Boston & Maine R. R. Co.*, 111 Mass. 125; *Com. v. Dickinson*, 9 Phila. (Penn.) 561; *Oakland R. R. Co. v. Oakland, &c. R. R. Co.*, 45 Cal. 365; *Sixth Avenue R. R. Co. v. Kerr*, 72 N. Y. 330.

⁴ *Philadelphia, &c. R. R. Co. v. Philadelphia*, 47 Penn. St. 325; *Iron R. R. Co. v. Ironton*, 19 Ohio St. 299; *Old Colony, &c. R. R. Co. v. Plymouth*, 14 Gray (Mass.), 144; *Chicago, &c. R. R. Co. v. Lake*, 71 Ill. 333; *Com. v. Essex County*, 13 Gray (Mass.), 239.

⁵ *Metropolitan City R. R. Co. v. Chi-*

owned by one railroad company, but not used for railroad purposes, by another company for use in the construction of a railroad, is unavailing to condemn the franchises of the former. All that is acquired is a right of way, and, incidentally, the power to cross the track of the former where the routes of the two roads cross.¹ The taking of the franchise or property of one corporation for the use of another is not a repeal of its charter, but an enforced purchase of its property.² Nor can it in any sense be said to operate as a violation of the obligations of a contract, because all contracts are subject to certain implied conditions; and unless expressly exempted therefrom, franchises are as much subject to condemnation by the sovereign power as any other.³ The property of a corporation may be condemned in whole or in part,⁴ and the franchise still remain in the company; and in such a case only the value of the property is to be estimated; and if the franchise only is taken, the value of the property should not be included.⁵ In considering the right of one company to condemn and use the property of another company, it makes no difference which is the elder company. If the elder company has exercised its power to condemn property for its right of way, and has constructed and is operating its road, that does not withdraw its property from the equal power of condemnation of its right of way for a crossing, to be enjoyed in common by a junior company. The right to cross is equal, and does not arise out of

cago, &c. R. R. Co., 87 Ill. 317; Baltimore, &c. T. Co. v. Union R. R. Co., 35 Md. 224; State v. Eastern, &c. R. R. Co., 36 N. J. L. 181; Grand Junction R. R. Co. v. County Commissioners, 14 Gray (Mass.), 553; Sixth Avenue R. R. Co. v. Kerr, 45 Barb. (N. Y.) 138; Massachusetts Central R. R. Co. v. Boston, &c. R. R. Co., 121 Mass. 124; Lake Shore, &c. R. R. Co. v. Cincinnati, &c. R. R. Co., 30 Ohio St. 604; Newcastle, &c. R. R. Co. v. Peru, &c. R. R. Co., 3 Ind. 464; Alabama, &c. R. R. Co. v. Kenney, 39 Ala. 307; Union Pacific, &c. R. R. Co. v. Burlington, &c. R. R. Co., 3 Fed. Rep. 106; Northern Pacific R. R. Co. v. St. Paul, &c. R. R. Co., 3 Fed. Rep. 702; Towanda Bridge Co., *in re*, 37 Leg. Int. (Penn.) 389; Lexington, &c. R. R. Co. v. Applegate, 8 Dana (Ky.), 289; Kerr's Case, 42 Barb. (N. Y.) 119; Com. v. Pittsburgh, &c. R. R. Co., 58 Penn. St.

26; Com. v. Penn. Canal Co., 66 Penn. St. 41; Crosby v. Hanover, 36 N. H. 404.

¹ State v. Easton, &c. R. R. Co., 36 N. J. L. 181.

² State v. Hudson Tunnel Co., 38 N. J. L. 548; Grand Junction R. R. Co. v. Middlesex, 14 Gray (Mass.), 553.

³ Richmond R. R. Co. v. Louisa R. R. Co., 13 How. (U. S.) 71; Red River Bridge Co. v. Clarksville, 1 Sneed (Tenn.), 176; Central Bridge v. Lowell, 4 Gray (Mass.), 474; Barber v. Andover, 8 N. H. 398; Armington v. Barnet, 15 Vt. 745; James River Co. v. Thompson, 8 Gratt. (Va.) 170; Salem Turnpike Co. v. Lyme, 18 Conn. 451.

⁴ Worcester R. R. Co. v. Commissioners, 118 Mass. 561; Sixth Avenue R. R. Co. v. Kerr, 45 Barb. (N. Y.) 138; Jersey City, &c. R. R. Co. v. Jersey City Horse R. R. Co., 20 N. J. Eq. 61.

⁵ Central Bridge v. Lowell, *ante*.

purchase. When the younger corporation has acquired its right of property in common with the older in a crossing, they become joint and equal owners, bound by mutual obligations to each other and to the public to so use this common right as to do no unnecessary harm to the other or to the public. It may be provided that all railroad crossings shall be made, kept up, and watchmen maintained at the joint expense of the companies, without regard to the priorities of either in the location and construction of its road. The elder company does not possess any paramount or vested privilege to operate its road over that of the younger. Nor can it impose all the burdens of maintaining this crossing upon the road last constructed. When the appropriation is made, paid for, and put to the new use, both companies stand on a perfect equality as to the rights and privileges in the use of the crossing.¹

Land already taken by the exercise of eminent domain may be taken by legislative authority for other public uses; and when so taken, it is presumed that the former use has ceased, or become detrimental,² or relatively of less importance.³ It is not presumed that roads will be laid lengthwise of a right of way, unless it is shown that no other practical route could be had.⁴ Railroads entering towns are subject, under the general authority given to towns and counties, to have roads and streets laid across their tracks. The franchise is taken subject to any inconvenience that may arise from such opening.⁵ Railroads and canals must allow improvements subsequently authorized to cross or tunnel their rights of way, on reasonable terms and proper compensation.⁶ A franchise which is subject to forfeiture is valid until forfeited by some action on the part of the State, and the property of such corporation is still protected by the Constitution, and must be paid for according to its proper value.⁷

But a franchise cannot be taken under the general law, *but must have for its basis express legislative authority*,⁸ or *must arise from necessary*

¹ Lake Shore R. R. v. Cincinnati R. R., 30 Ohio St. 604.

² Miller v. Craig, 11 N. J. Eq. 175.

³ Talbot v. Hudson, 16 Gray (Mass.), 417; Miller v. Craig, 11 N. J. Eq. 175.

⁴ Crossley v. O'Brien, 24 Ind. 325.

⁵ Hannibal v. Hannibal R. R., 49 Mo. 480; New Orleans v. United States, 10 Pet. (U. S.) 662; Philadelphia R. R. v. Philadelphia, 9 Phila. (Penn.) 563; Little Miami R. R. v. Dayton, 23 Ohio St. 510.

⁶ Illinois Canal v. Chicago R. R., 14 Ill. 314; Richmond R. R. v. Louisa R. R., 13 How. 71; Northern R. R. v. Concord R. R., 27 N. H. 183; Brooklyn Central R. R. v. Brooklyn City R. R., 33 Barb. (N. Y.) 420; Glover v. Powell, 10 N. J. Eq. 211.

⁷ White v. South Shore R. R., 6 Cush. (Mass.) 412.

⁸ *In re* Boston & Albany R. R. Co., 53 N. Y. 574; Central City Horse R. R. Co. v.

*implication.*¹ But this rule must be understood as only applying in the case of public, or *quasi* public corporations,² as the property

Fort Clark Horse R. R. Co., 81 Ill. 523. In the case *Matter of the City of Buffalo*, 68 N. Y. 167, the definition of implication is given, and the construction which must be placed on statutes claimed to confer power by implication. The court say: "An implication is an inference of something not directly declared, but arising from what is admitted or expressed. In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded by the subsequent public use. If both uses may not stand together, with some tolerable interference which may be compensated for by damages paid; if the latter use, when exercised, must supersede the former; it is not to be implied from a general power given, without having in view a then existing and particular need therefor, that the legislature meant to subject lands devoted to a public use already in exercise, to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally appear. If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject-matter of it, so that, by reasonable intendment, some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner." In this case, the city proposed to excavate a canal sixty feet in width across the tracks of several railroads, and entirely through the yard of one of them, at a place where there are

numerous tracks, turn-outs, and switches. The present grade of these tracks was but a few feet above the natural level of the canal. The land, if taken by the city, would be taken in fee, and hence the railroad companies would have no right to bridge the canal, and the bridging, if done, would be at an immense expense. This interference, the court say, would not be a tolerable interference with an existing public use, which may be compensated for in damages, but an entire superseding of it by another public use. Both uses cannot stand together. It is not to be presumed that the legislature, by the general terms in which it gave power to the city to take lands, with no especial reference to this particular place or occasion, meant to produce such an effect.

A general authority to lay out streets and alleys will not justify the laying-out of a street across depot grounds, when the easement of the railroad company and of the city cannot reasonably coexist. *Milwaukee R. R. v. Faribault*, 23 Minn. 167. In many States the condemnation of private property for public use is governed by general laws. No restriction on routes is imposed by the acts, and conflicts have frequently arisen. Land already devoted to another public use cannot be taken, under general laws, where the effect would be to extinguish a franchise. If, however, the taking would not materially injure the prior holder, the condemnation may be sustained. *New York R. R. Co. v. Metropolitan Gas-light Co.*, 63 N. Y. 326; *Morris R. R. Co. v. Central R. R. Co.*, 31 N. J. L. 205. Or if the property sought to be condemned was not in use, or absolutely necessary to the enjoyment of the franchise. *Peoria R. R. Co. v. Railroad Co.*, 66 Ill. 174; *Oregon R. R. Co. v. Bailey*, 3 Oreg. 164. A corporation, either private or municipal, cannot, under a general power to take lands for a public use, take from another corporation, having the like power, lands or property held by it for a public purpose

¹ CARPENTER, J., in *Evergreen Cemetery Assn. v. New Haven*, 36 Conn. 242.

² *In re Boston & Albany R. R. Co.*, 53 N. Y. 574.

of *any* purely *private* corporation may be taken *in invitum*, the same as that of an individual;¹ and the same is also true as to lands of public or *quasi* public corporations not in use, and which can be taken without detriment to the public, or interfering with the use to which they are devoted,² and where there is a necessity for

pursuant to its charter. But an easement may be acquired *in invitum*, by legislative authority, in lands held and occupied for a public use, when such easement may be enjoyed without detriment to the public or interfering with the use to which the lands are devoted. Lands held simply as a proprietor, but not used or necessary to the public purpose, may be taken as of a private person. *Matter of Rochester Water Commissioners*, 66 N. Y. 413. Property abandoned by a former corporation may be taken. The taking is not a forfeiture of the franchise, for the State alone can declare such forfeiture; but the land may be taken because not necessary to the old corporation, and because one company cannot condemn and hold land not necessary or convenient for its business, merely to prevent a rival company from competing with it. *Oregon R. R. Co. v. Bailey*, 3 Oreg. 164. A portion of a horse railroad which constitutes the most valuable portion of the road cannot be condemned under a general law. A crossing may properly be made, but the condemnation should be of the whole road, and not of the most valuable portion of it. *Central City Horse R. R. Co. v. Ft. Clark Horse R. R. Co.*, 81 Ill. 523. When different corporations desire the same location, the one that is prior in point of time is also prior in point of right, and the first location, if followed by construction, operates to secure the prior right. *Waterbury v. Dry Dock R. R. Co.*, 54 Barb. 388; *The People v. New York R. R. Co.*, 45 Barb. 73. And unless an exclusive right is given to a particular route, the company which files the first survey is entitled to the route. It does not signify that because the articles of incorporation of one are prior in date to those of the other, or that one has made preliminary surveys over a particular route, or has made purchases of individuals along that route, it has acquired a prior right. Until the survey is made and filed, the company would hold

the land purchased as any other individual land-owner, and such land could be condemned by the rival company upon compensation. *Morris R. R. Co. v. Blair*, 9 N. J. Eq. 635. The priority of construction gives no rights where another company has perfected its location first. *Chesapeake Canal Co. v. Baltimore R. R.*, 4 Gill & J. (Md.) 1. A right of way taken and occupied by one road cannot be taken by another, by a general proceeding, without stating in the petition that the land was occupied by another company, and without showing any necessity for taking that particular land. *Cincinnati R. R. Co. v. Danville R. R. Co.*, 75 Ill. 113; *San Francisco Water Co. v. Alameda Water Co.*, 36 Cal. 639. The commissioners who assess the damages cannot determine the priority of right, *San Francisco Water Co. v. Alameda Water Co.*, 36 Cal. 639, nor can the owner raise questions of priority between the two companies claiming the land, under separate proceedings, to defeat condemnation. *Lake Merced Water Co. v. Cowles*, 31 Cal. 215; *Mills Eminent Domain*, §§ 46, 47.

¹ *White River Turnpike Co. v. Vt. Central R. R. Co.*, 21 Vt. 590; *Grand Junction R. R. Co. v. Middlesex*, 14 Gray (Mass.), 553; *State v. Hudson Tunnel Co.*, 38 N. J. L. 548; *Bellona Company's Case*, 3 Bland (Md.), 442; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Trustees v. Salmon*, 11 Me. 109; *Peoria, &c. R. R. Co. v. Peoria & S. R. R. Co.*, 66 Ill. 174.

² *Matter of Rochester Water Works*, 66 N. Y. 413; *Matter of New York Central, &c. R. R. Co.*, 63 N. Y. 326. Lands held by a railway company for other than railway purposes may be taken *in invitum*. *Iron R. R. Co. v. Ironton*, 19 Ohio St. 299; *Peoria, P. & J. R. R. Co. v. Peoria, &c. R. R. Co.*, 66 Ill. 174; *In re Rochester Water Commrs.*, 66 N. Y. 413; *In re Ninth Av.*, 45 id. 729. *In Eastern R. R. Co. v. Boston & Maine R. R. Co.*, 111 Mass. 125, it

taking such lands for the purpose for which they were taken; ¹ and the question as to whether such necessity exists or not is one of fact for the jury.² The rule may perhaps be better stated thus: One public corporation cannot take the lands or franchises of another public corporation *in actual use by it*, unless *expressly authorized to do so* by the legislature; but the lands of such a corporation, not in actual use, may be taken by another corporation, authorized to take lands for its use *in invitum*, whenever the lands of an individual may be so taken, subject to the qualification that there is a *necessity* therefor.

was held that the legislature had the right to authorize one railroad to take the land of another railroad which it had acquired by eminent domain, upon payment of compensation; and the same rule was followed in Chicago, &c. R. R. Co. v. Town of Lake, 71 Ill. 333; New York, &c. R. R. Co. v. Boston, &c. R. R. Co., 36 Conn. 196; City of Bridgeport v. New York, &c. R. R. Co., id. 255; 4 Am. Rep. 63; Evergreen Cemetery Assoc. v. New Haven, 43 Conn. 234; Matter of Kerr, 42 Barb. 119; Backus v. Lebanon, 11 N. H. 19. But to authorize the taking of land already actually devoted to a public use there must be an express statutory authority. In *re* Boston & Albany R. R. Co., 53 N. Y. 574. Thus, in Central City Horse R. R. Co. v. Fort Clark Horse R. R. Co., 81 Ill. 523, it was held that a part of the line of one railroad could not be taken by a competing road acting under an ordinance of a city council. So, in Evergreen Cemetery Assoc. v. New Haven, 21 Am. Rep. 643, 43 Conn. 234, it was held that, without special statutory authority, or necessary and reasonable implication, a municipal corporation could not take for a highway the land of a cemetery, whether such land was actually in use for interments or not. But in Matter of New York Central, &c. R. R. Co., 63 N. Y. 326, it was held that, under the general statute, a railroad could take the land of a gas-light company not in actual use, such company not being a public corporation. In Matter of Rochester Water Commissioners, 66 N. Y. 413, the court said: "An easement may be acquired *in invitum*, by legislative authority, in lands held and occupied for a public use when such easement may be enjoyed without detriment to the public or interfering with

the use to which the lands are devoted. New York Central & Hudson R. R. Co. v. Metropolitan Gas-light Co., 63 N. Y. 326. So, too, lands held by a corporation or by a public body, but not used for or necessary to a public purpose, but simply as a proprietor and for any private purpose to which they may be lawfully applied, may be taken as if held by an individual owner. The property rights of a corporation in lands not held in trust for a public use are no more sacred than those of individual proprietors. The law only protects from condemnation for public purposes lands actually held by authority of the sovereign power for or necessary to some public purpose or use. Lands held upon a special trust for a public use cannot be appropriated to another public use without special authority from the legislature." In Peoria, &c. R. R. Co. v. Peoria, &c. R. R. Co., 66 Ill. 174, it was held that the land of one railroad company not in actual use might be condemned,—"clearly implying," said BRESEE, J., in Central City Horse R. R. Co. v. Fort Clark Horse R. R. Co., 81 Ill. 523, "if it was in actual use for their track or appurtenances, that it was not subject to condemnation by another road." But in no case can the right be exercised without compensation. Thus, in Southwestern R. R. Co. v. Southern Telegraph Co., 12 Am. Rep. 585, 46 Ga. 4, a statute authorizing a telegraph company to erect its lines upon the way of a railroad company, without providing for enforcing payment of damages, was held unconstitutional and void.

¹ Evergreen Cemetery Assoc. v. New Haven, *ante*.

² Bowler v. Perrin, 47 Mich. 154.

This rule was adopted and ably upheld in a Connecticut case.¹ In that case the plaintiffs, a cemetery association formed under the gen-

¹ *Evergreen Cemetery Assoc. v. New Haven*, 43 Conn. 234. In *Baltimore, &c. R. R. Co. v. P. W. & Kentucky R. R. Co.*, 17 W. Va. 812, the defendants, by proceedings *in invitum*, took a part of the buttress of the plaintiff's bridge, erected by it across Wheeling Creek. It appeared that the portion taken was not necessary to the support of the bridge and the exercise of the franchise of the company. The court held that its condemnation was proper. JOHNSON, J., in a masterly opinion, reviewed the cases, and said: "It is a mistake to suppose that land in use for certain purposes by a railroad company is not liable to condemnation. Pleas numbers two and three did not so much, as aver that the lands were in present use, and they were, of course, properly rejected. There is nothing so sacred in the title of a railroad company to property that it cannot be taken under the exercise of the right of eminent domain. I understand the law to be, that property belonging to a railroad company, *and not in actual use*, or necessary to the proper exercise of the franchise thereof, may be taken for the purposes of another railroad under the general railroad law of the State. An express legislative enactment is generally required in order to take such property in use by a railroad company, except where the proposed appropriation would not destroy or greatly injure the franchise of the company, or render it difficult to prosecute the object thereof. If such consequences would not follow, a general grant is sufficient. *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.*, 17 Conn. 40; *Little Miami R. R. Co. v. Day*, 23 Ohio St. 510; *Tuckahoe Canal Co. v. T. R. Co.*, 11 Leigh (Va.), 79; 3 Gratt. (Va.) 258. In *Richmond, &c. R. R. Co. v. Louisa R. R. Co.*, 13 How. (U. S.) 71, it appeared that the legislature of Virginia incorporated the Richmond, Fredericksburg, & Portsmouth R. R. Co., and in the charter pledged itself not to allow any other railroad to be constructed between the places, or on any portion of that distance, the probable effect of which would be to diminish the number of passengers

travelling between the one city and the other upon the railroad authorized by that act, or to compel the said company, in order to retain such passengers, to reduce the passage money. Afterwards the legislature incorporated the Louisa R. R. Co., whose road came from the west and struck the first-named company's track nearly at right angles at some distance from Richmond; and the legislature authorized the Louisa road to cross the track of the other and continue their road to Richmond. The court held that in the last grant the obligation of the contract with the first company was not impaired within the meaning of the Constitution of the United States; that in the first charter there was an implied reservation of the power to incorporate companies to transport other articles than passengers; that a franchise could be condemned in the same manner as individual property. *West Bridge Co. v. Dix et al.*, 6 How. (U. S.) 507. In *Grand Rapids, &c. R. R. Co. v. Grand Rapids & Indiana R. R. Co.*, 35 Mich. 265, it was held that one railroad has no right to appropriate without compensation the franchise or property of another for the construction of its road. The fact that property has been taken for a particular public use does not make it public property for all purposes; and the property rights of a railroad company in its right of way are protected by the same restrictions against appropriation by any other railroad company for railroad purposes or other public use as is afforded by the Constitution and laws in the case of the private property of an individual. *Baltimore & Havre de Grace Transportation Co. v. Union R. R. Co.*, 35 Md. 224. It is insisted by counsel for plaintiff in error that where a corporation is authorized by its charter or a general law to take by condemnation the land required for its purposes, it cannot, under such general authority, condemn property already appropriated to public use by another corporation; that to authorize it to do so, the power must be granted to it by express terms, or by necessary implication. For this position they rely upon *B. & M.*

eral laws of the State, owned certain lands in New Haven, which had been acquired by it under its charter for a burial-ground, and

R. R. Co. v. L. & L. R. R. Co., 124 Mass. 368; Housatonic R. R. Co. v. Lee & Hudson River R. R. Co., 68 N. Y. 391; Evergreen Cemetery Association v. New Haven, 43 Conn. 234; Matter of B. & A. R. R. Co., 53 N. Y. 574; Matter of City of Buffalo, 68 N. Y. 167. In the case in 124 Mass., it appeared that the location of the proposed extension of the defendant's railroad, of which the plaintiff complained, was twenty-six feet wide, and crossed upon a level two branches of the plaintiff's railroad, about a quarter of a mile apart; and at these crossings, and for the whole distance between them, was, for a small portion of its width, upon the plaintiff's depot and station grounds; but, for the greater part of its width, was along and within the plaintiff's location of 1847, and included a great part of the signal houses, of the store house, of the paint shop, and of the carpenters' shop, and of the freight platform; that the construction of the proposed extension of the defendant's road would be a serious injury to the plaintiff, and would greatly interfere with its necessary use of the tracks, signal houses, etc. The court, in its opinion, quoted with approbation what had been said in the case in 118 Mass.,—that 'a charter to build and maintain a railroad between certain points, without describing its course and direction, but leaving that to be determined and established by the corporation, as provided by the general laws, does not *prima facie* give any power to lay out the road over land already devoted to and within the recorded location of another railroad. It is not to be presumed that the legislature intended to allow land thus devoted to one public use to be subjected to another, unless the authority is given in express words, or by necessary implication.' In the case in 68 N. Y., it was held that 'the legislature may interfere with property held by a corporation for one public use and apply it to another, and may delegate the power so to do to another corporation; but such delegation must be in express terms, or arise from necessary implication. In determining whether a power to take lands given

in general terms was meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior use, and the extent to which it will be impaired or diminished by the taking for the subsequent use. A legislative intent to subject lands devoted to a public use, already in exercise, to one which might thereafter arise, will not be implied from a gift of power made in general terms without having in view a then existing and particular need for the subsequent use,—at least where both uses cannot stand together, and the latter, if exercised, must supersede the former.'

It will be observed that in these last cases the interference with the franchise was great, and much injury would have been sustained by the companies if their property had been taken. But the taking of a portion of a buttress might inflict no injury at all upon the Baltimore & Ohio R. R. Co. The courts will take care to see that one railroad company is not materially injured for the benefit of another; and where no such material injury will result, the onward march of improvement demands that a great work of internal improvement shall not be impeded by imaginary injury to another corporation. The instruction was properly refused. It is assigned as error that the court refused to set aside the verdict and grant a new trial. Upon a careful examination of the evidence, we think it fully sustains the verdict. But it is insisted by counsel for the plaintiff in error that the evidence shows that more land was included in the upper parcel of land sought to be condemned than was necessary for the purposes of petitioner, and the verdict ought therefore to be set aside. It is true, as contended by the counsel, that private property can only be taken for a public use, and no more of such property can be taken than is necessary for such use, which must be determined when proper from the statute upon the subject and the facts appearing in the case. Therefore, when it clearly appears that the property taken, or a part thereof, is not necessary for the public

were laid out and used by it for that purpose. In 1873 the city of New Haven, in pursuance of its corporate powers or otherwise, ordered the widening and straightening of Winthrop Avenue between certain points; and for that purpose took a portion of the plaintiff's land bordering on the avenue, about eight feet in width, covered with shrubbery, evergreens, and other ornamental trees. The land was shown to be in *actual use* by the association and *necessary* for its purposes, but was not shown to be necessary for the purposes of widening the avenue. CARPENTER, J., in the course of his opinion upon the question whether the defendants could take the land for the purposes named, said: "The power which the city has to take the land is the same as that conferred by general statute upon towns, there being no special power granted to take any part of this cemetery for such purposes. The petitioners are incorporated under the statute authorizing and regulating the organization of associations for the purpose of procuring and establishing burying grounds or places of sepulture. The association holds the land comprising the cemetery, subject to the provisions of the law authorizing its organization, and it is now held by the association, except

use for which such condemnation is sought, as to such part the taking is unlawful. *Matter of Albany Street*, 11 Wend. (N. Y.) 149; *Dunn v. Charleston*, Harp. (S. C.) 189; *Buckingham v. Smith*, 10 Ohio, 288. But does it appear in this record that more land was condemned than was necessary for the public use set forth in the petition? The only evidence before the jury on that subject was brought out on the cross-examination of the engineer of the petitioner, who said: 'For any structure which petitioner would put on the parcel of land just south of Wheeling Creek, it would only need twelve and one-half feet on each side of its centre line. For the remainder of the parcel west of this twenty-five feet petitioner had no immediate use, and witness could not say that it would ever be useful. It was one of those cases where railroads sometimes condemn all of the ground that is rendered useless to the former owner. In cases where the remainder of the ground was cut off from connection with the adjacent land, and where the damages for crossing amounted to as much as the whole

land was worth, it was just as well to take the whole.' Whether the whole of the upper parcel south of Wheeling Creek was necessary for the use of petitioner was not an issue before the jury. The petition particularly described it, and claimed that it was necessary for the use of the petitioner, which was a public use. The defendant, in the county court, did not take issue on that allegation in the petition. The only issues as to that parcel were, 'that the land last hereinbefore mentioned was, at the time of the beginning of the said condemnation proceedings, and still is, held and owned by the said defendant for the purpose of being used in its said business, and was at the time of the beginning of said proceedings, and still is, in use by the said defendant in its said business; and that in following the general course of the petitioner's road it is not necessary for the said petitioner to build its said line of road over said last-mentioned land.' Therefore it is clear that the evidence is not responsive to any issue before the jury."

such parts thereof as have been sold to be used and occupied as places of burial, which comprise a large part thereof.

"It is further found that the land so taken is needed for the purposes of the cemetery, and is not needed for the purpose of widening and straightening Winthrop Avenue. The use of land for a burying-ground is a public use, and, for such a purpose it may be taken, if need be, under the right of eminent domain. The fact that this land is held and used under a deed from the former owner, and was not taken by proceedings *in invitum*, cannot affect the nature of the use. It is held by as high and sacred a tenure as it would have been if the sovereign power of the State, in the exercise of the right of eminent domain, had been called to the aid of the petitioners in acquiring it. The question then is, whether land already devoted to a public use can be taken by the public for another use which is inconsistent with the first, without special authority from the legislature, or authority granted by necessary and reasonable implication. There are cases in which it would seem that lands used for a burying-ground, have been taken by the municipal authorities for highway purposes.¹ But whether they were taken under a general or special authority does not appear; nor does it appear that there was a necessity for taking them in order to exercise the powers granted; but it does appear that the question whether the public had a right so to take them without the consent of the owners, was not made and decided in either of the cases referred to.

"That the legislature has the power to authorize the taking of land already applied to one public use, and devote it to another is unquestionable.² And this power may be granted either by express words or by necessary implication. When the power is granted to municipal or private corporations in express words, no question can arise. In this case it is not claimed that the respondents were expressly authorized to take the petitioners' land. The question then arises whether, by a reasonable construction of the statute authorizing the respondents to lay out streets and highways, they had the power to take any portion of the petitioners' land for that purpose. The language is general and broad enough to embrace all lands, whether used for one purpose or another; nevertheless, there are cases in which it will be presumed that the legislature intended that it should not apply. It will be

¹ In the Matter of Albany Street, 11 Worcester R. R. Co., 23 Pick. Mass. 360; Wend. (N. Y.) 149; in the Matter of Springfield v. Conn. R. R. Co., 4 Cush. Beekman Street, 4 Bradf. (N. Y. Surr.) 503. (Mass.) 63; Bridgeport v. New York &

² Boston Water Power Co. v. Boston & New Haven R. R. Co., 36 Conn. 255.

presumed that land applied to one public use should not be taken and devoted to another use inconsistent with the first unless there is a necessity for it. Thus, it will be presumed that the legislature did not intend to authorize a town to lay out a highway along the track of a railway, or along the bed of a canal, as the two uses cannot well exist together. The one necessarily excludes the other. So also a railroad company, unless expressly authorized, cannot lay its track upon a highway; and when permitted, except in special cases, a substitute road must be provided. On the other hand, a highway may cross a railroad or a canal, as there is a manifest necessity for it, and it may be done without destroying the franchise, in whole or in part, and without seriously interfering with its exercise.

"The same land cannot properly be used for burial-lots and a public highway at the same time. The two uses are inconsistent with each other. *Land, therefore, applied to one use, should not be taken for the other, except in cases of necessity.* That brings us to inquire whether the necessity exists in the present case. The facts show that it not only does not exist but that there is hardly an apology for taking the land in question. If taken, it renders a very large number of lots in the cemetery inaccessible to carriages. That inconvenience can be remedied only by making a new avenue. That can only be done by taking six lots sold to private parties, all of which have been actually used for burial purposes. How the association is to acquire the title to those lots unless the owners voluntarily part with it, it is not easy to see. On the contrary, there is no difficulty in effecting the desired improvement by taking land on the other side of the street. . . . It can make no difference that the part taken was used for shrubbery and a carriage-way. A cemetery includes lots not only for depositing the bodies of the dead, but also avenues, walks and grounds for shrubbery and ornamental purposes. All must be regarded alike as consecrated to a public and sacred use. The idea of running a public street, regardless of graves, monuments, or the feelings of the living, through one of our great public cemeteries, would be shocking to the moral sense of the community, and would not be tolerated except upon the direst necessity. Yet the right to do so must be conceded, if the action of the respondents in the present case can be vindicated. The right to take a part of a cemetery, implies the right to take another, and the right to take one part implies the right to take the whole." The action of the defendant in taking the land was declared null and void.

To justify an interference with a vested franchise by granting another to a rival company, upon the ground that it is taking the former franchise under the right of eminent domain, it must appear that the government intends to exercise this sovereign right, by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting such intent. It must also appear by the statute that they recognize the right of private property and mean to respect it, and the act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owner. If the government authorizes the taking of property for any use other than a public one, or fails to make compensation, the act is simply void; no right of taking as against the owner is conferred, and he has the same rights and remedies against a party acting under such authority as if it had not existed. In general, therefore, where any act seems to confer an authority to take property, and the grant is not clear and explicit, and no compensation is provided by it for the owner or party whose rights are injuriously affected, the courts will presume that it was not the intent of the legislature to exercise the right of eminent domain, but simply to confer a right to do the act, or exercise the power given, on first obtaining the consent of those affected.¹

An exclusive privilege to build a bridge is a franchise, not only as to the right to build and maintain it, but as to the exclusion of all other such grants, though the limits of such exclusion extend beyond the limits set for the location of the proposed bridge. And such an exclusive privilege is not held subject to any implied condition of yielding it up without compensation if required by the public convenience. Although it is competent for the legislature to grant to others a franchise which interferes with such exclusive right, if they provide in the new grant for compensation to be made, they cannot make such new grant without providing for compensation. It is not enough that the grantees of the former privilege may have an action for damages against the grantees of the latter.²

¹ *Boston & Lowell R. R. Co. v. Salem Smith*, 30 N. Y. 44; *Oswego Bridge Co. & Lowell, &c. R. R. Co.*, 2 Gray (Mass.), 1; *Matter of Flatbush Avenue*, 1 Barb. (N. Y.) 286; *Matter of Hamilton Avenue*, 14 id. 405.

² *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Fort Plain Bridge Co. v. 51*, it was held, reversing the same case in 27 N. Y. 87, that an enactment by a State in incorporating a company to build a toll-bridge and take tolls fixed by the act, that

There is no difference in this respect between lands taken by the corporation under the right of eminent domain, and those which were acquired by it by purchase. Both are entitled to equal protection in its hands, so long as necessary for its use.¹ The circumstance that the corporation has taken lands under this power, for what the legislature has adjudged to be a public use, does not strip them of their character as private property, in the hands of such corporation, so as to authorize the legislature to give to another corporation the right to take any part of them for its use without compensation.²

Whatever may be the nature of the title acquired by the corporation under the exercise of the right of eminent domain, whether it is to be regarded as investing it with an easement merely, or with the fee, *whatever interest it does acquire is its property*, and is *private property*, although acquired and held for

it should not be lawful for any person or persons to erect any bridge within two miles either above or below the bridge authorized, was within the case of *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 625, and a contract inviolable although the charter of the company was without limit as to duration. The court here say: "We have supposed, if anything was settled by an unbroken course of decisions in the Federal and State courts, it was that an act of incorporation was a contract between the State and the stockholders. All courts at this day are estopped from questioning the doctrine. The security from property rests upon it, and every successful enterprise is undertaken in the unshaken belief that it will never be forsaken. A departure from it now would involve danger to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the government. An attempt even to reaffirm it could only tend to lessen its force and obligation." This doctrine had been conceded in the same case in the Court of Appeals of New York, but it was there held that the contract was not to be implied because the franchise was not directly granted by the act in question, but only by reference to former enactments. Of

this the Supreme Court say that a contract may be made in this way as well as by direct enactment. The doctrine of the *Binghamton Bridge Case* had been laid down in *Piscataqua Bridge v. N. H. Bridge*, *ante*; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149; *Bridge Co. v. Hoboken Land and Improvement Co.*, 13 N. J. Eq. 81; *Townsend v. Blemott*, 6 Miss. 503; *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. (N. Y.) 100. A grant to a toll-bridge company, with a prohibition of any other bridge within a mile, is not infringed by a subsequent grant for a railroad bridge within that distance, to be used exclusively for railroad purposes, *Lake v. Virginia, &c. R. R. Co.*, 7 Nev. 294; *Bridge Co. v. Hoboken Land and Improvement Co.*, 13 N. J. Eq. 81; affirmed, 1 Wall. (U. S.) 116; *contra*, *Enfield Toll-Bridge Co. v. Hartford and N. H. R. R. Co.*, *ante*. Nor is a ferry franchise infringed by a subsequent bridge franchise. *Piatt v. Covington & Cincinnati Bridge Co.*, 8 Bush (Ky.), 31.

¹ *Evergreen Cemetery Assoc. v. New Haven*, *ante*.

² *South Western R. R. Co. v. Southern Tel. Co.*, 46 Ga. 4; *Grand Rapids, New-ago, & Lake Shore R. R. Co. v. Grand Rapids & Indiana R. R. Co.*, 35 Mich. 265; 24 Am. Rep. 545.

a public use, and, at least in the case of railroad corporations, it is evident that its use, in order that its rights as granted by its charter may be exercised, must, necessarily, not only be permanent but practically exclusive.¹ Therefore a railroad track cannot be appropriated for highway purposes without just compensation having been made to the company owning the track.²

The legislature has no power to take the franchises of one company and give them to another, without compensation.³ Thus, Congress has no power, by declaring railways to be post-roads, to authorize a telegraph company to establish its lines over the right of way of a railway company, without making compensation according to law.⁴ It is a settled principle that a telegraph line erected along and upon the right of way of a railroad company is an additional burden upon the fee, and the original owner if he retains the fee may recover compensation in damages for such additional use.⁵ Such a line is also a burden upon the easement of the railroad company for which compensation may be had.⁶ But a railroad may erect a telegraph line along its right of way for its own use and benefit in the operation of its road and to facilitate its business, and a line so constructed and used in good faith is not an additional burden on the fee.⁷ In view of the provisions of the Revised Statutes of the

¹ *Grand Rapids, &c. R. Co. v. Grand Rapids & Indiana R. Co.*, 35 Mich. 265; 24 Am. Rep. 545.

² See *post*, § 278 *b*. See also the forcible language of MARSTON, J. in *Grand Rapids, &c. R. Co. v. Grand Rapids & Indiana R. Co.*, 35 Mich. 265; 24 Am. Rep. 545. A highway laid across a railway track is a taking of the railway company's property for which compensation must be made. *Old Colony, &c. R. Co. v. Plymouth County*, 14 Gray (Mass.), 156.

³ *Boston Water Power Co. v. Boston, &c. R. Co.*, 23 Pick. (Mass.) 360; *National Doeks, &c. Co. v. State* (N. J.), 21 Atl. Rep. 570.

⁴ *Atlantic & Pacific Tel. Co. v. Chicago, &c. R. Co.*, 6 Biss. (U. S.) 158. Land occupied as a public street cannot be taken without compensation, even by authority of the legislature. *Jersey City, &c. R. Co. v. Jersey City, &c. Horse R. Co.*, 20 N. J. Eq. 61; *Hoboken Land, &c. Co. v. Hoboken*, 36 N. J. L. 540.

⁵ *American Teleph. Co. v. Smith*, 71 Md. 535; 7 L. R. A. 200; 18 Atl. Rep.

910; 35 Am. & Eng. Corp. Cas. 12; *Atlantic, &c. Tel. Co. v. Chicago, &c. R. Co.*, 6 Biss. (U. S.) 158; *W. U. Tel. Co. v. Am. Un. Tel. Co.*, 9 Biss. (U. S.) 72; *Am. & Eng. Ency. Law, Art. "Telegraphs."*

⁶ *Southwestern R. Co. v. Southwestern, &c. Tel. Co.*, 46 Ga. 43; 12 Am. Rep. 585; *Atlantic, &c. Tel. Co. v. Chicago, &c. R. Co.*, 6 Biss. (U. S.) 158. A statutory provision authorizing telegraph companies to erect their lines "upon any of the public roads" does not authorize the occupation of a railroad's right of way. *New York City, &c. R. Co. v. Central Union Tel. Co.*, 21 Hun (N. Y.), 261. And a statute authorizing the construction of a telegraph line upon the right of way of a railroad company, without providing for compensation, is unconstitutional. *Southwestern R. Co. v. Southwestern Tel. Co.*, 46 Ga. 43; 12 Am. Rep. 585.

⁷ *W. U. Tel. Co. v. Rich*, 19 Kan. 517; 27 Am. Rep. 159; *St. Joseph, &c. R. Co. v. Dryden*, 11 Kan. 186. "We entertain no doubt whatever as to the right of a railroad company to construct on and over its

United States granting to telegraph companies a right of way over all public and post roads, a railroad company cannot grant, nor can a telegraph company acquire, exclusive rights over the right of way of the railroad. Such a grant or acquisition is clearly against the policy of the law, and is void even though authorized by a State statute, except, of course, where the railroad and the telegraph lines are both purely local affairs, constructed and operated entirely within the limits of a single State.¹

The construction of a highway upon part of the right of way of a railroad company constitutes a taking of the property of the company for which compensation must be rendered to it.² So also of the construction of another railroad track. Of this we have treated further on.

But it is now well settled that there is no implied contract by the State in the charter of a turnpike or other private corporation, that their property, or even their franchise itself, shall be exempt from the common liability of the property of individuals to be taken for the public use; that it may be taken, on proper compensation being made; that a railroad is an improved highway, and that property taken for its use, by authority of the legislature, is property taken for the public use, as much as if taken for any other highway; and that the legislature may delegate its power to a railroad corporation, to take private property for public use in the construction of their railroad, as well as to a turnpike corporation to take the like prop-

right of way a telegraph or telephone line for its use in the operation of its road and despatch of its business; and it may do this by itself, or may employ another company to do it; or may do it conjointly with another company. If, then, this line is in process of construction, or is about to be constructed, over the right of way of this railroad company, in good faith, for the use and benefit of the latter in the operation of its road, or to facilitate its business, or is reasonably necessary for that purpose, the land-owners have no ground of complaint, because such use of their land is within the scope of the original easement, for which they have already received compensation." MILLER, J., in *American Teleph. & Tel. Co. v. Pearce*, 71 Md. 254. The court quoted with approval from the case of *Western Union Tel. Co. v. Rich*, 19 Kan. 517, just referred

to, — but held that the facts in the case did not show a construction in good faith for the purposes of the railroad only, and therefore held the line to be an additional use for which compensation must be made to fee owners.

¹ Revised Stat. of U. S., §§ 5263-5269; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, *affirming* 2 Woods, 643; *W. U. Tel. Co. v. Am. Un. Tel. Co.*, 9 Biss. (U. S.) 72; *W. U. Tel. Co. v. Balt. & O. Tel. Co.*, 22 Fed. Rep. 133; *Pacific Postal Tel. Co. v. W. U. Tel. Co.*, 50 Fed. Rep. 493; *Am. & Eng. Ency. Law*, Art. "*Telegraphs*." Compare *California, &c. Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398. See also *New Orleans, &c. R. Co. v. Southern, &c. Tel. Co.*, 53 Ala. 211; and *Thompson on Electricity*, §§ 2, *et seq.*

² *Old Colony R. Co. v. Plymouth County*, 14 Gray. (Mass.), 155.

erty for the public use in the construction of a turnpike road.¹ So it may authorize the laying out of a common public highway over a road made by a turnpike corporation, and the taking of the franchise of the corporation for that purpose, notwithstanding the charter of the corporation is still in force, and the corporation in possession of the road constructed by virtue of it,—provided compensation is made to the corporation for their property thus taken.² A stipulation that the property or franchises of a Corporation shall not be taken for public use upon just compensation, if required by the public exigencies, cannot be implied or inferred from the grant of the right to

¹ *White River Turnpike Co. v. Vermont Central R. Co.*, 21 Vt. 590. In this case the court held also, as a settled principle, "that where there has been a legislative grant to a private corporation to erect a bridge, turnpike, or other public convenience, which is not in its terms exclusive, there is no constitutional obligation on the legislature, — however strong a moral one there may be, — not to grant to a second corporation the right to erect another bridge or turnpike for a similar purpose, to be constructed so near the former as greatly to impair, or even to destroy the value of the former; and this without making compensation to the first corporation for the consequential injury." *Citing Charles River Bridge v. Warren Bridge*, 11 Pet. (U.S.) 420; *Enfield Bridge Co. v. Hartford, &c. R. Co.*, 17 Conn. 454.

The principle of the text has been recognized in many cases. See *Wheeling Bridge Co. v. Wheeling & Belmont Bridge Co.*, 34 W. Va. 155; 11 S. E. Rep. 1009 (property of an improvement company taken for use of a similar company); *Cincinnati, &c. R. Co. v. Belle Centre*, 48 Ohio St. 273; *Yates v. West Grafton*, 34 W. Va. 783; *Old Colony R. Co. v. Framingham Water Co.*, 153 Mass. 561; *Commissioners v. Mich. Central R. Co.* (Mich.), 51 N. W. Rep. 447; *National Docks, &c. R. Co. v. State*, 53 N. J. L. 217; *Corey v. Chicago, &c. R. Co.*, 100 Mo. 282; *Colorado, &c. R. Co. v. Union Pacific R. Co.*, 41 Fed. Rep. 293; *Allegheny Valley R. Co. v. Pittsburgh Junction R. Co.*, 122 Penn. St. 511; 6 Atl. Rep. 564; *Suburban Rapid Transit Co. v. New York*, 128 N. Y. 510; *Chicago, &c. R. Co. v. Cincinnati, &c. R. Co.*, 126 Ind. 513. A

junior street railway may condemn a right of way longitudinally over the tracks of a senior company whenever it appears that the joint use of such tracks will best subserve the interests of the public. *Toledo Electric St. Ry. Co. v. Toledo Consol. St. Ry. Co.* (Ohio, 1892), 26 Weekly Law Bull. 172. See also note in 39 Am. & Eng. R. Cas. 16, as to condemnation of corporate property and franchises.

² *Barber v. Andover*, 8 N. H. 398; *Armington v. Town of Barnet*, 15 Vt. 745. An exclusive right to maintain a toll bridge within certain limits is a franchise which may be appropriated for the public good upon just compensation being made therefor. *Red River Bridge Co. v. Mayor, &c. of Clarksville*, 1 Sneed (Tenn.), 176. Under the general railroad law of New Hampshire of 1844, providing that any real estate, franchise, or easement of any corporation may be taken for a highway, in the same manner as the real estate of individuals, the track or other property of one railroad company may be taken by another, if it appear that the public good requires such taking. *Northern R. v. Concord, &c. R.*, 27 N. H. 183. Whether, if the charter of a corporation contains an express stipulation against its property being taken away by the right of eminent domain this would secure it, see *West River Bridge v. Dix*, 6 How. (U.S.) 507; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *Washington Bridge v. State*, 18 Conn. 53; *Washington, &c. Turnpike Co. v. Baltimore, &c. R. Co.*, 10 G. & J. (Md.) 392; *Harvey v. Thomas*, 10 Watts (Penn.), 63; *Harvey v. Lloyd*, 3 Penn. St. 331; *Shoenberger v. Mulhollan*, 8 Penn. St. 134.

organize as a corporation, or to acquire property for a particular use, and to take a compensation in tolls for the use of it. Nor can it be inferred from the fact that the property is, in its nature, an incorporeal hereditament,—as, a right of way. The fact that the corporation does not own the fee of the land over which their road is constructed, does not imply any such stipulation, nor the fact that a part of the property is a franchise. Incorporeal hereditaments, as well as a fee, may be taken, and this whether the property belongs to an individual or a corporation.¹ Even if the taking of the property may, incidentally, put an end to the exercise of the corporate powers because nothing is left for their exercise, this is no objection. There is no implied contract that the corporation may not be dissolved, or its operation be suspended by a subsequent exercise of the right of eminent domain, if their property, franchise included, is of such a nature that that power may operate upon it.² A provision in the charter of a corporation by which the State reserves the right to purchase the property after a certain period, does not imply in any manner a relinquishment of the right to take the property of the corporation, or any part of it, if required for public use, upon making just compensation.³

Where a corporation created by the legislature was authorized to erect a toll-bridge, and in the charter it was provided that "no person or persons shall have liberty to erect another bridge" within certain limits, it was held that this was not a contract, beyond the grant of a franchise, which precluded the State from authorizing another bridge to be made within the limits, *on compensating the first company for the injury to them*.⁴ The circumstance that the legislature has no power to repeal the charter of a corporation does not exempt its franchise from condemnation for public use,⁵ as the taking of its property is not a repeal of its charter, but an enforced purchase of its property for a public use.⁶ If the property and the franchise are inseparable, they may both be taken.⁷ Compensation being made, there is no impairment of the obligation

¹ Backus v. Lebanon, 11 N. H. 19; Co., 14 Ill. 314; Trustees v. Salmond, 11 Northern R. R. v. Concord, &c. R. R., 27 Me. 109.
N. H. 183.

² Backus v. Lebanon, 11 N. H. 19.

³ Id.

⁴ Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn. 454.

⁵ Jeffersonville R. R. Co. v. Dougherty, 40 Ind. 33; Illinois Canal v. Chicago R. R.

⁶ Grand Junction R. R. Co. v. Middlesex, 14 Gray (Mass.), 553; State v. Hudson Tunnel Co., 38 N. J. L. 548.

⁷ Crosby v. Hanover, 36 N. H. 404; West River Bridge v. Dix, 6 How. (U. S.) 507; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420.

of a contract in taking such franchises and property,¹ and the provision for compensation recognizes the validity of the contract.² The entire franchise of a corporation need not be condemned where both can exist together. Thus, a railway company can run its trains upon its roadway, although another company is also authorized to run its trains upon the same track. The property in the railway still remains in the original owner, but the franchise is impaired by the privilege given to the other company, and must be compensated for.³

SEC. 239. **Exclusive Grants: Presumptions as to Earlier Grants.**—

While a grant of privileges to a corporation may be exclusive, and the legislature may not have reserved to itself the right to alter, amend, or repeal its charter, or even though there may be an express stipulation in the charter that no other similar corporation shall be established within a certain distance of it, yet it is held that the grant shall be presumed to have been made upon the condition that no other similar corporation shall be established, *without proper compensation to it*, and that the establishment of another corporation within the distance named, *which provides for just compensation to such corporation for the injury to its franchise*, does not impair the obligation of any contract, but leaves the corporation subject, as it should be, to all the incidents of citizenship, and of the exercise of sovereign powers for the public good.⁴ Grants of this character are con-

¹ Baltimore T. Co. v. Union R. R. Co., 35 Md. 224; Richmond R. R. Co. v. Louisa R. R. Co., 13 How. (U. S.) 71.

² West River Bridge v. Dix, 6 How. (U. S.) 507.

³ Jersey City, &c. R. R. Co. v. Jersey City Horse R. R. Co., 20 N. J. Eq. 61; State v. Noyes, 47 Me. 189; Salem Turnpike Co. v. Lynn, 18 Conn. 451.

⁴ Richmond, &c. R. R. Co. v. Louisa, &c. R. R. Co., 13 How. (U. S.) 71. In this case the legislature of Virginia incorporated the stockholders of the Richmond, Fredericksburg, & Potomac R. R. Co., and in the charter pledged itself not to allow any other railroad to be constructed between those places, or any portion of that distance; the probable effect would be to diminish the number of passengers travelling between the one city and the other upon the railroad authorized by that act,

or to compel the said company, in order to retain such passengers, to reduce the passage-money. Afterwards the legislature incorporated the Louisa Railroad Company, whose road came from the West and struck the first-named company's track nearly at right angles, at some distance from Richmond; and the legislature authorized the Louisa Railroad Company to cross the track of the other, and continue their road to Richmond. In this latter grant, the obligation of the contract with the first company is not impaired within the meaning of the Constitution of the United States. In the first charter, there was an implied reservation of the power to incorporate companies to transport other articles than passengers; and if the Louisa Railroad Company should infringe upon the rights of the Richmond Company, there would be a remedy at law, but the appre-

strued strictly, and no rights are acquired by implication which curtail or injuriously affect the public interests, but the franchise must stand upon the express terms of the statute conferring it. It may be questionable whether the franchises of one corporation can be taken for another, where they both serve the same public purpose, and accomplish the same ends and results. Thus, it would perhaps not be competent for the legislature to take the franchises of one railway for another, when they both have the same *termini* and route. SHAW, C. J., in a leading case¹ upon this head, said: "The plaintiffs still retain their franchise, they still retain all their rights derived from the legislative grants; and the only effect of the subsequent acts is to appropriate to another and distinct public use a portion of the land over which their franchise was to be used. We cannot perceive how it differs from the case of a turnpike or canal. Suppose a broad canal extends across a large part of the State. The proprietors have a franchise similar to that of the plaintiffs, to use the soil in which the bed of the canal is formed, and it is, in the

hension of it will not justify an injunction to prevent them from building their road. Nor is the obligation of the contract impaired by crossing the road. A franchise may be condemned in the same manner as individual property. *New Jersey Southern R. R. Co. v. Long Branch Comm'rs*, 25 N. Y. Eq. 28; *Metropolitan City R. R. Co. v. Chicago, &c. R. R. Co.*, 87 Ill. 317; *Boston & Lowell R. R. Co. v. Boston & Salem R. R. Co.*, 2 Gray (Mass.), 1; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.*, 7 N. H. 35; *New Orleans, &c. R. R. Co. v. Southern, &c. Tel. Co.*, 53 Ala. 211; *West River Bridge v. Dix*, 6 How. (U. S.) 507; *Beekman v. Saratoga, &c. R. R. Co.*, 3 Paige Ch. (N. Y.) 45. In *Commissioners on Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446, GRAY, J., says: "In this country, as in England, every grant from the sovereign power is, in case of ambiguity, to be construed strictly against the grantee and in favor of the government. *The rights of the public are, therefore, not to be presumed to have been surrendered to a corporation, except so far as an intention to surrender them clearly appears in the charter.* The grant of a franchise from the commonwealth for one public object is not to be unnecessarily interpreted to the disparagement of an-

other. *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 544-548; *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How. (U. S.) 172, 192; *Richmond, Fredericksburg & Potomac R. R. Co. v. Louisa R. R. Co.*, 13 id. 71; *Cleveland v. Norton*, 6 Cush. (Mass.) 383, 384; *Boston v. Richardson*, 13 Allen (Mass.), 146, 156. It is upon this principle that it has been held that a general authority to lay out highways will not warrant the laying out of a highway over navigable waters; that a charter for the construction of a turnpike or railroad from one place to another will not authorize the grantees to obstruct an existing highway, unless such obstruction is necessary to give a reasonable effect to the statute; and a grant of land covered by tide water does not affect the power and duty of the legislature to protect the public rights of navigation and fishing over it." *Commonwealth v. Coombs*, 2 Mass. 489; *Wales v. Stetson*, id. 143; *Springfield v. Connecticut River R. R. Co.*, 4 Cush. (Mass.) 63; *Commonwealth v. Alger*, 7 Cush. (Mass.) 53.

¹ *Boston Water Power Co. v. Boston & Worcester, R. R. Co.*, 23 Pick. (Mass.) 366. See also *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507; *Beekman v. Saratoga, &c. R. R. Co.*, *ante*.

same manner, derived by a grant from the legislature. It is a franchise. But if afterwards it becomes necessary to lay a turnpike, or a public highway across it, would this be a disturbance or revocation of the franchise, and inconsistent with the power of the legislature in exercising the right of eminent domain for the public benefit? It might occasion some damage; but that would be a damage to property, and, pursuant to the Bill of Rights, must be compensated for by a fair equivalent. It may be said that the way might be carried high over the canal, and so not obstruct it. But suppose a railroad, a new erection, not contemplated when the canal was granted, and from the nature of which, it must be kept on a level, so as to subject the canal proprietors to considerable expense and trouble; whatever other objections might be made to it, it seems to us, that it could not be considered as a revocation, still less an annihilation of the franchise of the proprietors. If it is suggested that under this claim of power *the legislature might authorize a new turnpike, canal, or railroad on the same line with a former one to its whole extent, we think the proper answer is, that such a measure would be substantially and in fact, under whatever color or pretence, taking the franchise from one company and giving it to another, in derogation of the first grant, not warranted by the right of eminent domain and incompatible with the nature of legislative power.* In that case the object would be to provide for the public the same public easement which is already provided for, and secured to the public by the prior grant, and for which there could be no public exigency. Such a case therefore cannot be presumed.

“If the whole of a franchise should become necessary for the public use, I am not prepared to say that the right of eminent domain, in an extreme case, would not extend to and authorize the legislature to take it, on payment of a full equivalent. I am not aware that it stands upon a higher or more sacred ground than the right to personal or real property. Suppose, for instance, that a bridge had been early granted over navigable waters, say in this harbor, at the place where East Boston ferry now is, and the extension of our foreign commerce, and the exigencies of the United States in maintaining a navy for the defence of the country, should render it manifestly necessary to remove such a bridge; I cannot say that it would not be in the power of the legislature to do it, paying an equivalent. Or suppose, as it has sometimes been suggested, that these dams of the plaintiffs, by checking the tide waters flowing through the

channels below Charles River bridge, and through the harbor of Boston, should have so far altered the regimen of the stream, as gradually to fill up the main channel of the harbor and render it unfit for large ships; suppose it were demonstrated, to the entire satisfaction of all, that this was the cause, that the harbor would become unfit for a naval station, or for commerce, by means of which most extensive damage would ensue to the city, to the commonwealth, and to the eastern States (for I mean to put a strong case for illustration), would it not be competent for the legislature to require the dams to be removed, the basins again laid open to the flux and reflux of the tide? I am not prepared to say that it would not, on payment of an equivalent. But it is not necessary to the decision of this cause, to consider such a case, because, as before said, the act of the defendants does not, in any legal sense, annul or destroy the franchise of the plaintiffs."

Where the grant of a new franchise does not in express terms give to the corporation the right to take the franchise of a corporation already established, the presumption is that the new corporation was not expected to interfere in any substantial degree with the franchises of the elder one.¹ *If however the two grants cannot stand*

¹ State v. Montclair R. R. Co., 21 N. J. Eq. 328; *In re* New York & B. R. R. Co., 20 Hun (N. Y.), 201; Parker v. Sunbury, &c. R. R. Co., 19 Penn. St. 211; Hatch v. Cincinnati, &c. R. R. Co., 18 Ohio St. 92; *In re* Boston & Albany R. R. Co., 53 N. Y. 574; Comm'rs of Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446. In Alexandria & Fredericksburg R. R. Co. v. Alexandria & Washington R. R. Co., 75 Va. 780; 40 Am. Rep. 743, it appears that the Alexandria & Washington Railroad Company was chartered in February, 1854, for the purpose of constructing and operating a railroad between the cities of Alexandria and Washington. It had under its charter acquired title in fee to such lands as were suitable and necessary for the purposes for which it was incorporated, in the mode prescribed by statute, and had laid out its road and constructed its road-bed on the lands it had so acquired, and had laid its track, and was running its train thereon, when the Alexandria & Fredericksburg Railroad Company, having been authorized by act of assembly, approved June 4, 1870, to extend its line of road

from the city of Alexandria to a point on the Potomac, opposite the city of Washington, caused the track of their road to be laid upon the road-bed aforesaid of the Alexandria & Washington Railroad Company, appropriating the west eighteen and one-half feet of the same to its use. This strip of land constituting a part of the Alexandria and Washington company's road-bed, was taken from said company by the Alexandria & Fredericksburg Railroad Company, and condemned for its use by the judgment of the County Court of Alexandria County. The Alexandria & Fredericksburg Railroad Company were duly empowered by the general law to take the lands of private parties for the use of their said road; the legislature, having decided that it will be for the public utility, authorizes the company to take such lands as are needed for the purpose. And the law invested the company with title thereto in fee simple, upon the payment of the compensation determined on, subject however to certain restrictions and limitations in both the general law and in the special act of the legislature under which it had

together, and upon an application of the grant to the subject matter, it is found that the latter will be defeated unless it is permitted to

any authority to construct its road. After giving the authority to construct the road, the act contains a restriction and limitation of its powers in the following words: "Provided, that in the extension of the said railway it shall in no way interfere with the chartered rights or franchises of any railroad extending between Alexandria and Washington; but this proviso shall not be construed as preventing said Alexandria and Fredericksburg Railroad from crossing any such railroad." The company took a strip of eighteen and one-half feet of the road-bed of the Alexandria & Washington Railroad Company, extending the whole length of the road, amounting to eight acres and twenty-five perches, which had been appropriated to it, and the title to which in fee was vested in it by the law under its charter, and which it held under its chartered rights and franchises. ANDERSON, J., said: "It is contended by the counsel for the appellant in their able argument that this was no interference with the rights and franchises of said company. That it was only the appropriation of land of said company, as of individuals, and not its franchises, and that rights in this clause and franchises mean the same thing. And in support of their claim they cite the language of President TUCKER in Tuckahoe Canal Co. v. Tuckahoe R. R. Co., 11 Leigh (Va.), 75, in which he held that a franchise was an incorporeal hereditament; consequently, they say, it cannot be land. That is true; but, as was said by Judge TUCKER: 'It is a franchise to be a corporation with power to sue and be sued, and to hold property as a corporate body.' The property taken by the Alexandria & Fredericksburg Railroad Company was held by the Alexandria & Washington Railroad Company as a corporate body; and according to Judge TUCKER in the said opinion, is held as a corporate body by virtue of its franchise. And can it be said that it was no interference with the company's franchise to take the land which it held under it? I cannot think so. It seems to me that it was a very direct and serious interference with its franchise. The language of the

restriction is very strong, — 'shall in no way interfere;' and that the language might not be misunderstood, the restriction is expressed with greater fullness and force, — 'shall in no way interfere with the chartered rights or franchises of any railroad,' etc. It is very clear, it seems to me, that to take the lands of the company upon which its railroad bed was constructed, for the length of the road, or a part of them which it held under its chartered rights and franchises, was such an interference as is expressly prohibited by said clause of the act; and this, I think, more plainly appears from the latter part of the clause, which makes a saving in favor of the Alexandria and Fredericksburg company, that the language shall not be construed to prevent that company from crossing such road. It implies that without this qualification the legislature apprehended that the proviso might even prevent its crossing such road. It must be remembered that there are powers exercised by a corporation to appropriate land for its corporate purposes. And Judge COOLEY says: 'There is no rule more familiar or better settled than this, that grants of corporate powers, being in derogation of common right, are to be strictly construed; and this is especially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the State itself, and interfering most seriously, and often vexatiously, with the ordinary rights of property.' If the foregoing views are correct, and I think they are, the County Court of Alexandria has no delegated authority to exercise the right of eminent domain under the statute in such cases, and consequently had no jurisdiction to adjudicate the question whether the land should be taken from one company and given to another company; and upon this ground said judgment of the County Court was *coram non iudice*, and consequently null and void. It vested no right in the Alexandria & Fredericksburg company, and can form no barrier or impediment to the consideration and decision of this case, just as if there had been no such judgment rendered. For

interfere with the franchises of another corporation, the presumption is raised that such interference was contemplated by the legislature.

the court having no jurisdiction of the subject matter, there is no judgment in the way, and the case turns upon the question whether the Alexandria and Fredericksburg company had any authority of law to interfere with the chartered rights and franchises of the Alexandria & Washington company by appropriating to itself its road-bed, either in whole or in part. We have seen that it had no such right, and upon this view of the case the decree of the Circuit Court, I think, was clearly right, and ought to be affirmed. But if contrary to my understanding of the statute, it does delegate to the County Courts in such cases authority to exercise the right of eminent domain, and invests them with jurisdiction in general to determine what lands shall be condemned for the railroad company, and what shall not be, and to invest the title in fee simple to such as they condemn, — a power and jurisdiction which, I think, the statute may be searched in vain to find conferred on the County Courts in railroad cases, — it still remains a question, was the County Court of Alexandria invested with jurisdiction in this case to take from the Alexandria & Washington company its road-bed, in whole or in part, which it held in fee under its charter, devoted to the public use, and give it to the Alexandria & Fredericksburg company for another public use? It is undoubtedly true, it was said in *Proprietors of Locks & Canals v. City of Lowell*, 7 Gray (Mass.), 226, that land or other property which has in conformity with the provisions of the Constitution been devoted to the public use, may afterward in like manner be again taken and appropriated to the public service, under a subsequent statute duly enacted, if such purpose is expressly, or by unavoidable implication authorized by its provisions. . . . But if such an appropriation is once made, the property cannot afterward be interfered with, or the right of holding and enjoying it in that definite manner be interrupted or disturbed, except under the provisions of some subsequent statute, expressly or by necessary implication, authorizing its subjection to public service in another and different manner.

In the *Housatonic R. R. Co. v. Lee & Hudson R. R. Co.*, 118 Mass. 391, the court held that a charter to build and maintain a railroad between certain points, without describing its course and direction. . . . does not, *prima facie*, give any power to lay out the road over land already devoted to and within the recorded location of another railroad. It is not to be presumed that the legislature intended to allow land thus devoted to one public use to be subjected to another, unless the authority is given in express words or by necessary implication, — citing *Springfield v. Connecticut River R. R. Co.*, 4 Cush. 72. 'A general authority to lay out a railroad does not authorize a location over land already devoted to another public use.' *Mills on Efn. Dom.* § 46. Numerous other cases are cited by appellee's counsel in support of this doctrine, which I need only refer to. *Boston & L. R. R. Co. v. Railroad Co.*, 2 Gray (Mass.), 35-37; *Hickok v. Hine*, 23 Ohio St. 523; s. c. 13 Am. Rep. 255; *In re Buffalo*, 68 N. Y. 171; *Milwaukee, &c. R. R. Co. v. Faribault*, 23 Minn. 169; *Contra Costa R. R. Co. v. Moss*, 23 Cal. 325; *San Francisco & A. W. Co. v. Water Co.*, 36 id. 639; *Barber v. Andover*, 8 N. H. 398; *West Boston Bridge v. County Comm'rs*, 10 Pick. (Mass.) 270; *In re Boston & A. R. R. Co.*, 53 N. Y. 574. The appropriation of private property for the use of a railroad by a railroad company is by authority of the act of the legislature, which authorized the construction of the road, which COOLEY says, *supra*, must be held for this purpose the law of the land. And the County Court, it seems to me, could have no jurisdiction, in the face of such legislative action, to divert it from such use, and appropriate it to another, unless authorized by a subsequent act of the legislature in express terms, or by necessary implication; and to this result the authorities before cited lead. The power being extraordinary and against common right must be construed strictly. The omission of the legislature to embody these restrictions in the statute, in the revision of 1849, as recommended by the revisers, I do not think can be construed as a legis-

Thus, in a Massachusetts case,¹ this question was considered, and it was held that while an act of the legislature which authorizes the construction of a railroad between certain *termini*, without describing its precise course and direction, does not *prima facie* confer power to lay out the road along and upon an existing highway; yet that it is competent for the legislature to grant such authority either by express words or *by necessary implication*, and that such implication may result either from the language of the act, or *from its being shown by an application of the act to the subject matter, that the railroad cannot by reasonable intendment be laid in any other manner.*²

lative construction of the law in conflict with what seems to be the whole current of judicial decision. But I deem it unnecessary to pursue this inquiry further. The special act of the legislature which authorized the Fredericksburg & Alexandria company to construct this road, exempted, as I have endeavored to show, the property of the Alexandria & Washington company which the Fredericksburg & Alexandria company, in laying out its road, appropriated to itself from condemnation by that company, it being an interference with the chartered rights and franchises of the other company. And by virtue of that exemption it could not be taken by the Alexandria & Fredericksburg company, and it was not within the jurisdiction of any court to condemn it, because by that exemption it was not subject to the right of eminent domain. Upon this aspect of the case I will content myself with a reference to the able opinion of the judge of the Circuit Court. Whilst I have confidence in the correctness of the ground first taken in this opinion, I am inclined to the opinion that upon this view also the County Court exceeded its jurisdiction in its judgment of condemnation, and that consequently its said judgment may be attacked collaterally."

¹ Springfield v. Connecticut River R. R. Co., 4 Cush. (Mass.) 63.

² Little Miami, C. & X. R. R. Co. v. Dayton, 23 Ohio St. 510; Morris & Essex R. R. Co. v. Newark, 10 N. J. Eq. 352; Chicago, Rock Island, &c. R. R. Co. v. Joliet, 79 Ill. 25; Rex v. Pease, 4 B. & Ad. 30; New York, &c. R. R. Co. v. Boston, &c. R. R. Co., 36 Conn. 136; Contra Costa R. R. Co. v. Moss, 23 Cal. 323; White River Turn-

pike Co. v. Vermont Central R. R. Co., 21 Vt. 590; Central City Horse R. R. Co. v. Fort Clark Horse R. R. Co., 81 Ill. 523; Com. v. Old Colony, &c. R. R. Co., 14 Gray (Mass.), 93. The presumption is against the ability of one company to condemn the property and franchises of another corporation; and in order to sustain such action the words of the act must be clear and distinct. State v. Noyes, 47 Me. 189; Worcester R. R. Co. v. Railroad Commissioners, 118 Mass. 561; Milwaukee R. R. Co. v. Faribault, 23 Minn. 167; *In re* Ninth Ave., 45 N. Y. 729; Parker v. Sunbury & E. R. R. Co., 19 Penn. St. 211; Hatch v. Cincinnati & I. R. R. Co., 18 Ohio St. 92; *In re* New York Central & H. R. R. Co., 77 N. Y. 248; *In re* City of Buffalo, 68 N. Y. 167; Commissioners v. Holyoke Water Power Co., 104 Mass. 446; Chicago R. I. & P. R. R. Co. v. Joliet, 49 Ill. 25; Little Miami C. & X. R. R. Co. v. Dayton, 23 Ohio St. 510. If not conferred in express words, the authority must be by necessary implication. Thus, if the construction of the road between the termini as laid down in the charter would be impossible unless the road of another company is partly taken, the power to take such road would be implied. Central City Horse R. R. Co. v. Ft. Clark Horse R. R. Co., 81 Ill. 523; Springfield v. Conn. River R. R. Co., 4 Cush. (Mass.) 63; New York H. & N. R. R. Co. v. Boston, H. & E. R. R. Co., 36 Conn. 196; Bridgeport v. New York & N. H. R. R. Co., 36 Conn. 255; Worcester R. R. Co. v. Railroad Commissioners, 118 Mass. 561; Pennsylvania R. R. Co.'s Appeal, 3 Am. & Eng. R. R. Cas. 507. But where this circumstance does not exist, the power will not be im-

The right to tunnel a street may be implied from the circumstance that it is impossible to reach the designated *terminus* without doing so;¹ but the company is liable for injuries to adjacent buildings from such operation, regardless of the question of negligence.²

In the construction of railways, it necessarily occurs that highways and other railways must be crossed, and although the power is not expressly given, it is necessarily inferred. But authority to take the bed either of a highway or railway longitudinally for any considerable distance will not be inferred, especially where it is possible to build the road without doing so.³ A town or other mu-

plied. *In re Boston & A. R. R. Co.*, 53 N. Y. 575; *St. Louis, J. & C. R. R. Co. v. Trustees*, 43 Ill. 303; *Danbury & N. R. R. Co. v. Norwalk*, 37 Conn. 109; *Atlanta v. Central R. R. Co.*, 53 Ga. 120; *Hannibal v. Hannibal & St. J. R. R. Co.*, 49 Mo. 480; *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345; *Boston & M. R. R. Co. v. Lowell & L. R. R. Co.*, 124 Mass. 368. The right of one railroad to cross another may be implied when a longitudinal taking cannot be justified. There is often a necessity for one when there is no necessity for the other, and the instances are rare in which a longitudinal taking can be justified. *In re City of Buffalo*, 68 N. Y. 167; *Housatonic R. R. Co. v. Lee & H. R. R. Co.*, 118 Mass. 391; *Worcester & N. R. R. Co. v. Railroad Comm'rs*, 118 Mass. 361; *Boston & M. R. R. Co. v. Lowell & L. R. R. Co.*, 124 Mass. 368; *Commonwealth v. Erie & N. E. R. R. Co.*, 27 Penn. 30, 339; *Cleveland & P. R. R. Co. v. Speer*, 56 Penn. St. 325; *Cake v. Philadelphia & Erie R. R. Co.*, 87 Penn. St. 307; *Tennessee & A. R. R. Co. v. Adams*, 3 Head, 596; *Oregon Cascade R. R. Co. v. Bailey*, 3 Or. 164; *Contra Costa R. R. Co. v. Moss*, 23 Cal. 323; *Starr v. Camden & Amboy R. R. Co.*, 9 N. J. L. 592; *Hoboken Land Co. v. Hoboken*, 35 N. J. L. 205; *National R. R. Co. v. Easton & A. R. R. Co.*, 36 N. J. L. 181; *Attorney-General v. Morris & Essex R. R. Co.*, 19 N. J. Eq. 386; *Newark & N. Y. R. R. Co. v. Newark*, 24 N. J. Eq. 515; *Greenwich v. Easton & A. R. R. Co.*, 23 N. J. Eq. 217; 25 id. 565; *Green v. Wycombe Ry. Co.*, L. R. 9 Q. B. 210; *Pugh v. Golden Valley R. R. Co.*, L. R. 12 Ch. Div. 274; *Attorney-General v. Ely, H. & S. R. R. Co.*, L. R. 4 Ch. 194.

The general rule is that when one railroad company crosses the tracks of another, just compensation must be made, and this includes compensation for the obstruction by reason of the crossing, and the consequent increased difficulty and danger in operating the line. *Lake Shore & Mich. S. R. R. Co. v. Chicago & W. Ind. R. R. Co.*, 100 Ill. 21; *Lake Shore & Mich. S. R. R. Co. v. Chicago, &c. R. R. Co.*, 2 Am. & Eng. R. R. Cas. 454; *St. Louis, &c. R. R. Co. v. Springfield, &c. R. R. Co.*, id. 487.

¹ *Baltimore & P. R. R. Co. v. Reaney*, 42 Md. 117.

² Id.

³ *New Jersey Southern R. R. Co. v. Long Branch Comm'rs*, 25 N. J. Eq. 28; *Pugh v. Golden Valley Ry. Co.*, L. R. 12 Ch. Div. 274; *Regina v. Wycombe Ry. Co.*, L. R. 2 Q. B. 310; *Attorney-General v. Ely, &c. Ry. Co.*, L. R. 6 Eq. 106; *Attorney-General v. Morris & Essex R. R. Co.*, 19 N. J. Eq. 386; *Housatonic R. R. Co. v. Lee, &c. R. R. Co.*, 118 Mass. 391; *Worcester & Norwich R. R. Co. v. Railroad Comm'rs*, 118 id. 561; *Boston & Maine R. R. Co. v. Lowell, &c. R. R. Co.*, 124 id. 368; *National R. R. Co. v. Eastern, &c. R. R. Co.*, 23 N. J. Eq. 181; *St. Louis, &c. R. R. Co. v. Trustees*, 43 Ill. 303; *Hoboken Land Co. v. Hoboken*, 21 N. J. Eq. 205; *Starr v. Camden & Amboy R. R. Co.*, 24 N. J. L. 592; *Com. v. Erie, &c. R. R. Co.*, 27 Penn. St. 339; *Greenwich v. Eastern, &c. R. R. Co.*, 24 N. J. Eq. 217; *Long Branch Comm'rs v. West End R. R. Co.*, 29 N. J. Eq. 566; *Cake v. Philadelphia, &c. R. R. Co.*, 87 Penn. St. 307; *Oregon Cascade R. R. Co. v. Bailey*, 3 Oregon, 164; *Tennessee, &c. R. R. Co. v. Adams*, 3 Head (Tenn.), 596.

municipal corporation may lay out roads and streets across a railroad, but without express authority they cannot take the location of a railroad for either streets or highways.¹ Where two charters are

Says SCOTT, C. J., in *Chicago & Alton R. R. v. Joliet, Lockport, &c. R. R. Co.*, 105 Ill. 388: "Unless every railroad corporation takes its right of way subject to the right of the public to have other roads both common highways and railways constructed across its track whenever the public exigency might be thought to demand it, the grant of the privilege to construct a railroad across or through the State would be an obstacle in the way of its future prosperity of no inconsiderable magnitude. The claim made for damages in this respect has neither reason nor the weight of authority for its support. In *Railroad Co. v. Railway*, 30 Ohio St. 604, it is well said, 'while the elder road can demand compensation for its property to the extent of its appropriation, *it has no right to demand tribute from the junior road* for the enjoyment of the same corporate franchises which it possesses.'" *Massachusetts Central R. R. Co. v. Boston, Clinton, &c. R. R. Co.*, 121 Mass. 125.

¹ *In re City of Buffalo*, 68 N. Y. 167; *Atlanta v. Central R. R. Co.*, 53 Ga. 120; *Northern Central R. R. Co. v. Baltimore*, 46 Md. 425; *Danbury, &c. R. R. Co. v. Norwalk*, 37 Conn. 109. In *City of Bridgeport v. New York & New Haven R. R. Co.*, 36 Conn. 255, BUTLER, J., said: "It appears from the finding that in laying out the highway in question, a portion of the land taken and appropriated by the railroad company for its use under its charter, was taken and appropriated as part of the highway through its whole extent. It does not appear that it was necessary to take it, and the necessity cannot be presumed. As matter of fact, outside the record, we all know that it was not. Whether or not it was so taken with a view to lay a foundation for assessing the contemplated benefits upon the remaining land, or the remaining interest of the company in the land, I do not know, nor is it material to inquire. I am satisfied that such an assessment could not be made upon either, and that if such was the original intention it was wisely

abandoned. In the first place, it is questionable whether the city of Bridgeport had power thus to take the land appropriated and occupied by the railroad, for such a purpose. The city of Bridgeport is authorized by its charter to lay out necessary public highways. In doing this its officers act under authority delegated by the legislature in general terms, and in the exercise of that power the officers of the city perform the same public duty and have substantially the same authority within their territorial limits by the provisions of their charter that the officers of boroughs and towns have and exercise in like cases and no more, and that is, an authority to lay out such streets and highways as public convenience and necessity may require. In doing that they may take and appropriate any property which has not been before subjected to the eminent domain of the State. But is the ribbon of land which the legislature in the exercise of that right of eminent domain have authorized this railroad company to take, appropriate and hold for the construction of a railroad, subject to be taken from them in whole or in part, and in the whole if in part, under a power to lay out highways previously given in general terms, by the authorities of every town, city or borough between New Haven and the western line of the State, and appropriated for the purposes of a highway? This question has not, to my knowledge, been judicially determined, but it would seem upon principle that it must be answered in the negative. The officers of towns in laying out highways act under a general authority, and those of the plaintiff city had a special but not more extensive power. The railroad company act under and possess a special and exclusive grant and that grant is a contract. The legislature has virtually said to them: 'We give you the privilege of exercising the public right of eminent domain over that ribbon of land, to the extent necessary to acquire, possess and enjoy an easement, and such exclusive control as may be neces-

granted for the construction of railways between the same *termini*, there being no necessary conflict in their objects or charters, the

sary to its enjoyment, in consideration that you will erect, maintain, and operate a railroad upon it.' Did they intend that that easement should be subject to be taken away from the company, in whole or in part, by the local authorities for the purpose of highways? The question in this aspect is one of presumed intent, and I think from the very nature of the case the legislature cannot be presumed to have intended to make, or the company to receive, such a limited and subordinate agent. Undoubtedly, the legislature may repeal the charter of the defendants and destroy their right in the land, for they have reserved the power to do it. And so they may authorize another company to appropriate its property and its franchise, upon making just compensation therefor, and may authorize a city to assess its franchise for benefits. But the intention to do so must be clearly and unequivocally expressed. No power is given to the city of Bridgeport in express terms to take the interest of the defendants in the land. Whatever power its officers have, is given, as I have said, in general terms; and it has been well said that a general power, thus given, ought not to be construed to authorize the taking of land already appropriated to a highly important public use. *Boston Water Power Co. v. Boston & Worcester R. R. Co.*, 23 Pick. (Mass.) 397, 398. In relation to the laying of highways across the land taken for railroads, such an intention may well be presumed, for in respect to them, in our growing country, a necessity must be anticipated, and therefore must be presumed to have been contemplated. But with respect to parallel highways no such necessity can exist, for the power given to appropriate the adjoining land of individual proprietors, *however occupied*, and *to any necessary extent*, is ample, and therefore as to parallel highways no such intent can be presumed. Moreover, the power to take and appropriate even parallel highways is given to this and other railroads by charter, and in the general law. If so taken, can the officers of this and other cities dispossess them again

whenever they think public convenience or necessity require it? And if they do, cannot the railroad company re-take it? Which is then to be the dominant corporation and ultimately prevail in the struggle? The solution of this question in my mind is, that when the railroad company have appropriated land under their grant with the approbation of the commissioners their right was intended to be and is exclusive, except as to crossings, which are an absolute necessity. 'The grant of land for one public use,' says Chief Justice SHAW, 'must yield to another *more urgent*,' 4 Cush. (Mass.) 63, and the railroad is treated by the legislature as the more urgent and exclusive use, and such it is in effect." *Hannibal v. Hannibal & St. Joseph R. R. Co.*, 49 Mo. 480. In *Milwaukee & St. Paul R. R. Co. v. Faribault*, 23 Minn. 167, it was held that under a general power to lay out and open streets, a city has no authority to open streets through depot grounds of a railroad company acquired under authority of the legislature, in such manner as to destroy or essentially impair the value of the company's easement therein. The court said: "The rule is well settled that in cases of this kind the legislative intent must be made to appear by express words or by necessary implication. *Inhabitants of Springfield v. Connecticut River R. R. Co.*, 4 Cush. (Mass.) 63; *City of Bridgeport v. New York & New Haven R. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63; *Matter of Boston & Albany R. R. Co.*, 53 N. Y. 574. And such implication never arises except as a necessary condition to the beneficial enjoyment and efficient exercise of the power expressly granted, and then only to the extent of the necessity. *Hickok v. Hine*, 23 Ohio St. 523: 13 Am. Rep. 256. . . . It is claimed by defendant that the city council, in this case, was the sole and exclusive judge as to the public necessity and propriety of laying out the proposed street, on the ground that the necessity and expediency of laying out highways is exclusively a legislative, and not a judicial, question. This is undoubtedly a correct rule as applied to the

prior right is with the one which is first with its location and survey.¹

legislature itself, and also to a municipal body when acting within the conceded limits of its delegated powers. But when, as in this case, the jurisdiction of the inferior tribunal over the particular subject-matter depends, not upon an express grant of power, but upon the existence of an alleged necessity from which the disputed power is to be implied, the decision of such tribunal upon the existence of the necessity is neither final nor conclusive upon the courts." So, in *Matter of Boston & Albany R. R. Co.*, 53 N. Y. 574, it was held that in the absence of express authority or necessary implication, a railroad company could not take lands held by a municipal corporation in trust, for the use of the public as a park or common. In *Matter of City of Buffalo*, 68 N. Y. 167, it was held, under similar circumstances, that a city empowered to take land for canals, basins, slips, etc., could not take lands of a railroad company, used for its yard, depot, etc. The court, by FOLGER, J., said: "In determining whether a power generally given is meant to have operation upon lands already devoted by legislative authority to a public purpose, it is proper to consider the nature of the prior public work, the public use to which it is applied, the extent to which that use would be impaired or diminished by the taking of such part of the land as may be demanded for the subsequent public use. If both uses may not stand together with some tolerable interference which may be compensated for by damages paid, — if the latter use when exercised, must supersede the former, — it is not to be implied from a general power, given without having in view a then existing and particular need therefor, that the legislature meant to subject the lands devoted to a public use already in exercise to one which might thereafter arise. A legislative intent that there should be such an effect will not be inferred from a gift of power made in general terms. To defeat the attainment of an important public purpose to which lands have already been subjected, the legislative intent must unequivocally ap-

pear. If an implication is to be relied upon, it must appear from the face of the enactment, or from the application of it to the particular subject-matter of it, so that by reasonable intendment some especial object sought to be attained by the exercise of the power granted could not be reached in any other place or manner." In *Central City R. R. Co. v. Fort Clark R. R. Co.*, 81 Ill. 523, it was held that a horse railway company cannot take part of a railway of another like company. The court said: "We do not wish to be understood as holding one railroad company may not condemn the road of another, under a power granted by the legislature so to do. On this we express no opinion; but we do insist, an established railroad being a public institution, and useful only in its entirety, cannot be cut up and sectionized by a competing road, acting under an ordinance of a city council. Proceedings might be instituted perhaps to condemn the entire road and franchise, and thus pass it over as an entirety to the competing road; but that one competing road can bisect it here, and another there, at a different point, taking to themselves the most productive portions of the road, and leaving an unproductive fragment to the first proprietors, we do not believe, and have seen no authority giving countenance to a doctrine, in its operation so unjust and at war with just principles. And we are at a loss to understand how this part of appellants' franchise, occupying the most populous and business part of the city, can be operated jointly by their competitors. But whether it can or not be safely done, it is unimportant to inquire, as in our opinion, one competing street railroad company cannot take, by the exercise of the right of eminent domain, a fragment of a competing road in successful operation, and the most valuable part of it, and thus destroy, in effect and usefulness and value, the remaining fragments."

¹ *Morris & Essex R. R. Co. v. Blair*, 9 N. J. Eq. 635; *Waterbury v. Dry Dock &c. R. R. Co.*, 54 Barb. (N. Y.) 388.

SEC. 240. What constitutes a "Taking." — The constitutional provision declaring that "private property shall not be taken for public uses without just compensation" does not prohibit the legislature from authorizing a temporary exclusive occupation of the land of an individual, during incipient proceedings to the acquisition of a title to it or an easement in it for a public use, although such occupation may be more or less injurious to the owner; *but precludes the acquisition of any title, easement, or permanent appropriation of the land from the owner, without an actual payment or tender of a just compensation.* Such occupation becomes unlawful, unless the title or the easement is acquired within a reasonable time; otherwise the occupiers become trespassers *ab initio*.¹

It is not necessary that property should be "taken" in a literal sense in order to entitle the owner to compensation. *A serious interruption to the common and necessary use of property* may amount to a taking and entitle the owner to compensation, although the land itself is not taken from him; as, where water is set back, or earth and sand is cast thereon, or a structure is erected thereon, under a statute authorizing such acts for the public benefit.² Thus, a railway company, claiming to act under legislative authority, removed a natural barrier situated north of E.'s land, which had always before completely protected his meadow from the effects of floods and freshets in a neighboring river. In consequence of this removal, the waters of the river, in times of floods and freshets, sometimes flowed on to E.'s land, carrying sand, gravel, and stone thereon. It was held that this was a taking of E.'s property, within the meaning of the constitutional prohibition; and that the legislature could not authorize the infliction of such an injury without making provision for compensation. The principle must be the same, whether the owner is wholly deprived of the use of his land or only partially deprived of it; although the amount or value of the property taken in the two instances may widely differ. A partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. Taking a part is as much forbidden by the Constitution as taking the whole. The difference is only one of degree; the quantum of interest may vary, but the principle is the same. In asserting a right to maintain such

¹ Cushman v. Smith, 34 Me. 247; ² Pumpelly v. Green Bay Co., 13 Wall. Nichols v. Somerset & Kennebec R. R. (U. S.) 166.
Co., 43 Me. 356.

a cut, a railroad company necessarily asserts the right to produce all the results which naturally follow from the existence of the cut. In effect it thus asserts a right to discharge water on the land. Such a right is an easement. A right of occasional flooding is just as much an easement as a right of permanent submerging; it belongs to the class of easements which are by their nature intermittent, — that is, usable or used only at times. An easement is property, and is within the protection of the constitutional prohibition.¹ The flooding of land owned by private individuals, by the placing of artificial obstructions in the bed of a river, is a taking of the land, within the meaning of the provision of the Wisconsin constitution requiring compensation to be made for private property taken for public use. Consequently, an act authorizing the construction of a dam in a running stream, which would cause such flooding of private land, and not providing for compensation to the owners is unconstitutional and void.² A statute which authorizes an entry upon land, for the purpose of making the preliminary or final surveys for a corporate work, before compensation is made, is constitutional, if it makes suitable provision for compensation in case the land is subsequently taken therefor. Unless the legislature possess power to authorize an entry for this purpose, a clause of the Constitution permitting private property to be taken for public use, upon making just compensation, would be nugatory. A constitutional provision that private property shall not be taken for public use, etc., does not prohibit the legislature from permitting an entry to be made upon the property of an individual, for the purpose of a preliminary examination. The prohibition relates only to the *taking it* for public use without just compensation.³

The use by a company of land adjoining their railroad, for a cart-way while constructing their road, is not within the limits of the commissioner's appraisal, especially when it appears that the land taken for the road is sufficiently ample in width for cartways. Such use is *prima facie* for the purposes of convenience, not of necessity, and without the consent of the owner of the land is ordinarily a mere trespass. The only use of adjoining lands, for passage during the construction of a railroad, that can come within the limits of the appraisal, extends to gaining access to the land taken.⁴

¹ *Eaton v. B. C. & M. R. R.*, 51 N. H. 504.

² *Polly v. Saratoga & Washington R. R. Co.*, 9 Barb. (N. Y.) 449.

³ *Arimond v. Green Bay, &c. Canal Co.*, 31 Wis. 316.

⁴ *Sabin v. Vermont Central R. R. Co.*, 25 Vt. 363.

In an English case a corporation, having, under the act of Parliament, right to take land for certain public works, gave notice to the owner of the inheritance, of an intention to take it. They then entered regularly upon the land for the purpose of surveys, etc., and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some wagons, and rails, and other implements on the land, and there left them, but did not commence the works, or do any damage. This was done without obtaining the assent of the plaintiff, but it became known to his agent in the end of December. In the beginning of the following February, without any previous communication with the defendants, he filed his bill for an injunction to restrain them from allowing the wagons, etc., to remain on the land, and from taking possession of the land until they had complied with the provisions of the lands clauses consolidation act. It was held that though the corporation were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of the act, and that the bill was improperly filed.¹

If a person's land is taken, he is then entitled to have his damages assessed for probable consequential injuries; but except under peculiar statutes, a person whose land is not taken has no remedy, either by having his damages assessed under the statute or by an action therefor. Thus, if a railway is laid along the border of a person's land, but no portion of his land is taken, while he is burdened with the duty of fencing occasioned by such act, yet his damages are purely consequential;² and the same is also true of the construction of a railway so near the buildings of another that the vibration and jarring from the motion of its trains injures its walls, and the smoke and cinders from the engines are cast thereon from a proper operation of the road; the rule is, *damnum absque injuria*.³

The making of a public improvement in the vicinity of private property, which is incidentally injured thereby, but no part of which is taken or used for the construction of the work, is not a taking of private property for public use, within the constitutional provision

¹ Standish v. Mayor, &c. of Liverpool, 1 Drew. 1.

² Kennett's Petition, 24 N. H. 139.

³ Cogswell v. N. Y. & N. H. R. R. Co., 48 N. Y. Superior Court, 31. But see Baltimore & Potomac R. R. Co. v. Reaney, 42 Md. 117, where it was held that a railway company was liable for in-

juries resulting to adjacent buildings from tunnelling under a street, which were the natural and inevitable result of such operation, whether guilty of negligence in prosecuting the work or not; and that, there being no other remedy provided by statute, an action for the damages would lie.

requiring the payment of compensation.¹ Thus a corporation, in constructing their works, raised a high embankment near to, and in front of, the plaintiff's house, so that the plaintiff could not pass and repass to and from the same, and for this injury the plaintiff claimed damages. It was held that as the charter of the company only required them to make compensation for lands which were taken for the corporate purposes, they were not liable for such consequential damages; that simply affecting land injuriously, by the construction of their works, was not a taking of it for public use, within the purview of the Constitution; that the company were justified, under their charter, in building their road in a prudent and reasonable manner, and could not be subjected to damages resulting to individuals whose lands had not been taken by them.² But where a railroad company, having power by charter to take land, and being made liable for all damages to any person or persons, excavated a lot adjoining the plaintiff's, so as to weaken the foundations of his house, and erected an embankment in the highway opposite his house, so as to obscure the light, and render it otherwise unfit for use, — it was held that although this did not constitute a taking of the plaintiff's land within the meaning of the charter, yet the company were bound to make compensation for consequential damages.³

It is not a good objection to a proceeding to ascertain the value of land taken for public use by authority of law, that it had been previously taken possession of without authority.⁴ Nor will a company be deprived of the power to take land for the necessary use of their works, when the emergency arises, by having previously

¹ *Alexander v. City of Milwaukee*, 16 Wis. 247.

² *Richardson v. Vermont Central R. R. Co.*, 25 Vt. 465.

³ *Bradley v. New York & New Haven R. R. Co.*, 21 Conn. 294. Injury to a mill-privilege upon a navigable stream, by a rise in the waters caused by improvements in the navigation, was held not a taking of private property which is a subject of compensation. *Canal Appraisers v. Tibbits*, 17 Wend. (N. Y.) 571. Though a franchise, that is, the right to maintain a toll-bridge, is private property, a diminution of its productiveness, by means of the opening of a free highway in the neighborhood, is not a taking of it within the provision of the Constitution. *Matter of Hamilton Avenue*, 14

Barb. (N. Y.) 405. Compare *Red River Bridge Co. v. Clarksville*, 1 Sneed (Tenn.), 176. Where a corporation located a plank-road upon a county road, it was held that the corporation was liable for damages caused by making such road, that is, by endangering the stability of houses along the line of the road by excavations. The grant of the right of locating a plank-road upon a county road does not exclude the idea that the owner of the soil over which the road passes should have compensation for any injury he may sustain by changing a county road into a plank-road. *Williams v. Natural Bridge Plank-Road Co.*, 21 Mo. 580.

⁴ *Borough of Harrisburg v. Crangle*, 3 W. & S. (Penn.) 460.

attempted to take it for other purposes, not warranted by their act.¹ But the power of taking land by a company is exhausted by a location; the company cannot be indulged with another choice.² But where a railway company has power to take a certain quantity of land, that power is not exhausted by their taking in the first instance a smaller quantity, if they subsequently find that the quantity comprised in their first purchase is not sufficient for their works. Thus, a railway company, having given notice of their intention to build a railway under an individual's land by means of a tunnel, and to treat with him for the amount of compensation, are not thereby precluded from afterward giving notice of their intention to take, or from appropriating the surface of the same land, where they find that the making of the tunnel is impracticable or dangerous to the buildings on the surface.³

Where the legislature confers the power upon *two* railway companies to purchase compulsorily the same piece of land, and one company has taken the land and constructed its road upon it, equity will enjoin the other company from proceeding to take it compulsorily for its use, until the conflicting rights of the companies are determined by a trial at law.⁴

SEC. 241. **Conditions precedent.** — Where the statute imposes any conditions upon a railway corporation, precedent to their right to condemn lands for the use of their railway, they must be fully and specifically performed, to give validity to their proceedings. Thus, if the charter or general law requires that they shall first apply to the owners, and endeavor to agree upon the amount of compensation, unless it is shown that the owner is absent or legally incapacitated, they cannot proceed to take the necessary proceedings for condemnation, until they have made a *bond fide* effort to comply with the statute.⁵ And the petition should set forth that a *bond*

¹ Webb v. Manchester & Leeds Ry. Co., 1 Eng. Ry. Cas. 576; Simpson v. Lancaster & Carlisle Ry. Co., 4 Eng. Ry. Cas. 625; Williams v. South Wales Ry. Co., 3 De G. & S. 354.

² Neal v. Pittsburgh, &c. R. R. Co., 2 Grant's Cas. (Penn.) 137.

³ Stamps v. Birmingham, &c. Ry. Co., 7 Hare, 251.

⁴ Manchester, &c. Ry. Co. v. Great Northern Ry. Co., 9 Hare, 284; Lancaster & Carlisle Ry. Co. v. Maryport & Carlisle Ry. Co., Eng. Ry. Cas., 504.

⁵ Reitenbaugh v. Chester Valley R. R. Co., 21 Penn. St. 100. Before condemnation of private land for the use of the United States can be had under the act of 1859, the government must have sought to buy at a stated price, and it is only a disagreement upon the price which can authorize proceedings for condemnation under this act. Gilmer v. Lime Point, 19 Cal. 47. In Stacey v. Vt. Central R. R. Co., 27 Vt. 39, ISHAM, J., said: "It appears from the case also, that in February, 1850, the defendants changed their

fide effort has been made to agree with the owner, or a sufficient excuse therefor.¹ It would be impossible to define specifically what

line of road by locating the same on other land than that of the plaintiff, and upon which their road has been constructed. That alteration of their line of the road has superseded the necessity of taking the plaintiff's land on which the road was first surveyed. The right of the corporation to change the line of their road is given them by the 15th section of their charter, which provides that if the directors of that company, for any cause, shall deem it expedient, they may change the location of such parts of their road as they shall deem proper. That change in the line of their road, however, will operate as an abandonment of their former survey on the plaintiff's land, so that the company can no longer claim any right or interest in the land itself, or to any easement growing out of it, in consequence of that survey having been made. That doctrine has been expressly held in Massachusetts, in relation to highways, *Commonwealth v. Westborough*, 3 Mass. 406, and *Same v. Cambridge*, 7 Mass. 163, and the same effect, we think, will follow in cases of this character. The result is, that the plaintiff retains his land free from any incumbrance arising from that location or survey of the road. That abandonment of the line of the road over the plaintiff's land, however, does not necessarily supersede his claim for damages. The right to recover those damages, whether liquidated by the agreement of the parties or by commissioners, is not necessarily defeated by that act of the company. If the land has once been taken, if the company, for any period of time, have been seised and possessed of the land so appraised, or if the plaintiff has had, at any time, a perfected right to the damages awarded by the commissioners, a subsequent abandonment of that location, and the establishment of a new line for the road, will have no effect to defeat the plaintiff's claim for the damages which have been awarded to him.

Westbrook v. North, 2 Me. 179; *Hampton v. Coffin*, 4 N. H. 517; *Harrington v. Comp'rs of Berkshire*, 22 Pick. (Mass.) 267; *Hawkins v. Rochester*, 1 Wend. (N. Y.) 53. Under such circumstances the plaintiff would be entitled, on the abandonment of that location, to the land free from any encumbrance of that character, and also to the damages which were allowed to him. The important question in the case therefore arises, whether the Vermont Central Railroad Company have ever been seised or possessed of this land of the plaintiff's, and for which the award of the commissioners was made; or has the plaintiff ever had a vested right to the damages which were awarded on that survey of the road. The determination of these questions depends upon the construction which is to be given to the 7th section of the charter of this company. We obviously can derive but little aid on this subject from adjudged cases in other States, unless they have arisen upon some statutory provision, embracing substantially the specific provisions of that section of this charter. By that section it is provided that when land or other real estate is taken by the corporation for the use of their road, and the parties are unable to agree upon the price of the land, the same shall be ascertained and determined by commissioners, together with the charges and costs accruing thereon, *and upon the payment of the same, or by depositing the amount in a bank as shall be ordered by the commissioners, the company shall be deemed to be seised and possessed of all such lands as shall have been appraised*. This provision is quite specific in stating what act on the part of the corporation vests in them a right to the land. They derive no title to the land or any easement growing out of it from the fact of their having surveyed the road across the plaintiff's land, or having placed that survey on record, nor by having the damages ap-

¹ *Rejtenbaugh v. Chester Valley R. Co.*, 21 Penn. St. 100. If, however, the petition in the first instance fails to set forth

these facts, it may be amended. *Pennsylvania R. Co. v. Porter*, 29 Penn. St. 165.

a railway company must do in order to entitle it to condemn lands for its use, because in every case it depends upon the provisions of

praised by commissioners, and causing their award to be recorded. The statute is express, that the payment or deposit of the money according to the award must be made before any such right accrues. Until that payment is made, the company have no right to enter upon the land to construct the road or exercise any act of ownership over the same. A court of equity would enjoin them from exercising any such right, or they might be prosecuted in trespass at law. The survey and appraisal of damages are merely preliminary steps to ascertain the terms upon which the land can be taken for such purposes, if the company shall see fit to use the same for the construction of their road. If it is accepted, and the company conclude to take the land, that acceptance and that taking is consummated only by a payment or deposit of the money, for the use of the owner of the land, as awarded and directed by the commissioners. The case of the Baltimore & Susquehanna R. R. Co. v. Nesbit *et al.*, 10 How. (U. S.) 395, is very decisive on this question. In that case land was taken by the company under a charter granted by the State of Maryland. Under a provision in their charter, the damages were assessed by a jury, and that assessment was confirmed by the court. In that case, as in this, the road was located, and the damages conclusively determined and settled, so that no further litigation could arise on that matter. In that case as in this also, the charter provided that the payment, or tender of payment of such valuation should entitle the company to the estate or land as fully as if it had been conveyed. The charter of that company and of this, in all particulars important upon this question, are substantially similar. The court remarked, 'that it is the payment or tender of the value assessed by the inquisition which gives the title to the company, and consequently without such payment or tender no title could, by the very terms of the law, have passed to them.' They further observed, 'that it can hardly be questioned, that without acceptance in the mode prescribed, the company were not bound; that if they had

been dissatisfied with the estimate placed upon the land, or could have procured a more eligible site for the location of their road, they would have been at liberty, before such acceptance, wholly to renounce the inquisition. The proprietors of the land could have no authority to coerce the company into its adoption.' The same doctrine was sustained in the case of *Bloodgood v. Mohawk & Hud. R. R. Co.*, 18 Wend. (N. Y.) 10, 19. In that case the company were authorized to enter upon the land and make such examinations and surveys as were necessary to determine the most advantageous route for the road, and to take the same for that purpose; provided, that all land so taken shall be purchased by the company of the owner, and in case of a disagreement as to the price or value of the land, commissioners were to be appointed to determine the same, and upon payment of such damages with the costs, or depositing the same in a bank in the city of Albany, then the corporation shall be deemed to be seized and possessed of the land so appraised. It will at once be perceived, that the provisions of that charter are not only similar in this respect to that of the Vermont Central Railroad Company, but that they are expressed in very similar language. The Chancellor remarked 'that this provision should be considered in the nature of a condition precedent, not only to the acquisition of the legal title to the land, but also to the right to enter and take the permanent possession of the land for the use of the corporation.' It is very clear, from these cases, that as the Vermont Central Railroad Company have never paid or deposited the amount of that award of the commissioners for the benefit of the plaintiff, as ordered by them, that the company have never acquired any right or title to the land appraised, or to any easement growing out of it; and that none can now be acquired under those proceedings. The abandonment of that location, and the adoption of a new route, and the construction of their road thereon, will prevent the acquisition of any such title or the perfection of any such right. It is

its charter or the general law under which it is formed, and in all cases all the conditions precedent to the exercise of this power

insisted, however, that though the corporation have no right to the land, and have never been seised or possessed of the same, yet that the plaintiff, under the provisions of that act, has acquired a vested right to the damages awarded by the commissioners, and that that right became vested in him when the award was made and recorded. The statute requires 'that the commissioners shall determine the damages which the owner of the land may have sustained, or shall be likely to sustain, by the occupation of the same for the purposes aforesaid.' The actual taking and occupation of the same for such purposes is the foundation upon which the binding character of that award is made to rest. It is those circumstances which the commissioners are to take into consideration in ascertaining the amount of damages. If, therefore, the land has never been taken by the company in a manner in which they can legally occupy the same, no damages have arisen, or can arise, from that cause. When the corporation obtains a vested right to the land, or to the easement, the landholder has a vested right to the damages; that specific act which vests the right in them, gives also a vested right to the owner of the land. These respective rights are correlative, and have a reciprocal relation; the existence of one depends upon the existence of the other. If the corporation have no vested right to the land, the owner of the land has no vested right to the price which was to be paid for it. This is the very ground upon which the cases were sustained, to which we were referred in the 2 Me. 179; 4 N. H. 517; and 1 Wend. (N. Y.) 53. Two of these cases were in assumpsit, and the other in debt for the recovery of a sum awarded for land taken for similar purposes. The land-owner was allowed to recover his damages, and was treated as having a vested right to them; as a vested right to the easement in the land had been acquired, for which those damages had been given as a compensation. That is also the doctrine of the case in the 10 How. (U. S.) 395, for on that ground alone was sustained the con-

stitutionality of the act of Maryland, in causing to be vacated the *first appraised*, and ordering a new inquisition to be taken. As there had been no payment or tender of the damages assessed, there was no vested right to the land, and for that reason the act was held constitutional in vacating the first inquisition. On the same ground, and, for that reason specifically assigned, the court in the case of *Harrington v. Berkshire*, 22 Pick. (Mass.) 267, granted a *mandamus* to enforce the payment of damages awarded to the landholder. The road had been laid, the title to the easement *under their statute had vested*, and for that reason, the party had a vested right to the damages awarded. We know of no case, neither have we been referred to any, in which such damages have been recovered, or in which the owner of the land has been considered as having a vested right to the same, when the corporation had acquired no right to the land, or to an easement growing out of it. There is no propriety or consistency in saying that the plaintiff shall recover this compensation for land which has never been taken or purchased from him; that this company shall pay for a right or an easement, which they never had, and which they never could legally enjoy. If the line of this road had been so varied as to run over another portion of the plaintiff's land, it would hardly be contended that he would be entitled to a double compensation; yet such would be the result if this action can be sustained. The cases in England have no definite bearing upon this subject, nor are they in conflict with the construction we have given to the provisions of this charter. In that country, generally, the railroad is located, and its courses definitely defined, when the application is made to Parliament for a charter. When a charter is granted, it is based upon that location, and authority is granted to take that specific land for that purpose. The owner of the land is required to specify the sum he demands for it, and if not assented to, inquisition is to be made to determine the value of the land. *Burkinshaw v. Bir-*

must be performed, and all the steps required must be taken.¹ If the statute requires that the line shall be surveyed and the proposed

mingham & Oxford Ry. Co.; 5 Eng. Law & Eq. 492. Under those charters it has been held that if no inquisition is made, the company are bound to pay the sum specified, and not only has payment been enforced by *mandamus*, but the company have, by the same process, been compelled to carry into effect all the powers delegated to them by their charter. *Blakemore v. Glamorganshire Canal Navigation*, 1 My. & K. 162, 163; *Regina v. The Eastern Counties Ry. Co.*, 10 Ad. & El. 531; *Regina v. The York & North Midland Ry. Co.*, 16 Eng. Law & Eq. 299. That doctrine, however, has since been overruled in the Exchequer Chamber, to which the last cited case was carried on a writ of error. *York & N. Midland Ry. Co. v. Regina*, 18 Eng. Law & Eq. 206, 207, 208. Those charters are now treated as conferring conditional powers to take the land on making compensation for it. The observations of JERVIS, C. J., in the last case, are very appropriate and applicable to the rights of the parties under this charter: 'The company may take land; if they do they must make full compensation. The words of the statute are permissive, and only impose the duty of making full compensation to each landholder, as the option of taking the land of each is exercised.' This case, as well as the case of *Burkinshaw v. The Birmingham & Oxford Ry. Co.*, 4 Eng. Law & Eq. 489, establishes the correlative and reciprocal relation existing between the right of the company to the land, and the right of the owner of the land to the damages awarded. If the land has been taken in such a manner as to vest in the company a right to the use and occupancy of it, compensation is to be made; but no right to such compensation can exist where the land has not been taken. The authorities upon the questions involved in this case, we think, are more than ordinarily clear and decisive, and fully establish the principle that the plaintiff has no claim to these damages, as the land has never been taken or occupied by the corporation for the purposes mentioned in their charter; and that the payment of the

money as awarded by the commissioners is necessary, and is to be treated as a condition precedent to the right of the company to the land, or to any easement growing out of it. In *Neal v. Pittsburgh & Connellsville R. R. Co.*, 31 Penn. St. 19, it is held that where a railway company had located their road through a man's land and had the damages assessed by viewers and confirmed by the court, the owner of the land was entitled to execution for the amount as upon a judgment in his favor, although the company had not taken possession, and had instituted proceedings to ascertain the advantages of another route with a view to change the location. The court say: 'Though railroad companies may make experimental surveys at pleasure before finally locating their road, yet certainly it has never been granted to them to have experimental suits at law as a means of chaffering with the land-owners for the cheapest route.'

¹ *Whiteman v. Wilmington, &c. R. R. Co.*, 2 Harr. (Del.) 514; *Blaisdell v. Winthrop*, 118 Mass. 138; *Adams v. Saratoga, &c. R. R. Co.*, 10 N. Y. 328; *White v. Nashville, &c. R. R. Co.*, 7 Heisk. (Tenn.) 518; *Lund v. New Bedford*, 121 Mass. 286; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *City of Buffalo, in re*; *Derby v. Framingham, &c. R. R. Co.*, 119 Mass. 316; *Levering v. Philadelphia, &c. R. R. Co.*, 8 W. & S. (Penn.) 458; *O'Hara v. Pennsylvania R. R. Co.*, 25 Penn. St. 445; *Wilson v. Lynn*, 119 Mass. 117; *Penn. R. R. Co. v. Porter*, 29 Penn. St. 165; *Blaisdell v. Winthrop*, 118 Mass. 138. The statute must be strictly followed, and if the proceedings are required to be brought in the name of the people, they will be void if not so brought. *Stanford v. Worn*, 27 Cal. 171; *Owners v. Albany*, 15 Wend. (N. Y.) 374; *Curran v. Shattuck*, 24 Cal. 427; *West Va. Transp. Co. v. Volcanic O. & C. Co.*, 5 W. Va. 382; *Dimmick v. Bradhead*, 75 Penn. St. 464; *Darlington v. United States*, 82 Penn. St. 382; *San Francisco, &c. Water Co. v. Alameda Water Co.*, 36 Cal. 639; *Teick v. Conner County*, 11 Minn. 292; *Leslie v. St. Louis*, 47 Mo. 474.

route filed in the Secretary of State's office,¹ or that the damages shall be appraised and tendered to the land-owner,² or secured,³ all these things must be done before the right to enter upon the land exists, as well as all other things required by the act creating the corporation or by the general statutes.

Full payment for the land taken is a condition precedent to the right of entry for permanent occupation; the great weight of authority is in favor of the view that the constitutional provisions for the protection of private property require payment to precede the taking; a mere entry or record of judgment for the amount of the award is not due compensation.⁴ Indeed, under the Kentucky Constitution, which provides that no man's property shall be taken without due compensation *being previously made*, it is held that a statute authorizing an entry on the land, pending proceedings to ascertain the damages upon the company's executing a bond with sufficient surety and to a sufficient amount conditioned to perform the judgment rendered in the proceedings, is unconstitutional and cannot authorize an occupation of private property without compensation being first made.⁵ In Indiana, however, a less rigorous doctrine is maintained, and payment is not considered a condition precedent to the right of entry.⁶ And in most of the States the company is allowed to enter, pending proceedings, upon making a sufficient bond or an unconditional deposit.⁷ But where the statute permits the company to take

¹ *Morris, &c. R. Co. v. Blair*, 9 N. J. Eq. 635.

² *Stacey v. Vermont Central R. Co.*, 25 Vt. 39; *Starr v. Camden, &c. R. Co.*, 24 N. J. L. 592.

³ *Bensley v. Mountain Lake, &c. Co.*, 13 Cal. 346.

⁴ *Jones v. New Orleans, &c. R. Co.*, 77 Ala. 227; 14 Am. & Eng. R. Cas. 217; *Moody v. Jacksonville, &c. R. Co.*, 20 Fla. 597; 14 Am. & Eng. R. Cas. 53; *Chambers v. Cincinnati, &c. R. Co.* 69 Ga. 320; 10 Am. & Eng. R. Cas. 376; *Schreiber v. Chicago, &c. R. Co.*, 115 Ill. 340; 23 Am. & Eng. R. Cas. 130; *Downing v. Des Moines, &c. Co.*, 63 Iowa, 177; 14 Am. & Eng. R. Cas. 317; *Bradley v. Missouri Pac. R. Co.*, 91 Mo. 493; 30 Am. & Eng. R. Cas. 379; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316; 26 Am. & Eng. R. Cas. 559; *Louisville, &c. R. Co. v. Quinn*, 14 Lea (Tenn.), 65; 22 Am. & Eng. R. Cas. 111; *Northern Pac. R. Co. v. St.*

Paul, &c. R. Co., 3 Fed. Rep. 702; 1 Am. & Eng. R. Cas. 12. A payment to the sheriff of the amount of the award is not sufficient, and if the land-owner has not received the amount of the award, he may maintain ejectment notwithstanding such payment. *White v. Wabash, &c. R. Co.*, 64 Iowa, 281; 17 Am. & Eng. R. Cas. 82. As to the general doctrine of the text, compare *post*, § 249.

A contrary rule is held to prevail where the appropriation is made by the State or a municipal corporation. See *Loweree v. Newark*, 38 N. J. L. 151.

⁵ *Covington, &c. R. Co. v. Piel*, 87 Ky. 267; 33 Am. & Eng. R. Cas. 207; 8 S. W. Rep. 449.

⁶ *Northern Pac. R. Co. v. Barneyville, &c. R. Co.*, 4 Fed. Rep. 298; 1 Am. & Eng. R. Cas. 8; *Prather v. Western Union Tel. Co.*, 89 Ind. 531; 14 Am. & Eng. R. Cas. 1. See also *post*, §§ 246, 249.

⁷ *Downing v. Des Moines, &c. R. Co.*,

possession of lands before its right has been perfected under condemnation proceedings, upon deposit of the value of the land, the deposit, in order to be operative, must be unconditional, and if any condition as to its payment to the owner is imposed, is attached to it, it is unavailing.¹ Where payment is a condition precedent the company is a trespasser if it enters without discharging the condition, and is liable as such.²

SEC. 242. **Abandonment, effect of: What is.**—A railway company may, if it chooses to do so, abandon a right of way which it has acquired under the statute, and in such a case, unless it has, under the statute, acquired an unconditional fee in the land, it will revert to the former owner.³ But the company is bound to pay the land-owner the damages sustained from such taking, and it cannot relieve itself from liability therefor by tendering a deed to the land-owner, although such circumstance may go in reduction of damages.⁴ Where, however, proceedings have been instituted to assess

63 Iowa, 177; 14 Am. & Eng. R. Cas. 317; *Denver, &c. R. Co. v. Lamborne*, 8 Col. 380; 23 Am. & Eng. R. Cas. 115. The constitutional provision existing in many of the States which require payment or tender of compensation as a condition precedent to entry upon land, is sufficiently complied with by the filing of a bond with sufficient surety conditioned for whatever damages may be occasioned, or by making a deposit of a sufficient sum to cover whatever damages may be assessed. *Lake Erie, &c. R. Co. v. Kinsey*, 87 Ind. 514; 14 Am. & Eng. R. Cas. 309; *Kanne v. Minneapolis, &c. R. Co.*, 30 Minn. 423; 14 Am. & Eng. R. Cas. 308; *Shute v. Chicago, &c. R. Co.*, 26 Ill. 436; *In re New York Cental R. Co.*, 60 N. Y. 116; *Fox v. Western Pac. R. Co.*, 31 Cal. 538. See also as to deposits, *Downing v. Des Moines, &c. R. Co.*, 63 Iowa, 177; 14 Am. & Eng. R. Cas. 317; *Paterson v. Ferrelly*, 30 Iowa, 327; *Central Branch, &c. R. Co. v. Atchison, &c. R. Co.*, 28 Kan. 453; 10 Am. & Eng. R. Cas. 528. Where the land-owner appropriates the amount deposited, and on the appeal the award is diminished the company is entitled to recover the amount of the diminution with interest. *Watson v. Milwaukee, &c. R. Co.*, 57 Wis. 332; 10 Am. & Eng. R. Cas. 168. A judgment confirming the verdict of the jury is essen-

tial before the company is entitled by deposit of the amount of the verdict to take possession of the property. *Wagner v. New York, &c. R. Co.*, 38 Ohio St. 32; 10 Am. & Eng. R. Cas. 380. If the damages are increased on appeal the deposit must be correspondingly increased. *Downing v. Des Moines, &c. R. Co.*, 63 Iowa, 177.

¹ *Kanne v. Minneapolis, &c. R. Co.*, 30 Minn. 423.

² *Dimmick v. Council Bluffs, &c. R. Co.*, 58 Iowa, 637; 10 Am. & Eng. R. Cas. 105; *State v. Jacksonville, &c. R. Co.*, 20 Fla. 616; 17 Am. & Eng. R. Cas. 15; *post*, § 247.

³ *Hastings v. Burlington, &c. R. Co.*, 38 Iowa, 316. Under the Iowa code nothing less than a non-user for eight years will authorize the land-owner to re-take possession of a right of way. *Fernow v. Chicago, &c. R. Co.*, 75 Iowa, 526; 36 Am. & Eng. R. Cas. 420.

⁴ *Pinkerton v. Boston, &c. R. Co.*, 109 Mass. 527. Abandonment is, however, a defence to a claim for any additional damages on an appeal from *ad quod damnum* proceedings. *Hastings v. Burlington, &c. R. Co.*, 38 Iowa, 316. After judgment in condemnation proceedings the company cannot then abandon the location so as to escape the payment of the award. *Drath v. Burlington, &c. R. Co.*, 15 Neb. 367;

the damages, and money has been paid to the sheriff or other depository designated by the statute, the company cannot, upon an abandonment of the location, recover back the money.¹ If, after having located its road through one part of a person's land, and the damages have been duly assessed, it abandons such location and takes another part of the same person's land, the owner cannot in an action of trespass claim any damages for the first taking, as he is concluded by the award.² The question as to whether there has been an abandonment or not, is usually one of fact, to be determined by the circumstances of each case, and mere non-user for a long period, less than the period prescribed in the statute of limitations, as in one case thirteen years, is not sufficient to establish an abandonment.³

20 Am. & Eng. R. Cas. 385; *Leisse v. St. Louis, &c. R. Co.*, 72 Mo. 561; 6 Am. & Eng. R. Cas. 611.

¹ *Hastings v. Burlington, &c. R. Co.*, 38 Iowa, 316.

² *Baltimore, &c. R. Co. v. Compton*, 2 Gill (Md.), 20. See also *Cooper v. Anniston, &c. R. Co.*, 85 Ala. 106; 36 Am. & Eng. R. Cas. 581.

³ *Barlow v. Chicago, &c. R. Co.*, 29 Iowa, 276. In *Central Iowa R. Co. v. Moulton, &c. R. Co.*, 57 Iowa, 249, it appeared that in 1865 the Iowa Central R. Co. was organized for the purpose of constructing a railroad from the "south line of the State by way of Oskaloosa to Cedar Falls, in Black Hawk County," and previous to 1868 the company procured the right of way for the purpose aforesaid from the town of Moulton to Albia, and did some grading and other work on the right of way prior to and during 1868. In 1869 the Central R. Co. of Iowa was organized, and it acquired by purchase all the rights of the company first named south of Oskaloosa, including the right of way, grading, and other work done thereon between Moulton and Albia, and it was the right of way between said towns which the defendant sought to condemn under the right of way act. Beginning in 1869, and including 1871, the Central R. R. Co. of Iowa constructed and purchased a line of railroad from Albia north to Northwood, and the same has been continuously operated. After 1871 additions were made to the road consisting of about ten miles of coal and side tracks, and the erection of

four station-houses, and in that and the succeeding year the plaintiff caused the line between the towns of Albia and Moulton to be surveyed. In October, 1874, the company became financially embarrassed, and a receiver was appointed, who had charge of the road until June, 1879. Previous to that time the road was sold under a decree of foreclosure and purchased by a trustee, who, under the direction of the court, turned it over on the seventeenth day of June, 1879, to the plaintiff, who had been duly organized in May of that year. The condemnation proceedings were commenced on the fifth day of July, 1879, and the notice to the sheriff directed him to have the right of way appraised as the property of the Iowa Central R. Co., or its representatives under and in pursuance of an act of the General Assembly passed in 1870, as amended by an act passed in 1874, to amend section 1260 of the Code. The notice directed the sheriff to have assessed the road-bed and right of way, "excluding the work done thereon." The act of 1870 is in substance the same as sections 1260 and 1261 of the Code, and the act of 1874 amending section 1260 is as follows: "In any case where a railway constructed in whole or in part has ceased to be operated or used for more than five years, or in any case where the construction of a railway has been commenced by any corporation or person, and work on the same has ceased, and has not been in good faith resumed for more than five years, and the same remains unfinished, it shall be deemed and taken that

But an abandonment may be inferred from a mis-user, — as, if the property is rented to tenants for the purposes of a business entirely

such corporation or person thus in default has abandoned all right and privilege over so much as remains unfinished, as aforesaid, in favor of any other corporation or person which may enter upon such abandoned work, as provided in section 1261 of the Code. This statute went into force on the fourth day of July, 1874. Section 1261 of the Code provides that the right of way, work, and grading so abandoned may be condemned as other property; "but parties who have previously received compensation in any form for the right of way on the line of such abandoned railway which has not been re-fundued by them shall not be permitted to recover the second time; but the value of such road-bed and right of way, excluding the work done thereon, when taken for a new company, shall be assessed to the former company or its legal representative." SEEVERS, J., said: "Has there been an abandonment of the line between Moulton and Albia within the meaning and intent of the statute? It is insisted there has not, because there must be an abandonment of the whole road or projected line; that the statute does not contemplate a part of a road shall be regarded as abandoned when the greater portion has not only been constructed, but is being actually operated. If such had been the legislative intent, it would, it is said, have been without doubt clearly expressed as being that such part which has ceased to be operated, or upon which part work has ceased for the period named, should be regarded as abandoned. The question to be determined is one of fact, and no general rule can be laid down applicable to all cases. The statute clearly, we think, contemplates there may be an abandonment of a part of a constructed railway. But the fact that the work of construction has ceased for the period named, may, or may not, amount to an abandonment of a part of a contemplated road. Each case must be solved in accordance with the facts and circumstances. The usual and ordinary mode of constructing railways, we understand, is to commence at a recognized *terminus*, and prosecute and finish

the work of construction continuously from such point. Such was not done in this instance. But when the work of construction was resumed in 1869 at Albia, it proceeded steadily and continuously from that point north, instead of south to Moulton. If there were sufficient reasons for taking this course, the evidence fails to so show. The right of way in question had been procured at that time, and grading had been done thereon. Why was it not then, or at some subsequent time, utilized? Nothing, except the survey above stated, towards the construction of the road was done for a period of five years preceding the fourth day of July, 1879. The case, therefore, is within the statute, unless the reasons urged by the plaintiff excuse performance, or tend to show an intent not to abandon the portion of the road aforesaid. The survey alone does not, we think, show a resumption of the work of construction in good faith, conceding it was made after July 4, 1874. Nor can the construction of coal and side tracks, and the erection of station-houses, between Albia and Northwood, have any tendency to show the road between Moulton and Albia had not been abandoned. Whether it was absolutely essential the side tracks aforesaid should be constructed has not been shown. But conceding it was, then the intention to improve and extend the road between Albia and Northwood has been shown, while that portion between Moulton and Albia was, for the time being at least, abandoned or permitted to go to waste. There is not a single fact or circumstance which tends to show an intent to resume work south of Albia until after the commencement of the condemnation proceeding; and all there is now is an assertion of a purpose on the part of the plaintiff to either proceed with the work of construction or have it done by some one in its interest. If this be sufficient under the statute, it comes too late. The fact that the company under whom the plaintiff claims became financially embarrassed and was placed in the hands of a receiver, and therefore could not finish the work of construc-

foreign to that for which the land was taken,¹ although from the carrying on of such business by the tenants the company derives a profit through the increase of its freighting business. So, as it is the duty of a railway company to operate the whole of its road, if it neglects to do so for any considerable period without a valid excuse for its neglect to do so, such non-user will operate as an abandonment.²

The application of land devoted to one public use, in whole or in part to another public use, *not substantially different in its objects and purposes from the former*, does not operate as an abandonment. Thus, it has been held that a canal may be converted into a railroad,³ or a plank-road into a railroad,⁴ subject only to the payment of such damages to the land-owner as he may sustain from the change in

tion, cannot be regarded as a valid excuse under the statute, which embraces all cases or 'any case.' We have no doubt such a case was contemplated by the statute. Because of financial embarrassments, the construction of railways frequently cease for a longer or shorter period, and the General Assembly in its discretion has fixed a time when the rights obtained by such company shall be regarded as abandoned."

¹ *Proprietors of Locks v. Nashua, &c. R. Co.*, 104 Mass. 1. As to abandonment of location, see *post*, Chapter XV.

² *People v. Albany, &c. R. Co.*, 24 N. Y. 261.

³ *Hatch v. Cincinnati, &c. R. Co.*, 18 Ohio St. 92.

⁴ *Brainard v. Missisquoi R. Co.*, 48 Vt. 107. In this case it is held that there is no such disparity in the nature of the use of a plank-road and a railroad as to entitle the owner of the fee, whose land was condemned for the former, to damages for its conversion into a railroad, as no different or greater burden was imposed upon his land by the latter than by the former, and that the damage he sustained by reason of being deprived of the use of the plank-road being such as he sustained in common with all the rest of the public, he was entitled to no compensation therefor, but that he was entitled to damages for the expense of constructing a private way from his premises, rendered necessary by the construction of the railroad. This doctrine, which upon its face seems absurd and contrary to all authority, is rec-

oncilable with the cases and with human experience, upon the ground that, from the facts found, the plaintiff's estate sustained no additional damage from the construction of the railway, except as to the expense of the construction of the new way, which was allowed him; and the statement of the court, that as no different or greater burden was imposed upon his estate he was not entitled to damages, merely amounts to this, — that while the plaintiff sustained no additional damage from the construction of the railway in place of the turnpike, except as to the expense of the new way, his damage must be restricted to that. If a new burden was not imposed upon his estate, he would not have been entitled to damages to the extent of the expense of constructing the private way. The truth is, that, owing to the location of the plaintiff's estate, there were no other consequential damages to which he was entitled. If there had been, upon the same principle that he was allowed damages for the expense of the private way, he was entitled to have them assessed to him also; and the case is in no sense an authority for the broad proposition to which it has been cited by some authors, that a turnpike may be converted into a railway without the payment of additional damages to the land-owner; but is rather a direct authority for the proposition, that where a turnpike is condemned for a railway the land-owner is entitled to recover such damages as he actually sustains from the change of use.

the use. Where the entry in the first instance was lawful, upon an abandonment of the route the company may remove all fixtures placed by it upon the land;¹ but if the company entered without right, all the fixtures placed by it upon the land become a part of the soil and belong to the owner of the land; and if the company subsequently takes proceedings to obtain the land, upon assessment of the damages the owner of the land is entitled to have the value of the track and other fixtures assessed to him as a part of the damages.²

A railway corporation, having authority to condemn lands for its roadway, proceeded to exercise the right and condemned the plaintiff's land, but without constructing its road conferred its rights upon another corporation. The court held that although the transfer was not expressly authorized by statute, yet there was no abandonment of the land, and that, as the plaintiff's interest was in no way affected by the transfer, he could not be heard to complain.³ A railway company may discontinue proceedings instituted by them pursuant to the act delegating the power to acquire title to lands, at any time before the title is acquired and the rights resulting therefrom have become vested in the property-holder.⁴ But the corporation instituting such proceedings becomes answerable to the owner for all damages occasioned by them.⁵

After the report of the commissioners or viewers is filed and confirmed, the rights of the parties are determined, subject only to the right of review as to the amount of appraisal, and the company cannot avoid the payment of the damages.⁶ It is not necessary, in order

¹ *Wager v. Cleveland, &c. R. Co.*, 22 Ohio St. 556.

² *Matter of Long Island R. Co.*, 6 Thomp. & C. (N. Y.) 298; *Graham v. Connorsville, &c. R. Co.*, 36 Ind. 463.

³ *Crolley v. Minneapolis, &c. R. Co.*, 30 Minn. 541.

⁴ *Matter of Com'rs of Washington Park*, 56 N. Y. 144.

⁵ *Leissee v. St. Louis, &c. R. Co.*, 2 Mo. App. 105; *affirmed* 72 Mo. 561; 6 Am. & Eng. R. Cas. 611. In this case it was held to be error, however, to allow two persons not partners to sue jointly to recover counsel's fees and other damages, it appearing that in resisting the proceeding they acted severally and employed different counsel. A railway company, having power to take compulsorily certain portions of an estate, served notices to

treat for them. They afterward abandoned part of their undertaking, including the land comprised in some of the notices, but took the rest and paid the purchase-money into court, the estate in question being the subject of a testamentary settlement. Before the abandonment certain costs, charges, and expenses had been incurred by the tenant for life under the settlement, and certain other costs were subsequently incurred in an unsuccessful attempt to obtain compensation for not going on with the notice to treat in respect to the abandoned portions. It was held, on a petition by the tenant for life for investment of the fund in court, that these costs, charges, and expenses might properly be paid out of the fund before investment. *In re Strathmore Estates*, L. R. 13 Eq. 338.

⁶ *Matter of Rhinebeck, &c. R. Co.*,

to conclude the corporation, that the title to the land should have become vested in it under the proceedings. It is sufficient if the right to acquire it on payment of the award is fixed, for then the duty of the corporation to pay the award is absolute.¹

It should be observed that so long as the extent of the corporate work and its execution rest in the power of the corporation, so that they may discontinue it, the owners of the ground are not bound to desist from expending money on lands proposed to be taken; and they are entitled to be paid for the property when finally taken, at its value at the time of the commissioners' report, including improvements so made meantime.²

SEC. 243. Preliminary Survey.—The constitutional provision against the taking of private property without compensation does not prevent the legislature from authorizing an exclusive occupation of land for temporary purposes, as an incipient proceeding to the acquisition of the title thereto or of an easement therein, without compensation; and an entry upon lands under authority in its charter or in the general law to locate or survey its route is not a taking of land within the meaning of the Constitution.³ But the right must be exercised reasonably, and with reasonable diligence; and if the company enters, locates its line, and takes exclusive possession of the land under its survey, and neglects for an unreasonable time to perfect its proceedings to take the land, the owner may maintain trespass to recover damages for the continuance of the occupation. For the mere entry to locate and survey its route, however, and to ascertain the feasibility of a location there, which is not followed by an occupation of the land, trespass will not lie, and unless the statute provides therefor, no damages are recoverable.⁴ It has been held that even

67 N. Y. 242; *Harding v. Metropolitan Ry. Co.*, L. R. 7 Ch. 154; *East London Union v. Metropolitan Ry. Co.*, L. R. 4 Exch. 409.

¹ *Matter of Rhinebeck, &c. R. Co.*, 67 N. Y. 242; *Stone v. Commercial Ry. Co.*, 4 Mylne & C. 122; *Walker v. Eastern Counties Ry. Co.*, 6 Hare, 594.

² *Matter of Wall Street*, 17 Barb. (N. Y.) 617.

³ *Chambers v. Cincinnati, &c. R. Co.*, 69 Ga. 320; 10 Am. & Eng. R. Cas. 376; *Nichols v. Somerset, &c. R. Co.*, 48 Me. 357; *Cushman v. Smith*, 34 Me. 247; *Walther v. Warner*, 25 Mo. 289; *Orr v.*

Quimby, 54 N. H. 596; *Merritt v. Northern R. Co.*, 12 Barb. (N. Y.) 608. The mere temporary blocking of a street by a city in constructing a tunnel by legislative authority is not a taking of property which confers any right to compensation upon owners of property abutting on the obstructed street. *Transportation Co. v. Chicago*, 99 U. S. 635. See, however, *Sabin v. Vt. Central R. Co.*, 25 Vt. 363.

⁴ *Bonaparte v. Camden, &c. R. Co.*, 1 Baldw. (U. S.) 205; *Polly v. Saratoga, &c. R. Co.*, 9 Barb. (N. Y.) 449; *Cushman v. Smith*, 34 Me. 247; *Fox v. Western Pacific R. Co.*, 31 Cal. 488; *Bloodgood*

where a company has duly condemned a right of way, and entered thereon, *but has not actually occupied any portion of the land*, or disturbed the owner's fences or possession, it had not made such an appropriation of the land as to be guilty of a tort, or liable to pay the award.¹ Indeed, there are some cases which maintain that the occupation of lands by a railway company pending an appeal from the assessment of damages is not a taking of private property for public use without compensation, because in such case ample provision is made for compensation.²

SEC. 244. Right to take Materials from adjoining Lands. — Where the charter gives to a railway company the right to enter upon and take all such lands as may be indispensable to the completion of the road, there seems to be no question but that the company may take materials, as gravel, stones, etc., from adjoining lands *in invitum*; and the damages therefor need not be assessed until after the materials are taken.³ In such cases, the payment of compensation is held to be a condition subsequent; and if provision for compensation is made, the requirements of the Constitution are met.⁴ But where the charter or general law restricts the company to a certain amount of land, — as one hundred or two hundred feet, or to so much as is necessary for their use, — and at the same time provides that they may also take for certain purposes earth, stones, gravel, etc., “from the land so taken,” the company has no authority to take materials

v. Mohawk, &c. R. Co., 14 Wend. (N. Y.) 51; 18 Wend. 9; 31 Am. Dec. 313; *Lyon v. Green Bay, &c. R. Co.*, 42 Wis. 538.

¹ *Dimmick v. Council Bluffs, &c. R. Co.*, 58 Iowa, 637.

² *Peterson v. Foreby*, 30 Iowa, 827. But a statute permitting a court or judge to make an order in his discretion, pending proceedings to determine whether or not the land shall be condemned, allowing the company to enter into possession and use the land without providing compensation for the use and waste committed if the proceedings shall finally fail, is held to be unconstitutional and void. *Danes v. San Lorenzo R. Co.*, 47 Cal. 517; *California Pacific R. Co. v. Central Pacific R. Co.*, 47 Cal. 528.

³ *Vermont Central R. Co. v. Baxter*, 22 Vt. 365; *Leshner v. Wabash Nav. Co.*, 14 Ill. 85; *Bliss v. Hosmer*, 15 Ohio, 44; *Wheelock v. Pratt*, 4 Wend. (N. Y.) 647; *Lyon v. Jerome*, 15 Wend. 569; 26 Wend.

485; 37 Am. Dec. 277. But a voluntary grant of a right of way over his land by a land-owner confers no right upon the company to take sand or other materials from adjoining lands without compensating the owner. *Vermilya v. Chicago, &c. R. Co.*, 66 Iowa, 606; 23 Am. & Eng. R. Cas. 108. Land appropriated under an implied right derived from their charter and the provisions of a general railroad law, and used as a place of deposit for stone and earth, is a proper subject for compensation, although lying beyond the legal boundaries of the roadway, if necessary to the construction of the road. *East Pennsylvania R. Co. v. Schollenberger*, 54 Penn. St. 144.

⁴ *Bloodgood v. Mohawk, &c. R. Co.*, 14 Wend. (N. Y.) 51; 31 Am. Dec. 313; *Bradshaw v. Rogers*, 20 Johns. (N. Y.) 744; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 343; *Jerome v. Ross*, 4 Wend. (N. Y.) 650.

from lands outside of those taken.¹ Indeed, in all cases, in order to determine whether materials may be taken from outside lands, the charter or general law must be regarded, as the authority to do so depends entirely upon the circumstance whether it is or is not conferred thereby, as no such right exists at common law, however great the necessity therefor may be; nor has the company authority to take lands to supply materials for the *repairs* of its road.² It has, however, the right, whether expressly given or not, to take materials from one part of its road to use upon another part of it;³ and so, too, it has the right to cut the trees growing thereon, whether they are for fruit, shade, or ornament; and this right is a continuing one, and may be exercised at any time, and the company is the sole judge of the necessity of exercising it.⁴

All timber, minerals, and other materials on the land condemned which are not needed in the construction of the road are the property of the owner of the fee. The company acquires no interest in the land except the right to use it for a way, and to take from it such materials as are needed in the construction of its road; all other interest is retained by the original owner.⁵

¹ *Parsons v. Howe*, 41 Me. 218.

² *New York Central R. Co. v. Gunnison*, 1 Hun (N. Y.), 496.

³ *Chapin v. Sullivan R. Co.*, 29 N. H. 561.

⁴ *Brainard v. Clark*, 10 Cush. (Mass.) 6; *Preston v. Dubuque, &c. R. Co.*, 11 Iowa, 15. The use of such materials is not limited to that part of the road immediately adjacent to the land from which they were taken; they may be used on any part of the road. *Preston v. Dubuque, &c. R. Co.*, 11 Iowa, 15; *Henry v. Dubuque, &c. R. Co.*, 2 Iowa, 288; *Taylor v. New York, &c. R. Co.*, 38 N. J. L. 28.

⁵ *Woodruff v. Neal*, 28 Conn. 165; *Smith v. Rome*, 19 Ga. 89; *Dubuque v. Benson*, 23 Iowa, 248; *Hollingsworth v. Des Moines, &c. R. Co.* 63 Iowa, 443; *West Covington v. Freking*, 8 Bush (Ky.), 121; *Blake v. Rich*, 34 N. H. 282; *Winter v. Peterson*, 24 N. J. L. 524; *Bolling v. Mayor of Petersburg*, 3 Rand. (Va.) 563; *Barclay v. Howell*, 6 Pet. (U. S.) 498. See also as to minerals, *Errington v. Metropolitan, &c. Ry. Co.*, 19 Ch. Div. 559; 6 Am. & Eng. R. Cas. 562; 6 Am. &

Eng. Ency. Law, p. 532. Thus, the company has no right as against the land-owner to give away or sell hay cut by its servants within the limits of its location. *Bailey v. Sweeney*, 64 N. H. 296; 30 Am. & Eng. R. Cas. 328.

A railway company which has been condemned to pay for land, the owner reserving the minerals, is not liable to the land-owner by reason of his inability to work a mine which he has discovered under the railway. The conveyance of the surface of the land gives to the grantee an implied right of support, sufficient for the object contemplated, from the soil of the grantor adjacent as well as subjacent. *Caledonian Ry. Co. v. Sprot*, 2 Macq. H. L. Cas. 449; *Midland Ry. Co. v. Checkly*, L. R. 4 Eq. Cas. 19. The measure of damages in a case where land in a coal mine has been taken for an *underground* railroad, is the injury done to the tract, as a whole, or the difference between its value at the time of the entry, and its value after the completion of the railroad. *Brown v. Corey*, 43 Penn. St. 495.

SEC. 245. Estate taken by Railway Companies under Proceedings in invitum ; Uses of ; Remedy of Land-owner for wrongful Use. —

The State may take, or authorize the taking, of the fee of land, or a mere easement at its discretion;¹ and the question as to whether it authorized the taking of the fee or only an easement is purely one of construction for the courts,² to be determined in view of the language used in the act giving the authority to take it, and of the purposes for which it was taken. Where the State itself takes land

¹ *Prather v. Western Union Tel. Co.*, 89 Ind. 501 ; 14 Am. & Eng. R. Cas. 1 ; *State v. Evans*, 3 Ill. 208 ; *Challiss v. Atchison, &c. R. Co.*, 16 Kan. 117 ; *Dingley v. Boston*, 100 Mass. 544.

² *Washington Cemetery v. Coney Island, &c. R. Co.*, 68 N. Y. 591 ; *State v. Rives*, 5 Ired. (N. C.) 297 ; *Quimby v. Vt. Central R. Co.*, 23 N. Y. 387 ; *Heard v. Brooklyn*, 60 N. Y. 242. Generally, however, the charters of railroad companies authorize them to acquire an easement of right of way merely in the lands through which their road passes ; but it is an easement in perpetuity if the corporation continues to exist, or use it for railway or kindred purposes. *Western Pennsylvania R. Co. v. Johnston*, 59 Penn. St. 290 ; *State v. Brown*, 27 N. J. L. 13 ; *Alabama, &c. R. Co. v. Burkett*, 42 Ala. 83 ; *Eaton v. Boston, &c. R. Co.*, 51 N. H. 504 ; *Heard v. Brooklyn*, 66 N. Y. 242 ; *Blake v. Rich*, 34 N. H. 282. It cannot be made use of for any purposes of a different character from those for which it was originally taken, — *Pittsburgh, &c. R. Co. v. Bruce*, 102 Penn. St. 23 ; 10 Am. & Eng. R. Cas. 1, — or the land reverts to the original owner, and he may bring a writ of entry to enforce his rights. *Proprietors, &c. v. Nashua, &c. R. Co.*, 104 Mass. 1. And this reversionary interest is always regarded in assessing damages for the original taking. *Alabama, &c. R. Co. v. Burkett*, 42 Ala. 83. What is such a different use as to entitle the land-owner to set up this reversionary interest is a question of difficulty. It may be asserted where an attempt is made to employ land taken for railroad purposes for private manufacturing enterprises. *Proprietors of Locks v. Nashua, &c. R. Co.*, 104 Mass. 1. In *Hatch v. Cincinnati, &c. R. Co.*, 18 Ohio St. 92, it was held that no reversion-

ary right could in such case be set up, the land-owner being only entitled to recover compensation for the *additional* servitude to which his land is subjected. And the same rule has been held where a railroad company, having duly acquired land for its right of way, fails to complete its road within the time specified by the charter. In such a case it is held that it is competent for the legislature to authorize another company to appropriate the right of way and build the road, and the land-owners will be entitled to no additional compensation. *Noll v. Dubuque, &c. R. Co.*, 32 Iowa, 66. And the same is also true where all the property of the company is sold, together with its franchises, at a judicial sale ; the purchaser may operate the road without making any further compensation to the land-owners for the right of way. *Junction R. Co. v. Ruggles*, 7 Ohio St. 1 ; *Hatch v. Cincinnati, &c. R. Co.*, 18 Ohio St. 92. As to the precise interest acquired by a railroad company where it condemns a right of way over lands, there is some discrepancy among the authorities, but this discrepancy is traceable to the difference in the provisions of the statutes under which the lands were taken, or to the general policy adopted in the different States relative to such grants where the statute is not specific. As a rule the company acquires no greater estate than it is necessary for it to have to enable it properly to discharge its duties to the public, and the land-owner retains all rights except those which would necessarily conflict with the exercise of the franchises of the company. *Kansas Cent. R. Co. v. Allen*, 22 Kan. 285 ; *Chapin v. Sullivan R. Co.*, 39 N. H. 564 ; *Henry v. Dubuque, R. Co.*, 2 Iowa, 288 ; *Aldrich v. Drury*, 8 R. I. 554.

for its public works, whether by purchase or by the power of eminent domain, it is treated as having taken the fee, and the land does not revert to the former owners on cessation of the use for which it was taken.¹ Thus, where land was taken by a State for the construction of a canal, it was held that upon payment of the damages assessed, the title became absolute in the State, and did not revert to the original owner upon a cesser of the use for that purpose, or upon a change being made in the course of the canal,² and the State may convey the land at pleasure.³ So also, in authorizing the taking of land for public purposes, either by individuals or corporations, it may determine the nature and extent of the estate to be taken,⁴ or it may leave it discretionary with the corporation whether to take an easement or, the fee;⁵ and the question as to the character of the estate authorized to be taken is to be determined more in reference to the nature of the use to which the land is to be devoted than from the use or omission of technical terms; and either the presence or absence of the words "in fee simple" is not decisive of the character of the estate,⁶ although the language of the act has an important bearing upon the legislative intent in this respect. Thus, in a New York case,⁷ the city was authorized by the legislature to take lands for the purposes of a public park,

¹ *Rexford v. Knight*, 11 N. Y. 308; *People v. Michigan Southern R. Co.*, 3 Mich. 496. But in appropriating land for ordinary highways, only an easement of passage is usually condemned, the fee remaining in the original owner.

² *Haldeman v. Pennsylvania R. Co.*, 50 Penn. St. 425; *Brinkerhoff v. Wemple*, 1 Wend. (N. Y.) 470. See also *Heyward v. Mayor*, 11 N. Y. 314.

³ *People v. Michigan Southern R. Co.*, 3 Mich. 496.

⁴ *Raleigh, &c. R. Co. v. Davis*, 2 Dev. & B. (N. C.) 451; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Malone v. Toledo*, 23 Ohio St. 643; 34 Ohio St. 541; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234; *Rexford v. Knight*, 11 N. Y. 308; *Hayward v. New York*, 7 N. Y. 314; *De Varaigne v. Fox*, 2 Blatchf. (U. S.) 95; *Dingley v. Boston*, 100 Mass. 544; *Heard v. Brooklyn*, 60 N. Y. 242; *Chase v. Sutton Mfg. Co.*, 4 Cush. (Mass.) 152; *Cotton v. Boom Co.*, 22 Minn. 372; *Robinson v. Western Penn. R. Co.*, 72 Penn. St. 316; *Wyoming Coal Co. v. Price*, 81

Penn. St. 156; *Nelson v. Fleming*, 56 Md. 310; *Mason v. Lake Erie, &c. R. Co.*, 1 Fed. Rep. 712.

⁵ *Charleston, &c. R. Co. v. Blake*, 12 Rich. (S. C.) 634.

⁶ *Norton v. London, &c. Ry. Co.*, 13 Ch. Div. 268; *Watson v. N. Y. Central R. Co.*, 9 N. Y. 159; *New Orleans, &c. R. Co. v. Gay*, 31 La. An. 430; *Gardner v. Brookline*, 127 Mass. 408; *Rexford v. Knight*, 11 N. Y. 308; *Holt v. Somerville*, 127 Mass. 358; *Malone v. Toledo*, 34 Ohio St. 541; *Dingley v. Boston*, 100 Mass. 544; *Hooker v. Utica, &c. Turnpike Co.*, 12 Wend. (N. Y.) 371; *Bostock v. North Staffordshire Ry. Co.*, 4 El. & B. 798; *People v. White*, 11 Barb. (N. Y.) 655. A "right of way" in lands in its legal sense, in reference to a railway is a mere easement in the lands of others obtained by lawful condemnation to public use, or by purchase. *Williams v. Western Union R. Co.*, 50 Wis. 71; *Kansas Central R. Co. v. Allen*, 22 Kan. 285.

⁷ *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234.

and the act provided that upon payment to the owners of the value of the lands, "they shall vest forever in the city of Brooklyn," and it was held that the city took a fee in the lands, and might sell such parts thereof as were not needed for the purposes of the park. So where, for the purpose of enabling a city to abate a nuisance, and for the preservation of the public health, the legislature authorized the city to "purchase or otherwise take the lands," it was held that the fee of lands taken under the act vested in the city.¹ But it will not be presumed that the legislature intended that a greater estate should be taken than is necessary for the purposes for which the power is conferred. Thus, where a city was authorized to take lands for the purposes of an avenue, and the statute provided for the assessment and payment of the *value* of the lands taken, it was held that the fee was not taken, because not necessary for the purposes for which the lands were taken.² But where the fee is taken, no right of reversion exists in the original owner when the use for which it was taken ceases.³ As to railroad companies, it is generally held in this country that to lands taken for their use in the construction of their railroads they do not, in the absence of an express provision to that effect in their charter, take the fee, but only an easement

¹ *Dingley v. Boston*, 100 Mass. 544. So, where a city was authorized to purchase or take land for a public park, it was held that it might purchase the fee. *Holt v. Somerville*, 127 Mass. 408. The fee of private property may be taken for a public market when the statute authorizes it, and the municipality may afterwards sell when the use ceases. *Heyward v. Mayor*, 11 N. Y. 314.

² *Railway Co. v. Davis*, 2 Dev. & B. (N. C.) 467; *Washington Cemetery v. Prospect Park, &c. R. Co.*, 7 Hun (N. Y.), 655, *affirmed* 68 N. Y. 591. Land can only be taken for the purpose or use to which it is sought to be appropriated. *Oregon R. & Nav. Co. v. Oregon Real Estate Co.*, 16 Oreg. 444.

³ *Water Works Co. v. Burkhart*, 41 Ind. 364; *Penn., &c. Canal Co. v. Billings*, 94 Penn. St. 40; *Mason v. Lake Erie, &c. R. Co.*, 1 Fed. Rep. 712; *Haldeman v. Pennsylvania R. Co.*, 50 Penn. St. 425; *Wyoming Coal, &c. Co. v. Price*, 81 Penn. St. 156; *Robinson v. Western Penn. R. Co.*, 72 id. 316; *Sweet v. Buffalo, &c. R.*

Co., 13 Hun (N. Y.), 643. In Minnesota, under the general railroad law of 1857, "an absolute estate in fee simple" was conferred. *Scott v. St. Paul, &c. R. Co.*, 21 Minn. 322, and such statutes are held to be constitutional even though the Constitution only confers authority to grant a "right of way," such words being regarded as merely relating to the purpose for which, rather than to the estate in, the lands taken. *Challis v. Atchison, &c. R. Co.*, 16 Kan. 117. In Kansas, under the statute of 1864, an absolute fee was conferred. *Atchison, &c. R. Co. v. Allen*, 16 Kan. 117. But under the present statute, only an easement, and as held by the courts, a limited easement, is conferred. *Kansas Central R. Co. v. Allen*, 22 Kan. 285; 31 Am. Rep. 190. The legislature is the exclusive judge as to the degree and quality of the interest which is proper to be taken, and if it confers an estate in fee it must be estimated that such an interest was necessary to answer the public use. *Challis v. Atchison, &c. R. Co.*, 16 Kan. 117; 6 Am. & Eng. Ency. Law, 600.

therein, the fee remaining in the owner and reverting to him when the use thereof for such purposes ceases,¹ and its interest in the

¹ *Western Penn. R. R. Co. v. Johnston*, 59 Penn. St. 290; *Troy & Boston R. R. Co. v. Potter*, 42 Vt. 265; *Alabama, &c. R. R. Co. v. Burkett*, 42 Ala. 83; *Morris v. Schallsville, &c. Turnpike Co.*, 6 Bush (Ky.), 671; *Proprietors of Locks, &c. v. Nashua & Lowell R. R. Co.*, 104 Mass. 1, 6 Am. Rep. 181; *Beach v. Miller*, 51 Ill. 206; *Eaton v. Boston, Concord & Montreal R. R. Co.*, 51 N. H. 504; *Albany, &c. R. R. Co. v. Brownell*, 24 N. Y. 345; *Taylor v. New York, &c. R. R. Co.*, 39 N. J. Eq. 28; *Barlow v. McKinley*, 24 Iowa, 69; *Heard v. Brooklyn*, 60 N. Y. 242; *State v. Brown*, 27 N. J. L. 13. In *Hill v. Western Vermont R. R. Co.*, 32 Vt. 68, it was held that the company had no such interest in the land as could be levied upon. *Quimby v. Vermont Central R. R. Co.*, 23 Vt. 387; *Kellogg v. Malm*, 50 Mo. 496. In *Blake v. Rich*, 34 N. H. 285, FOWLER, J., says: "Does the railroad corporation acquire any higher, more extensive, and more exclusive right?" (than the public and the public authorities gain by the laying out of such lands as a public highway.) "A careful examination of the various statutes authorizing the taking of lands for railroads, and a comparison of the language with that of those statutes providing for the taking of land for highways, satisfies us it does not; and we see nothing in the use to which the land is appropriated, in the one case and the other, requiring the same phraseology to be differently construed in the two cases. By the theory as well as the letter of the law, the taking in both cases is for the public use, and that use is no more inconsistent with the continuance of the fee in the original owner in the case of a railroad than in that of a highway." But in *Railway Co. v. Davis*, 2 D. & B. (N. C.) 467, RUFFIN, C. J., says: "The doctrine of the common law is, that the public has only an easement in the land over which a road passes, and that the right of soil is undisturbed thereby. The reason is, that ordinarily the interest of the public requires no more. Every beneficial use is included in the easement, in respect at least to such highways as existed at the

time the principle was adopted, and to which it had reference. But if the use requisite to the public be such an one as requires the whole thing, the same principle which gives to the public the right to any use gives the right to the entire use, upon paying adequate compensation for the whole. It is for the legislature to judge in cases in which it *may* be for the public interest to have the use of private property, whether in fact the public good requires the property, and to what extent. From the great cost of this road [a railway], from its nature and supposed utility, it seems to be contemplated to preserve it perpetually, or for a great and indefinite period. All persons are excluded from going on it, unless in the vehicles provided by the public or its agents; and to enforce that provision and adequately protect the erections from injuries, it may be requisite to divest the property out of individuals." *Giesy v. Cincinnati, W. & Z. R. R. Co.*, 4 Ohio St. 308. In *Nicoll v. The New York & Erie R. R. Co.*, 12 N. Y. 128, it was objected that because by the act of incorporation there was given to the defendant only a term of existence of fifty years, therefore the grant of land in question, which was a piece six rods in width across the grantor's farm for the site of the defendants' railway, should be deemed to have conveyed an estate for years, not in fee. But the court said that the unsoundness of that position was easily shown; that it was never yet held that a grant in fee in express terms could be restricted by the fact that the grantee had but a limited term of existence. And "it is erroneous to say that an estate in fee cannot be fully enjoyed by a natural person, or by a corporation of limited duration. It is an enjoyment of the fee to possess it, and to have the full control of it, including the power of alienation by which its full value may at once be realized." It is well settled that corporations, though limited in their duration, may purchase and hold a fee, and they may sell such real estate whenever they shall find it no longer necessary or convenient. 2 *Preston on Estates*, 50. KENT says: "Corporations

land is withdrawn.¹ But the land being taken for a specific public use, so long as it is devoted to that use, there is no abandonment,

have a fee-simple for the purpose of alienation, but they have only a determinable fee for the purpose of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs; but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter. 2 Kent, 282. Large sums of money are accordingly expended by railroad companies in erecting extensive station houses and depots, and by banking corporations in erecting banking houses, because, holding the land in fee, they may be able to reimburse themselves for the outlay by selling the fee before the termination of their corporate existence." But the right of a railway company to the exclusive possession of the land taken for the purposes of their road differs very essentially from that of the public in the land taken for a common highway. The railway company must, from the very nature of their operations, in order to the security of their passengers, workmen, and the enjoyment of the road, have the right at all times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by the former owners in any mode and for any purpose. *Jackson v. R. & B. R. R. Co.*, 25 Vt. 150; *Conn. & Pass. Rivers R. R. Co. v. Holton*, 32 Vt. 47. In *Hazen v. Boston & M. R. R.*, 2 Gray, 580, THOMAS, J., says: "The right acquired by the corporation [a railway company], though technically an easement, yet requires, for its enjoyment a use of the land permanent in its nature, and practically exclusive." Under the Pennsylvania general railroad act of 1849, — conferring the right to survey and locate routes for railroads, and to enter, &c., and "occupy" all land on which its railroad, &c., may be located, first making ample compensation to the owner of such land, — a railroad whose charter is founded upon the act has an easement merely upon the land appropriated, a right of way or passage, with such

an occupancy as is necessary to give this right its effect; and this interest is not the subject of a lien or a sale under execution. *Western Pennsylvania R. R. Co. v. Johnston*, 59 Penn. St. 290. There is nothing to prevent a railroad company, having title to the use and occupancy of land under a lease, from laying down rails upon it, using them, etc., if not forbidden in the lease, or if waste be not committed by such acts. • But an appropriation of the property for the uses of a railroad, under the power granted to take it for such a purpose, is essentially different from such a mere use during the term of a lease. In the latter case no title is acquired to the easement, and the rails must come up before the expiration of the lease; but in the former a perpetual easement or right of way is acquired. In one case, the rent is all the compensation which the landlord can demand; in the other, the owner is entitled to compensation or security for it before his right of property can be invaded. *Heise v. Pennsylvania R. R. Co.*, 62 Penn. St. 67. At the time a railroad was laid upon the land of the defendant, it was not intended that the road should be merged in the freehold. The road was built solely by the railroad company, under the reasonable belief that it had a free right of way under the license, and by the permission of the owner of the soil. It was held that under the circumstances of the case, the rails and other materials, which formed a part of the railroad, were trade fixtures, and became personalty, liable to the same rules of law that govern other personal property. *Northern Central R. R. Co. v. Canton Co.*, 30 Md. 347. A telegraph company, by a judgment condemning land for its use under the eminent domain act, does not acquire the fee to the land, or the right to use it for any other purpose than to erect telegraph poles and suspend wires upon them, and maintain and repair the same, and use the structure for telegraph purposes. This of course gives the com-

¹ *Hastings v. B. & M. R. R. Co.*, 38 Iowa, 316.

although the railway has been sold, or by process of law has passed into the hands of another company; because it is the public use for which the land is taken, and so long as it is used for railway purposes it is immaterial what company or what individuals operate it.¹ Indeed, railways are leased, consolidated, and sold, quite commonly, and it would be a serious embarrassment to railway enterprises if the use of the roadway was confined exclusively to the company for whose use the lands were originally taken.

The title acquired is an easement, but it is an easement in the nature of a fee, and in the assessment of damages no difference is made because of the reversionary right, but damages for the full value of the land are given.² But the nature of the easement taken is practically exclusive, and in most of the States it is held that the company is entitled to the exclusive possession of the roadway, not only as against the public generally, but also as against the owner; as the possession of the owner, for any purpose which in any sense is inconsistent with the uses for which the lands were taken would be likely to be detrimental to the safety of the travelling public. The company being held up to the highest degree of diligence in reference to the safe condition of its road and appliances, must be allowed to exercise its own discretion as to the uses of the roadway; and common justice, as well as common prudence, requires that they should not be compelled to submit to dictation or interference from

pany the right at all times when necessary to construct or to repair the line, to enter upon the strip condemned, doing as little damage as possible. The company cannot cultivate such strip, or take exclusive possession of it, or enjoy it for any other purpose. The only exclusive right of occupancy the company acquires is the ground occupied by the poles erected for telegraph purposes. *Lockie v. Mutual Union Telegraph Co.*, 103 Ill. 401.

¹ *Noll v. Dubuque, &c. R. R. Co.*, 32 Iowa, 66; *Henry v. Dubuque, &c. R. R. Co.*, 2 id. 208; *Pollard v. Maddox*, 28 Ala. 321; *State v. Rives*, 5 Ired. (N. C.) 297; *Junction R. R. Co. v. Ruggles*, 7 Ohio St. 1.

² *Bemis v. Springfield*, 122 Mass. 110; *Murray v. County Comm'rs*, 12 Met. (Mass.) 455. In Minnesota, where railroad corporations, though incorporated for a limited period only, may renew their incorporation indefinitely, their easement in lands

taken for their roads is held to be practically equivalent to the fee, and the value of the lands taken is required to be assessed. *Robbins v. St. Paul*, 22 Minn. 286. But this easement is only of a right of way, or passage, with such occupancy as is necessary to give effect to the right, and it is not the subject either of a lien or a sale upon execution. *Western Penn. R. R. Co. v. Johnston*, 59 Penn. St. 290. But redundant lands taken by it, in fee or otherwise, are held to be subject to levy. *Plymouth R. R. Co. v. Calwell*, 39 Penn. St. 337. And a canal basin was held in the last case not to be a legitimate incident of a railway franchise. Town-lots and other property not legitimately incident to the franchise, will not pass under a mortgage of the railway and its franchises unless specifically named. *Shamokin Valley R. R. Co. v. Livermore*, 47 Penn. St. 465.

the land-owner in this respect, except in so far as is provided for by the express provision of the statute,¹ or as was evidently contemplated when the lands were taken. If a railway is built through the centre of a farm, dividing one part from the other, and all means of access thereto is cut off except by crossing the railway, and the statute makes no provision for farm crossings, and only an easement in the land is taken by the railway company, it is hardly reasonable to presume that the damages awarded to the land-owner were intended to compensate him for the land from which he is thus shut off. Such a presumption is unwarrantable and unreasonable, and it is believed that the land-owner has a right to cross the track or to go under it, at reasonable times and in such a manner as not to interfere with the operation of the trains upon the railway, when a necessity therefor exists, to get to and from the other portion of his farm with his crops and for usual farming purposes.² But where the stat-

¹ *Jackson v. Rutland & Burlington R. R. Co.*, 25 Vt. 150; *Cordell v. N. Y. Central R. R. Co.*, 70 N. Y. 119; *Junction R. R. Co. v. Philadelphia*, 88 Penn. St. 375; *Troy & Boston R. R. Co. v. Potter*, 42 Vt. 465; *Disbrow v. Chicago & Northwestern R. R. Co.*, 70 Ill. 246; *Taylor v. N. Y. & Long Island R. R. Co.*, 38 N. J. L. 28; *Norton v. London, &c. Ry. Co.*, L. R. 13 Ch. Div. 268; *Curtis v. Eastern R. R. Co.*, 14 Allen (Mass.), 55. In *Presbrey v. Old Colony R. R. Co.*, 103 Mass. 1, it was held that in assessing the damages to land for the location of a railway across it, they must be assessed upon the basis that the land-owner has no right to cross the railroad to get to and from a portion of his estate detached from his estate by such location, unless the railroad company has secured him such a right under the provisions of the statute. *Aldrich v. Drury*, 8 R. I. 554; *Jeffersonville, &c. R. R. Co. v. Goldsmith*, 47 Ind. 43; *Hatch v. Cincinnati, &c. R. R. Co.*, 18 Ohio St. 92; *Pittsburgh, Ft. Wayne, &c. R. R. Co. v. Bingham*, 29 id. 364; *Lake Superior, &c. R. R. Co. v. Grove*, 17 Minn. 322; *Burnett v. N. & C. R. R. Co.*, 4 Sneed (Tenn.), 528.

² In *Housatonic R. R. Co. v. Waterbury*, 23 Conn. 100, the defendant railroad crossed the plaintiff's road, dividing it into two parts, and it did not appear that there was any highway or ordinary

passway that enabled him to get from one side of his farm to the other, without crossing said railroad; and the defendants requested the court to instruct the jury that they had the exclusive right to the use and occupancy of their railroad track, through the lands of the plaintiff, and if they were in the ordinary and proper use of the railway, when the cow was killed, and the cow was trespassing upon the track, the defendants were not liable unless they were guilty of gross and wilful neglect, and that the plaintiff, in permitting his cow to stray or stand upon the track, as claimed to have been proved by the plaintiff, was a trespasser against the defendants; but the court instructed the jury that the defendants held their easement subject to the plaintiff's right to cross and recross, to and from the different sections of his farm separated by the road, provided the same was reasonably exercised; that it was their duty to ascertain if either party had been guilty of negligence; if the plaintiff saw his cow on the railroad track, about the time when the train ordinarily passed the road at that place, or if his cattle were turned upon land adjoining the railroad track, and were loitering along near the track, such facts might be evidence of negligence which it was proper for them to consider. It was held that such instructions were correct. *Kansas Central R. R. Co. v.*

ute makes provision for farm crossings, and provides a method by which a land-owner may procure the establishment of one, he has no

Allen, 22 Kan. 285; 31 Am. Rep. 190. It seems to us that the views advanced in this case by HORTON, C. J., correctly state the rule in cases where the fee to the land is not taken. He said: "As to the right of the company and the plaintiff to the strip of land taken and appropriated by the company,—after the strip of land is appropriated, the exclusive use of it vests in the company. No legal right or privilege to cross over or under it is reserved or left to the plaintiff. The company has a perfect right to fence up its road, except at public highways or public crossings. In this respect the right of the company differs materially from the rights of the public in land taken for a common highway. The railway company, the defendant, must, from the very nature of its operations, for the security of its trains, its passengers, and its employes, and its free use of its road, have the right at all times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by the plaintiff in any mode and for any purpose. From the record it is shown that the plaintiff testified that the farm was worth twenty dollars per acre before the construction of the railroad across it, and fifteen dollars per acre after its construction. He also testified that there were two drains crossed by the road on his land, one near the easterly entrance to the land, and one near the centre of the land; that the railroad company had filled up the eastern one, and made a trestle-work over the one near the centre; that the one near the centre of the farm was deep enough below the railroad trestle-work for stock to pass under the road, by making a little expenditure, but that the railroad company had not prepared it for such purpose, nor given him any right of way under or over said road; that the road cut off a part of his farm from Elk creek, and left him without access to it for his stock from the main part of his farm; that he had crossed the road with his teams and hauled a part of his crop across it the present season, and stacked it on the south side of the railroad near the creek, and that the railroad company never gave

him any right or privilege to cross the road under or over the road. Other witnesses were called as to the damages, who gave their opinions—some of them much above that of the plaintiff, and some of them much below it; and upon the testimony so given, it became a question of importance, as affecting the damages to be assessed, whether, under the appropriation made, as shown by this proceeding, the railway company had the right to the exclusive possession of the right of way appropriated, and to prevent the owner of the farm from passing under or over the said railroad with his teams or his stock. To decide the question involved, it becomes necessary to determine the nature and extent of the interest which railroad companies acquire in lands obtained by condemnation proceedings, under the law of 1868 and the amendments of 1870. Section 84, ch. 23, Laws of 1868, provides that the perpetual use of the land condemned shall vest in the railroad company to which it is appropriated for the use of the railroad. The law of 1864 provided that a title in fee simple might be acquired by railroad companies by virtue of their compulsory powers in taking land. Under the law of 1868, a mere easement only is granted; under the old law of 1864, an absolute title could be secured. Some reason must have existed in the minds of the law-makers for the change which has been made in the statute, and we have no right to extend by judicial construction an easement into an absolute title. There is a wide difference between the two. Under an absolute title in fee simple, the owner of the soil owns from the centre of the earth up to the sky. An easement merely gives to a railroad company a right of way in the land, that is, the right to use the land for its purposes. This includes the right to employ the land taken for the purposes of constructing, maintaining and operating a railroad thereon. Under this right the company has the free and perfect use of the surface of the land, so far as necessary for all its purposes, and the right to use as much above and below the surface as may be needed. This

right to cross the track with his teams where no crossing is established.¹ Nor has he any right to the possession of any part of the

would include the right to tunnel the land, to cut embankments, to grade and make road-beds, to operate and maintain a railroad with one or more lines of track with proper stations, depots, turn-outs, and all other appurtenances of a railroad. The former proprietor of the soil still retains the fee of the land and his right to the land for every purpose not incompatible with the rights of the railroad company. Upon the discontinuance or abandonment of the right of way the entire and exclusive property and right of enjoyment revert in the proprietor of the soil. After the condemnation and payment of damages, the soil and freehold belong to the owner of the land subject to the easement or incumbrance; and such land-owner has the right to the use of the condemned property, provided such use does not interfere with the use of the property for railroad purposes. In some cases the right of the owner of the soil would practically not amount to anything, because the purposes of a railroad company might require the use of all the land taken to such a degree as to forbid the owner from any benefit whatever. The paramount right is with the railroad company, and the land-owner can do nothing which will interfere with the safety of its road, appurtenances, trains, passengers, or workmen. With these views of the interest which railroad companies acquire in lands obtained by condemnation proceedings, it is evident that the court erred in instructing the jury that 'no legal right or privilege to cross over or under [the railroad] is reserved or left to the plaintiff' (defendant in error). Under this instruction the land-owner could not erect a suspension bridge over the road, or float in a balloon over it in the air, or even dig coal or mine minerals or quarry rock in the bowels of the earth beneath the road-bed. The law is otherwise. After the strip of land was appropriated to the plaintiff in error, the perpetual use of the land vested in the railway company, its successors and assigns, for railroad purposes. The defendant in error had no legal right or privilege to cross over or under the road so as to interfere with the use of the property for those purposes. The company had a perfect right to fence up its road except at public highways or public crossings. In the use of the land the railroad company had the paramount right, but the defendant in error had also the right to the land for every purpose not incompatible with the rights of the road. If the railroad company required exclusive occupancy of the land taken for the use of its railroad, on account of the nature of its operations, or for the security of its trains, its passengers, or its employes, it was entitled to such occupancy. On the other hand, if the company had built its bridges and trestle-work so high in places as to allow the free passage of stock or teams under the road, and their entry and passage were of no detriment to the railroad, and in no way interfered with use of the land for the purposes of the railroad, the defendant in error, as the land-owner, had the right to enter upon such land and pass under such bridges or trestle-work with his teams and stock, without being a trespasser. He had also the right to widen the drain or passage under the trestle-work, if this in no way interfered with the rights of the railway company. The trial court followed the authority of *Jackson v. Railroad Company*, 25 Vt. 150, but that is an exceptional case. It goes too far. It transfers an easement into an absolute title. It announces, as a matter of law, that a railroad company has the right at all times to the exclusive occupancy of the land condemned for its purposes, and excludes all concurrent occupancy by the land-owner in any mode or for any purposes. We are unwilling to approve that doctrine. It is our opinion that it is a question of fact, not of law, whether the necessities of the railroad demand exclusive occupancy for its purposes, and what use of the property by the

¹ Conn. & Pass. River R. R. Co. v. Holton, 32 Vt. 43.

roadway, or to the use of it for the purposes of cultivation, nor can he enter thereon to take away the herbage growing thereon, nor use any portion of the roadway for any purpose whatever that in the least degree endangers or embarrasses its use for any purpose to which the railway company has appropriated it.¹ Thus, in the Vermont case cited in the last note, it was held that the owner could not enter upon the land with teams to remove turf therefrom, the effect being to increase the danger of cattle getting upon the roadway, and the dust by the passage of the cars after the sward is removed from the side of the tracks. Besides, the removal of the turf would tend to weaken the embankment, by exposing the soil to the wash of rains, etc. In some of the cases it is said that the owner of the land is entitled to the wood and timber and the stone and minerals upon the land, except in so far as they are necessary to construct or repair the road.² But the value of this ownership is practically worthless, for the reason that without the assent of the company the owner has no right to cut the timber, or to enter to mine, quarry, or remove the stone, as it is evident that either of these acts would seriously embarrass and

owner is a detriment to or interference with the rights of the road. Again, this authority is in conflict with the majority of cases, and if adopted as the law in this State, now so sparsely settled, and where in many of the frontier counties but a single track is necessary, and public highways and public crossings are at great distances from each other, would work severe hardship and injustice. *Blake v. Rich*, 34 N. H. 282; *Wash. on Easements*, 159, 214; *Lance's Appeal*, 55 Penn. St. 16; *Evans v. Haefner*, 29 Mo. 141; *Alabama, &c. R. R. Co. v. Burkett*, 42 Ala. 83; 1 Red. on Railw. 247; *N. Y. Central R. R. Co. v. Kip*, 46 N. Y. 546; *Cemetery v. P. P. & C. I. R. R. Co.*, 68 id. 591. The direction to the jury by the court below, inconsistent with this opinion, being erroneous, the judgment is reversed and the cause remanded for new trial." The land-owner may lay pipes under the roadway when he can do so without injury to the road. *Hasson v. Oil Creek, &c. R. R. Co.*, 8 Phila. (Penn.) 556.

¹ *Conn. & Pass. River R. R. Co. v. Holton*, 32 Vt. 43. In *Leavenworth, Topeka, & S. W. R. R. Co. v. Paul*, 28 Kan. 816, the court held that where there

was no testimony as to the uses to which the railway company put the land, or the actual extent of its use, and the court instructs the jury that the fee simple remains in the land-owner, subject to the uses of the company for the purposes of the railway, that it was not error for the court to specifically instruct them "that he has the right to every use of it which can be made without interfering with the operation of the road, and to all grass and other vegetation which shall grow thereon." The land-owner cannot depasture his cattle upon the roadway. *Jackson v. Rutland, &c. R. Co.*, 25 Vt. 156; *Chicago R. Co. v. Patchin*, 16 Ill. 198. The company acquires an estate in severalty and not one in common with the owner. *Weston v. Foster*, 7 Met. (Mass.) 297.

² *Chapin v. Sullivan R. R. Co.*, 39 N. H. 564; *Preston v. Dubuque, &c. R. R. Co.*, 11 Iowa, 15; *Baker v. Johnson*, 2 Hill (N. Y.), 342. The right of the company to use the timber and materials upon the land condemnéd, in the construction of its road is recognized in all the cases. *Taylor v. N. Y. & Long Branch R. R. Co.*, 38 N. J. L. 28.

endanger the operations of the company, besides interfering with its right to use such timber in the repair of the road; and an entry without its assent for any such purpose would be a trespass for which the company may maintain an action at law,¹ and against which a court of equity would undoubtedly enjoin the land-owner, upon a bill brought by the company. But if the company cuts the timber, and does not need it for the purposes of construction, the owner of the land is entitled to that which is not used in the legitimate purposes of construction; and if the company should use it for any other purpose, or should sell it, it would be liable to the owner for its value; and if upon demand, it should refuse to permit the owner to take it away, it might be made liable in trover therefor;² and the owner may justify an entry upon the roadway to take it away, but not to cut it. The same rule would also prevail as to other materials.³ The minerals in the land belong to the land-owner, and he may take them away if he can do so without endangering the railway.⁴ But he cannot mine under the railway so as to destroy its subjacent support. But in England it is held that when a railway company has compulsorily purchased land with mines and minerals subjacent thereto, and subsequently sells a portion thereof as superfluous land, the purchaser from the railway company does not acquire the right of subjacent support for his surface as against the owner of the mines and minerals, and therefore cannot maintain an action for damages against the mine-owner for so working his mines as to cause injury to the surface and the buildings erected thereon.⁵ But as to the railway itself, the rule would be otherwise, and the mine-owner would be liable for the withdrawal of the subjacent support therefrom so as to injure or endanger it.⁶ The principle upon which this doctrine rests, as well as the doctrine itself, is illustrated in a recent case⁷ in which, in an action by the owner of an aqueduct

¹ Connecticut, &c. R. Co. v. Holton, 32 Conn. 43; North Penn. R. Co. v. Reham, 49 Penn. St. 101. The proprietors of a railroad have a right to cut the trees growing on the strip of land which they have taken for their road, whether such trees are for shade, ornament, or fruit, and whether such cutting be at the time of laying out their track or afterwards; and there is no burden of proof on such proprietors to show, in their justification, that the trees are cut for the purposes of their road. Brainard v. Clapp, 10 Cush. (Mass.) 6.

² Preston v. Dubuque R. Co., 11 Iowa, 15; Taylor v. N. Y. & Long Branch R. Co., 39 N. J. L. 28.

³ Id.

⁴ Hasson v. Oil Creek R. Co., 8 Phila. (Penn.) 556.

⁵ Pountney v. Clayton, 49 L. T. Rep. N. S. 283.

⁶ Hasson v. Oil Creek R. Co., 8 Phila. (Penn.) 556.

⁷ Rockland Water Co. v. Tillson, 75 Me. 170.

against the land-owner for damages caused by the working of a lime quarry, it was held that in regard to an aqueduct as in regard to a way, the owner of the easement may peaceably pursue his right against any obstructions which the land-owner throws in the way of its enjoyment. If the blasting in the quarry undermines the aqueduct, he may adopt new means of supporting it in its place; and if a broader base for the new support than the width of the original location of the aqueduct has been rendered necessary by the blasting, it is not a trespass upon the owner of the soil to use his land for that purpose. The aqueduct has the right of support in the land, and if the blasting under it within the limits of the location by the land-owner deprives it of its former support, the right still remains, and its enjoyment may be reclaimed with the incidents which necessarily go along with it. It was also held that the defendant was liable for injury done to the aqueduct, whether the working of the quarry was negligent or not; but that the defendant was not liable in such a case for injuries occasioned by the acts of his grantees, although holding the quarry under his warranty deed.

The materials within the limits of the land taken may be used by the company in the construction of the road, but they cannot be sold by it;¹ and materials may be taken from one part of the road to be used in the construction of another part of it.² Of course, where the fee of the land is taken, the entire property in the soil and all that is upon or under it belongs to the company. A telegraph line upon the right is an encroachment upon the exclusive possession of a railway company, and the damages for the use of the right of way for

¹ Aldrich v. Drury, 8 R. I. 454; Taylor v. New York, &c. R. Co., 39 N. J. L. 28. In Brainard v. Clapp, 10 Cush. (Mass.) 574, SHAW, C. J., says: "The railroad company are authorized to do all acts within the five rods which by law constitute their limits, in taking away or leaving gravel, trees, stones, and other objects which in their judgment may be necessary and proper to the grading and levelling of the road, in adjusting and adapting it to other roads, bridges, buildings, and the like, so as to render it most conducive to the public uses which the railway is intended to accomplish. Whatever acts, therefore, are requisite to the safety of passengers on the railway, to the

agents, servants, and persons employed by the company, and to the safe passage of travellers on and across highways and roads connected with it, and which can be done within the limits of the five rods, the company have a right under their act of incorporation to do. This is embraced in the idea of taking land for public uses." See also Chicago, &c. R. R. Co., v. Patchin, 16 Ill. 198.

² Chapin v. Sullivan R. R. Co., 39 N. H. 564. In Baker v. Johnson, 2 Hill (N. Y.), 342, it was held that where lands were taken for the purposes of a canal, the materials taken from one part of the land taken might be used upon another part of it.

that purpose go to the railway company and not to the land-owner.¹ And the same rule prevails where any part of the right of way is taken under the powers of eminent domain for any purpose similar to that of a railway. Where the statute gives the power to do so, lands may be condemned for the supply of materials, as gravel and stone necessary for the repair of the railway; but where this power is not expressly given, it must purchase such lands as are needed for this purpose, and may acquire the fee therein,² and convey a

¹ Atlantic Tel. Co. v. Chicago R. R. Co., 6 Biss. (U. S. C. C.) 158; Telegraph Co. v. Rich, 19 Kan, 517; Southwestern R. R. Co. v. Southern Tel. Co., 46 Ga. 48.

² Overmyer v. Williams, 15 Ohio, 26. Land cannot be taken for the supply of stone and gravel to be used in the repair of a distant part of the road, without the most urgent necessity therefor, or even in its construction. In N. Y. & Canada R. R. Co. v. Gunnison, 1 Hun (N. Y.), 496, it was held that under the statutes authorizing railroad companies to acquire title to real estate without the owner's consent, a company cannot take land simply for the purpose of removing gravel therefrom, to be used in constructing a distant portion of its road. BOARDMAN, J., said: "The company needs and will need additional land for side tracks, and storing cars; whether the necessity requires the particular lands in controversy, is not so clear. Still, enough is shown, of difficulties and obstructions in other neighboring localities, to lead to the conclusion that no other property is so available, or could be rendered so useful at so small an expense, as these lands of Gunnison. If so, the selection of proper grounds for these, and other necessary purposes, is very much in the discretion of the managers, if exercised in good faith. But the railroad company claims the right, and indicates an intent to use a portion of the lands, of which it seeks to acquire the title, for the purpose of taking therefrom gravel to ballast the road for many miles to the south of Crown Point. It appears that this land is mostly made up of a fine quality of gravel, suitable for such purpose, and that no suitable gravel can be obtained for fifteen miles south of it. One

of the objects for which such land is necessary to said company, is to excavate and carry away this gravel for ballast. The right of eminent domain is harsh in its application to individual rights. It is given for the public advantage, and to accomplish a public purpose. To accomplish such purpose, the railroad company is allowed to take private property, upon just compensation. Whatever is essential and indispensable to the construction, maintenance, or running of the road, is allowed to be taken. What the company acquires, is not a fee simple to the lands, — not an absolute right to use them, irrespective of the title and interests remaining in the individual, — but a right of way, and the right to adapt the soil and land, within its limits, to the ordinary uses and necessities of such a way. If a cut is required, the soil taken therefrom may be used for a fill, wherever needed. But it has not been considered lawful, so far as I can discover, to take lands outside the limits of its way; to remove earth, timber, rocks, or materials therefrom for the building of its road, under the right of eminent domain and public necessity. In matter of N. Y. & H. R. R. v. Kip, 46 N. Y. 546. At page 552 of the last case, ALLEN, J., says: 'The right to take lands upon which to erect a manufactory of cars . . . is not included in the grant. Neither can lands be taken for a mere subsidiary or extraordinary purpose.' He then indicates many of the purposes considered indispensable, such as justify the taking of land *in itinere*. But he nowhere intimates that the soil, below grade, may be taken and carried away for use in other localities. Such an act would be in excess of a right of way, or passage. Such act is not essential to the construction and

fee therein to a purchaser.¹ But it seems that if a railway company enters into a contract with a person to sell and convey to it such lands as may be required for its road, under such a contract the land-owner is not required to convey any more land than is requisite for the purposes of its road, and the company would not be entitled to a conveyance of the fee, but only of an easement in the land for such purpose.²

maintenance of a railroad, more than the use of ties or fuel. Yet, no one would maintain that a railroad company could condemn land, for the purposes of ties or fuel. The general principles, applicable to such cases, are well considered in *R. R. Co. v. Davis*, 43 N. Y. 137. The right of condemnation is the exercise of an extraordinary power reserved by the State, in hostility to the private rights of citizens. It must therefore be expressly granted, when exercised by a private or municipal corporation. The grant will not be extended by inference or implication. Nor can anything be taken, except by virtue of the law, for the benefit of the public, and under an indispensable necessity in the construction and maintenance of the road. It is not sufficient that it is convenient or cheaper for the road. Because such a rule would apply to ties, fuel, or outside soil for the purposes of embankments. It follows that the railroad company cannot acquire the right to this land, for the purpose of excavating the soil and carrying it away for many miles, under the doctrine of eminent domain, by virtue of the statutes now in force. The statute of 1869 enlarges the rights and powers of railroad companies, but such law only applies to railroads completed, and to the acquisition of other lands beyond their original necessities. *Railroad Co. v. Davis*, 43 N. Y. 143. But upon the merits of this case, the railroad company does not bring itself within any rule of necessity. All that is claimed in the affidavits on behalf of this application is, that no gravel suitable for ballast is to be had upon its road, south of these lands, for ten or fifteen miles; and that no other gravel, as good as this, is found upon the line of its road, between Port Henry and Putnam, a distance of twenty miles. By the affidavit of Buck, it appears that

the company has obtained large amounts of gravel, just north of these lands; and, upon information and belief, that the company has purchased and owned several acres, within one-half mile of Gunnison's, on the north, and that additional gravel-beds can there be procured, at a reasonable rate. By the affidavit of W. C. Gunnison, it further appears that the company owns another gravel-bed, of great extent and good quality, from four to five miles north of Gunnison's, and, since March, 1873, has been removing the same for railroad uses. These facts are not controverted by the petitioner. In view of these facts, of the value and situation of these lands, it would seem to be an unjust and unnecessary exercise of the power conferred upon the company, if these lands, or any part thereof, were taken for the excavation of gravel therefrom."

¹ *Halt v. Somerville*, 127 Mass. 408; *Heath v. Barmore*, 50 N. Y. 302; *State v. Brown*, 27 N. J. L. 13; *Nicoll v. N. Y. & Erie R. R. Co.* 12 N. Y. 121.

² *Hill v. Western Vt. R. R. Co.*, 32 Vt. 68. In this case the company, before the road was laid out or surveyed, procured a bond from B. to sell them such lands owned by him as should be required for their road. Their charter provided that the directors might cause such surveys of the road to be made as they deemed necessary, and fix the line of the same, and that the company might enter upon and take possession of such lands as were necessary for the construction of their road and requisite accommodations. The survey of the road, made by order of the directors, designated certain land belonging to B. as depot grounds; and the company paid him for and took the same, but never received any conveyance thereof from him. The plaintiff, having recovered a judgment against the company, levied

In an English case,¹ where lands were *conveyed* to a railway company, it was held that they could only be used for railway purposes, and that the use of a reservoir used to supply its canal with water, for aquatic purposes, was not authorized. When the use of the land for public purposes is *abandoned*, the land reverts to the original owner; but the mere fact of non-user, or that it is *temporarily* applied to other purposes or uses, which are consistent with the proper enjoyment of the easement, does not of itself amount to an abandonment, but the question is one of fact, to be found by the jury.² If buildings for mechanical, manufacturing, or other purposes, are erected upon the premises and let out to tenants, the land-owner is entitled to a writ of entry to establish his title, subject to the valid easement of the company, and to damages or mesne profits for the wrongful use of the land.³

his execution upon a portion of this land, and brought ejectment against the company to recover possession thereof. The referee, to whom the case was referred, found that a part of the land embraced in the levy was never necessary to the company for railway purposes, and would not become so prospectively. It was held that by B.'s contract with the company he was not bound to convey to them any greater quantity of, or estate in, his land than they required for depot accommodations; that under their charter the company could not acquire any more land, or any greater estate therein, for the purposes of a road-bed or stations, than was really requisite for such uses; that the estate so requisite was not one in fee-simple, but merely an easement, and was, therefore, not subject to be levied upon by the creditors of the company; that when taken for such purposes, the rule was the same, whether the land was taken compulsorily by condemnation, and the award of commissioners as to its extent and price, or under the agreement of the parties as to one or both of these particulars; that under their charter the directors had power to lay out their road and stations as they saw fit; and that, so long as they acted in good faith and not recklessly, their decision as to the quantity of land required for depot accommodations would be regarded as conclusive.

¹ Bostock v. North Staffordshire Ry.

Co., 13 Q. B. 988. See Mulliner v. Midland Ry. Co., L. R. 11 Ch. Div. 611.

² Worcester v. Western R. R. Co., 4 Met. (Mass.) 464; Dyer v. Sanford, 9 id. 395; Hayford v. Spokesfield, 100 Mass. 491.

³ Proprietors of Locks, &c. v. Nashua & Lowell R. R. Co., 104 Mass. 1; 6 Am. Rep. 181. As this is a leading case under this head, and of great practical value, I give it nearly entire. In this case a writ of entry was brought to recover three lots of land in Lowell, Mass., marked respectively A., B., and C. In 1838, the defendants, a railroad corporation, by authority of their charter, took possession of the lots A. and C., paying to the demandants, the owner in fee, the assessed damages. Buildings were erected on these lots, and by mistake of defendants as to the true boundary line, a portion of the buildings were located on the lot marked B. In 1851 the buildings on these lots were leased for private business purposes; and the premises have not since been used by defendants for railroad purposes. The parties agreed upon a statement of facts, of which the above brief synopsis is sufficient to give an understanding, and which closed as follows: "The directors of the railroad corporation will all testify, if competent for them so to do, that they never intended to permanently abandon the use of the demanded premises for railroad purposes. If upon the above state-

SEC. 246. When the Right of Entry vests in the Corporation.— Except where the statute otherwise expressly provides, the payment

ment of facts the defendants have any cause of action against the railroad corporation or their lessees, or either of them, such judgment is to be rendered in this action against the tenants as the demandants would be entitled to recover upon said facts, in any form of action, against the tenants or either of their lessees, and the case referred to an auditor to assess the mesne profits or damages; otherwise judgment to be for the tenants." *WELLS, J.*, said: "Under this agreed statement, the form of action and the pleadings become immaterial. But the principles which govern proceedings under a writ of entry are well adapted to test the relations and rights of the parties in respect to the matters in controversy in this suit. In regard to that part of the lot first described, which is designated as parcel B., the title of the demandants, and their right of immediate possession are admitted. The only question is, whether the action may be defeated by the specification of non-tenure and disclaimer in defence. The defendant corporation has been in the occupation of this parcel since 1851, by means of a permanent structure placed thereon. That occupation is in its nature adverse, and indicates a claim of title. That it was unintentional, and by mistake as to the true line of boundary, does not affect its legal character as a disseisin. When the suit was brought, the demandants were dispossessed; and there has been no restoration of the possession. These facts falsify the plea, and entitle the demandants to a judgment. *Allen v. Holton*, 20 Pick. (Mass.) 458; *Johnson v. Boardman*, 6 Allen (Mass.) 28. The other parcels sued for are included within the limits of the location of the railroad. The buildings thereon, which had been previously adapted to the uses of the railroad, were changed so as to adapt them to the purposes of private business, and the trade of merchants. They have been so occupied from that time,—being let for rent to tenants 'for their exclusive use and occupation for their said business and trade.' Although the railroad corporation may derive some advantages in its freighting

business from the carriage of goods for its tenants, and from the receipt and delivery of their goods at these buildings, instead of its own freight-houses, yet we think it would be a distortion of the agreed statement to regard these circumstances as sufficient to qualify the character of the occupation of the buildings, so as to bring it within the range of any purpose for which the corporate franchises were granted. The demandants contend that this continued appropriation of the buildings is an abandonment of its legal rights by the corporation; and that it has become a mere disseisor; so that the demandants are entitled to resume their title and possession, freed from the servitude. That property once taken and held by right of eminent domain, may be abandoned, so as to restore the original owner to his former rights, we are not disposed to question. But the facts here show no such abandonment. On the contrary, the tenant has been in the constant use and control of the property. The erection of the buildings was consistent with a proper enjoyment of the easement. *Worcester v. Western R. R. Co.*, 4 Met. (Mass.) 564. It did not destroy the easement nor defeat its exercise, nor indicate an intent to abandon it. *Dyer v. Sanford*, 9 id. 395, 402; *Hayford v. Spokesfield*, 100 Mass. 491. A misuse, however great the perversion, is not an abandonment. The subsequent unauthorized appropriation of the buildings did not therefore put an end to the right of use for the legitimate purposes of the franchise granted. *Sprague v. Waite*, 17 Pick. (Mass.) 309, 319. An easement does not become merged, or lost, by a disseisin, or a wrongful claim of title against the owner of the servient tenement. *Tyler v. Hammond*, 11 id. 193, 220. Besides, the corporation has continued the legitimate exercise of its franchise over so much of the location as is required for the present use and accommodation of its tracks. Its location has not been abandoned; and the right, derived by law from that location, to use any part of the land within its limits, is not such a mere license as will become

or tender of the land damages is not only a condition precedent to the title of lands taken by condemnation vesting in the corporation

void, *ab initio*, by reason of abuse or excess in its exercise. This position of the demandants is therefore not maintained, even if the testimony of the directors of the railroad offered to negative the intent to abandon be rejected. If the misappropriation worked a forfeiture, *pro tanto*, of the franchise originally authorized, or was a sufficient ground for decreeing a forfeiture, that could not be set up collaterally in a suit by a private party. Even in a direct suit for the purpose, a private party cannot obtain a decree of forfeiture, vacating, in whole or in part, a franchise or right held under lawful public authority. Proceedings of that nature are applicable only to an attempt to exercise privileges without lawful authority; and the exclusion thereby obtained extends only to such unlawfully assumed franchise. A public franchise can be forfeited only to the public. *Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co.*, 2 Gray (Mass.), 1; *Fall River Iron Works Co. v. Old Colony & Fall River R. R. Co.*, 5 Allen (Mass.), 221; *Heard v. Talbot*, 7 Gray (Mass.), 113. So far, then, as the demandants seek to recover possession and control of the property, as of their former right, their suit must fail. If they can recover any judgment for the land covered by the location, it must be rendered subject to all the lawful rights of the tenant under the franchises conferred by its charter and the location of its road. It does not follow that the action cannot be maintained at all. The fee of the land remains in the original owners, notwithstanding the location of the road. It is true that the nature of the use for which the land is taken is such as may require, and therefore authorize, complete possession and control by the railroad corporation. The occupation and use of lands which it is entitled to enjoy is declared to be 'permanent in its nature, and practically exclusive.' *Hazen v. Boston & Maine R. R.*, 2 Gray (Mass.), 577, 580. The mode of occupation, and the degree of exclusiveness, necessary or proper for the convenient exercise of its franchise, are within the absolute discretion of the managers of the

corporate functions. They are the sole judges of what is proper or convenient as means for attaining the end and performing the services for which the corporate franchises were granted. *Brainard v. Clapp*, 10 Cush. (Mass.), 6; *Boston Gas-light Co. v. Old Colony & Newport R. R. Co.*, 14 Allen (Mass.), 444; *Ham v. Salem*, 100 Mass. 350. But however extensive the right which the corporation thus takes by its location, it is not a fee, nor a freehold estate, but an easement only; not a corporeal interest, but an incorporeal right. Its right of occupation, however exclusive, is incidental only, and as a means of exercising the privileges and performing the functions defined by its charter. See *Boston Water Power Co. v. Boston & Worcester R. R. Co.*, 16 Pick. (Mass.) 512, 522; *Weston v. Foster*, 7 Met. (Mass.) 297; *Tucker v. Tower*, 9 Pick. (Mass.) 109; *Harback v. Boston*, 10 Cush. (Mass.) 295. The owner of the fee in land thus subjected to a public easement may maintain an action of trespass or a writ of entry against any one whose entry or acts upon the premises would support the action, unless he can justify under the authority of the party having the easement. Per *SEDGWICK, J.*, in *Commonwealth v. Peters*, 2 Mass. 125; *Perley v. Chandler*, 6 id. 454; *Robbins v. Borman*, 1 Pick. (Mass.) 122; *Hancock v. Wentworth*, 5 Met. (Mass.) 446. The title and right of the plaintiffs in this action are therefore sufficient to enable them to maintain their writ of entry. In what manner and to what extent will the rights of the tenant serve to defeat the action or modify the judgment? It is manifest that, if the general issue were pleaded, and nothing more, the title to the freehold being thus alone put in issue, the demandants must prevail. But suppose the defendant corporation should disclaim title, and specify the rights and authority under which it held the occupation. This would in effect be equivalent to a plea of special non-tenure or special disclaimer. Such a plea, if according to the truth of the case, would be a complete defence to the action. But the

taking them, but also to its rights to enter upon them for the construction of its road.¹ But as this provision is for the benefit of the

demandants may falsify that plea, that is, may show that the party impleaded is, nevertheless, tenant of the freehold. *Jackson on Real Actions*, 96, 101; *Prescott v Hutchinson*, 13 Mass. 439; *Creighton v. Proctor*, 12 Cush. (Mass.) 433, 438; *Dolby v. Miller*, 2 Gray (Mass.), 135; *Johnson v. Phillips*, 13 id. 198. Whenever, upon issue joined on such a plea, it is made to appear that the tenant in the action has in fact asserted rights in, or done acts upon, the premises which are not justified by the special interest or authority

relied on, and which from their character imply a claim of title, or require title to the estate itself for their justification, the plea fails. In this respect, the only difference between a general and a special disclaimer or non-tenure is in the evidence requisite to falsify the plea and establish a disseisin. Where there is a right which authorizes the party defendant, for certain purposes to disturb the soil or occupy the land, acts done in apparent conformity therewith, or even of an equivocal nature, will be referred to that special right; al-

¹ *McAulay v. Western Vt. R. R. Co.*, 33 Vt. 311; *Knapp v. McAulay*, 39 Vt. 275; *Austin v. Rutland, &c. R. R. Co.*, 45 id. 215; *Williams, &c. R. R. Co. v. Battle*, 66 N. C. 540; *Smart v. Portsmouth, &c. R. R. Co.*, 20 N. H. 233; *Baltimore, &c. R. R. Co. v. Highland*, 48 Ind. 381; *Hornback v. Cincinnati, &c. R. R. Co.*, 20 Ohio St. 81; *Baker v. Chicago, &c. R. R. Co.*, 57 Mo. 265; *Pettibone v. La Crosse, &c. R. R. Co.*, 14 Wis. 443; *Coe v. N. J. Midland R. R. Co.*, 32 N. J. Eq. 21; *Vilas v. Milwaukee, &c. R. R. Co.*, 15 Wis. 233; *Pickert v. Ridgefield Park R. R. Co.*, 25 N. J. Eq. 316; *St. Joseph, &c. R. R. Co. v. Callendar*, 13 Kan. 496; *Bloodgood v. Mohawk, &c. R. R. Co.*, 18 Wend. (N. Y.) 9; *Carli v. Stillwater, &c. R. R. Co.*, 16 Minn. 260; *Beekman v. Saratoga, &c. R. R. Co.*, 3 Paige Ch. (N. Y.) 45; *Driver v. Western Union R. R. Co.*, 32 Wis. 559; *Clarkson v. Hudson River R. R. Co.*, 12 N. Y. 304; *Crowner v. Watertown, &c. R. R. Co.*, 9 How. Pr. (N. Y.) 457; *Ballou v. Ballou*, 78 N. Y. 325; *Wheeler v. Rochester, &c. R. R. Co.*, 12 Barb. (N. Y.) 227; *White v. Nashville, &c. R. R. Co.*, 7 Heisk. (Tenn.) 518; *Stacey v. Vt. Central R. R. Co.*, 27 Vt. 39; *Blackshire v. Atchison, &c. R. R. Co.*, 13 Kan. 514; *Schuler v. Northern L. & P. T. R. Co.*, 3 Whart. (Penn.) 555. A railroad company has no right whatever to enter upon, and use and occupy the land of an individual, for the purpose of constructing its road; or to take and appropriate the

timber thereon, against the consent of the owner, before having ascertained the compensation to which such owner is entitled under the Constitution, and the payment thereof. And no provision of the general railroad act can be construed as purporting to give such right. *Blodgett v. Utica, &c. R. R. Co.*, 64 Barb. (N. Y.) 580. The Vermont Gen. Stat. ch. 28, § 17, — permitting land to be taken for a railroad with no appraisal of the damages before the construction of the road, — and § 20, — providing a remedy other than ejectment for such taking, — were construed not to allow remainder-men to maintain ejectment to recover joint possession of land, where a railroad company, owning one undivided moiety thereof in fee, and the life estate of A., in the other moiety, being in exclusive possession, duly located their railroad thereon, and appropriated the whole thereof for the ordinary, necessary, and legitimate purposes of the road, and continued thus to use and possess the same after the termination of said life estate, to the exclusion of the remainder-men, and without the appraisal or payment of land damages under the statute or otherwise, to the remainder-men. *Austin v. Rutland R. R. Co.*, 45 Vt. 215. Until those conditions precedent are performed, the legislature may authorize an award of damages already made to be vacated, and a new one to be made. *Baltimore, &c. R. R. Co. v. Nesbit*, 10 How. (U. S.) 395; *Gowen v. Penobscot R. R. Co.*, 44 Me. 140; *Garrison v. New York*, 21 Wall. (U. S.) 196.

land-owner, he may waive it, and permit an entry without the performance of this condition;¹ and where a railway company, with the

though, in the absence of such authority, the demandant would be entitled to regard the acts as an assertion of title and a disseisin of himself. It is immaterial how great or how limited may be the special interest or authority set up in justification, except as it affects the degree and kind of proof required to show that it has been exceeded, or that it does not apply to or justify the acts done. *In respect to lands taken by railroad corporations, although the discretion of the directors is unlimited as to the mode and extent of the use or occupation for the purposes for which the corporation was created, yet it is definitely limited by those purposes. Any uses of the land confessedly for other purposes, or not apparently for purposes permitted by its charter, are not protected by its authority. For such uses the owner may have his redress by any appropriate action.* A turnpike corporation may remove the earth within the limits of its road, for the purposes of construction or repair, and may erect permanent buildings for a toll-house, with cellar and well. *Tucker v. Tower*, 9 Pick. (Mass.) 109. But it may not even take the herbage for purposes not connected with the exercise of its franchise. *Adams v. Emerson*, 6 Pick. (Mass.) 57. See also *Appleton v. Fullerton*, 1 Gray (Mass.), 186; *Codman v. Evans*, 1 Allen (Mass.), 433. A similar distinction, founded on the purpose of the use of a highway, was pointed out in *Stackpole v. Healy*, 16 Mass. 33. So also as to railroads, in respect of liability to taxation. *Worcester v. Western R. R. Co.*, 4 Met. (Mass.) 564, 569. The rights of any party having an easement in the lands of another are measured and defined by the purpose and character of that easement. For all purposes consistent with that easement, the right to use the land remains in the owner of the fee. *Atkins v. Boardman*, 2 id. 457, 467; *Phipps v. Johnson*, 99 Mass. 26. The principle is the same, however extensive the rights conferred by the easement. In the present case, the occupa-

tion of the buildings upon the demanded premises for the general purposes of trade and mechanical or manufacturing business, by lessees having no other connection with the operations or interests of the corporation than as its tenants paying rent, and the conversion of those buildings by the corporation from their original design into private stores or shops for the purpose of so changing their use, placed them beyond the scope of the corporate purposes and functions. It is such an occupation of the land as, without warrant from the public authority, involves an assumption of ownership, and entitles the demandants to treat the corporation as tenant of the freehold by disseisin. *Jackson on Real Actions*, 97; *Johnson v. Phillips*, 13 Gray (Mass.), 198; *Johnson v. Boardman*, 6 Allen (Mass.), 28. The fact that the corporation has a valid easement, which entitles it to a greater or less use of the land for other purposes, is no impediment to a recovery by the demandants in this action; for the judgment will be rendered subject to such valid easement as the tenant actually has. *Alden v. Murdock*, 13 Mass. 256; *Morgan v. Moore*, 3 Gray (Mass.), 319; *Castle v. Palmer*, 6 Allen (Mass.), 401. The easement of the railroad corporation is of such a nature that the demandants cannot have judgment and execution that will exclude the corporation from complete possession and control of the premises for all purposes pertaining to the exercise of its corporate franchises. But they are entitled to a judgment which shall establish their title and rights as owners of the fee, and secure to them proper damages for the wrongful use of the land as well as their costs of suit. *Prescott v. Hutchinson*, 13 Mass. 439; *Richards v. Randall*, 4 Gray (Mass.), 53; Gen. Sts., ch. 134, § 14. The assessment of damages or mesne profits will be made with reference to the measure of title established by the suit. As to the land within the limits of the location, the tenant has made use of it for

¹ *McAulay v. Western Vermont R. Co.*, 33 Vt. 311.

consent of the owner of the land, enters upon it and constructs its road, and subsequently sells its road, or it is sold under a mortgage or under judicial orders, the title passes to the vendee, and the owner of such land cannot maintain ejectment against the vendee for the portion of his land occupied by such railway. Thus, in a Nebraska case,¹ the plaintiff was one of the original projectors of the O. & N. W. R. R., owning more than one fifth part of its capital stock, and was an active member of its board of directors during the whole life of the corporation. In 1869 the line of the road was laid out and established, and the first ten miles graded, passing over and occupying a tract of land belonging to the plaintiff. No objection was made by him to the occupation of his land by the railroad track. In May, 1871, the first twenty-six miles of the railroad, including that part crossing his land, was conveyed by the railroad company by deed of trust, to secure the payment of certain bonds therein described. In 1878 the deed of trust was foreclosed in equity, and the railroad was sold to satisfy the principal and interest due on the bonds. The defendant took its title to the railroad under such sale. Afterward the plaintiff brought ejectment, against the defendant to eject it from said land. It was held that the action could not be sustained. Said COBB, J., "The rights of property, however sacred, and guaranteed by the Constitution and the laws, yet must be held and enjoyed in relation to the rights of others. While property in the possession of the owner may be kept and enjoyed by him with little or no respect to the wants or wishes of other people, yet when he once suffers it to pass from his own

a valuable purpose. Its charter affords no justification of that use, and no protection against the claim of the owner of the fee for the mesne profits, against any disseisor. The assessor will therefore estimate the damages for all the parcels alike, according to the full, clear, annual value of the land, not including the improvements. Gen. Sts., ch. 134, §§ 15, 16; *Hatch v. Dwight*, 17 Mass. 289, 298. As the precise mode and extent of the projection of the building upon parcel B. does not appear, we cannot indicate beforehand whether any allowance should be made for improvements upon that parcel, or in what manner the structure is to be disposed of. Its situation is such as will probably lead both parties to find their

interests best promoted by an amicable adjustment in relation thereto. The computation will include six years preceding the suit, and the time since the date of the writ to the time of the return of the assessor's report. *Curtis v. Francis*, 9 Cush. (Mass.) 427, 468. In pursuance of the agreement upon which the case is brought up to us, an assessor will be appointed to estimate the damages accordingly. Judgment for the demandants, subject to all rights conferred upon the tenants by their corporate charter, and the location of their railroad over a part of the demanded premises."

¹ *Omaha, &c. R. Co. v. Redick*, 16 Neb. 313; 17 Am. & Eng. R. Cas. 107.

possession and control into that of others, either with or without consideration, the law limits him in the manner of repossessing himself of it, and this limitation can only be measured by the facts of each case as it arises. One who is put in possession upon an agreement for the purchase of land cannot be ousted by ejectment before his lawful possession is determined, by demand of possession or otherwise. It is also true that under the Constitution and laws of this State the assessment of damages, and payment or deposit of the amount is a condition precedent to the vesting of the title, or of any right in the company to construct their road. But these conditions are susceptible of being waived, and in these great public works the shortest period of clear acquiescence, so as fairly to lead the company to infer that the party intends to waive his claim for prepayment, will be held to preclude the right to assert the claim in any such form as to stop the company in the progress of the work, and especially to stop the running of the road after it has been put in operation, whereby the public acquire important interests in its continuance. Whatever rights the plaintiff may have against the present plaintiff in error, growing out of this right of way question, and whether he is estopped *in pais* to assert any or all of them, it seems clear to me that he is not entitled to a judgment that would enable him to sever a line of commerce which, by his assent, if not through his active agency in part, was constructed over the same property, and has enjoyed free passage over it for at least seven years."¹

Payment where it has been waived before entry being a condition subsequent, the land-owner cannot resume possession of the land, but, according to the English,² and some very respectable American authorities, he retains an equitable lien upon the land for the payment of such damages, when the company violates the conditions upon which entry without compensation was permitted, which may be enforced in a court of equity,³ or the land-owner may pursue the

¹ REDFIELD, C. J., in *McAulay v. Western Vt. R. R. Co.*, 33 Vt. 311.

² *Earl Ferrers v. Stafford, &c. Ry. Co.*, L. R. 13 Eq. 524; *Lycett v. Stafford, &c. Ry. Co.*, L. R. 13 Eq. 261; *Walker v. Ware, &c. Ry. Co.*, 1 id. 195; *Munns v. Isle of Wight Ry. Co.*, 8 id. 653. But the lien will not be enforced by an injunction restraining the running of engines and trains over the road until the dam-

ages are paid. *Lycett v. Stafford, &c. Ry. Co.*, *ante*; but an order for a receiver will be made with a direction to the company to give him immediate possession. *Munns v. Isle of Wight Ry. Co.*, *ante*.

³ *Gillson v. Savannah, &c. R. R. Co.*, 7 S. C. 173. In *Dayton, &c. R. R. Co. v. Lawton*, 20 Ohio St. 40, a land-owner and a railroad company entered into an agreement that the land-owner should

statutory remedy for his compensation;¹ or, according to some of the cases, where there is a mutual agreement between the company and the land-owner to waive the assessment of damages, and the company agrees to pay a specified price for the land, the land-owner may bring an action against it upon the promise to recover the stipulated price.² According to some of the cases, a land-owner's lien cannot exist upon the land taken by the railway company for its track, because of the nature of the works and the public interest in them.³ A waiver of prepayment of damages may be express or implied, and it will be implied when the company enters and pursues the work of constructing its road under such circumstances as make it his duty to resist the entry if he afterward intends to set up its illegality; and an owner who, by not insisting on prepayment as a condition precedent to a surrender of the land, and by making no attempt to impede the progress of the road-making, induces the company to expend large sums therein, cannot maintain ejectment on the ground of its failure to prepay.⁴ But mere silence and inaction for a few months after being informed that the company are constructing their track over the land will not be treated as such an acquiescence as to estop the owner from maintaining ejectment.⁵ If the entry is permitted upon the promise of the company to place

release to the company a right of way through the land, and allow them to enter and construct the road; and that the company should pay a specified sum at a future day, and should erect certain cattle-guards and crossings. The company took possession and constructed the road before receiving a deed or making payment of the price. It was held, 1. That the land-owner had an equitable lien for the price, and for damages for non-construction of the cattle-guards and crossings; and might elect between asking a specific performance of his contract and enforcement of his lien., 2. That the fact that he retained the legal title was sufficient to put any subsequent mortgagee or purchaser upon notice of his rights, and to charge him with the lien. *Knapp v. McAulay*, 39 Vt. 275; *Provolt v. Chicago, &c. R. R. Co.*, 57 Mo. 256.

¹ *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453; *Western Penn. R. R. Co. v. Johnston*, 59 Penn. St. 290; *Harrington v. St. Paul, &c. R. R. Co.*, 17 Minn. 215; *Smart v. Portsmouth, &c. R. R. Co.*, 20

N. H. 233; *McClinton v. Pittsburgh, &c. R. R. Co.*, 66 Penn. St. 404.

² *Platt v. Western, &c. R. R. Co.*, 65 N. C. 74.

³ *Dunn v. No. Missouri R. R. Co.*, 24 Mo. 493.

⁴ *Provolt v. Chicago, &c. R. R. Co.*, 57 Mo. 256; *Evans v. Missouri, &c. R. R. Co.*, 64 Mo. 453; *Harlow v. Marquette, &c. R. R. Co.*, 41 Mich. 336; *Attorney-General v. N. Y. & Long Branch R. R. Co.*, 25 N. J. Eq. 49; *Pickert v. Ridgefield Park R. R. Co.*, 26 id. 316; *Hentz v. Long Island R. R. Co.*, 13 Barb. (N. Y.) 646; *Cairo, &c. R. R. Co. v. Turner*, 31 Ark. 494; *Goodin v. Cincinnati, &c. Canal Co.*, 18 Ohio, 169; *Pettibone v. La Crosse, &c. R. R. Co.*, 14 Wis. 443; *Taylor v. Pettijohn*, 24 Ill. 312; *Lexington, &c. R. R. Co. v. Ormsby*, 7 Dana (Ky.), 276; *Andrews v. Farmers' Loan & Trust Co.*, 22 Wis. 288.

⁵ *Walker v. Chicago, &c. R. R. Co.*, 57 Mo. 275; *Conger v. Burlington, &c. R. R. Co.*, 41 Iowa, 419.

fences and cattle-guards adjoining the land, he cannot bring ejectment because it failed to do so, but may have his remedy in an action for specific performance, or he may build them and recover the expense from the company.¹

Where the entry is made without tendering or paying the land damages, without the assent of the owner, and the latter may maintain an action to recover possession, and may enjoin the use of his land until his damages are assessed and tendered;² and the same rule also prevails where the statute requires that the amount of damages assessed shall be paid, or deposited with the clerk of the court, and an entry is made pending an appeal from the assessment, without depositing the money as required.³

SEC. 247. Trespasser, when. — Where a railway company enters upon lands without the assent of the owner, and without having complied with the conditions of the statute, it is a trespasser, and the owner of the land may maintain ejectment against it, to recover possession,⁴ or trespass for the damages;⁵ and the same rule pre-

¹ *Baker v. Chicago, &c. R. R. Co.*, 57 Mo. 265. And the same is also the case where the right of way was relinquished upon the promise of the company to build a depot at a certain place. *Hubbard v. Kansas City, &c. R. R. Co.*, 63 Mo. 68. Thus, a land-owner for one dollar released to a railroad company the right of way, etc., through his land, and sold them a lot on which to erect a depot. In an action for not erecting it, it was held that parol evidence that its erection was the consideration for the release, was admissible; and that the measure of damage for the breach would be the additional value that would have

accrued to plaintiff's land had the depot been erected. But profits of business could not be considered. *Watterson v. Allegheny Valley R. R. Co.*, 74 Penn. St. 208.

² *Cox v. Louisville, &c. R. R. Co.*, 48 Ind. 178.

³ *Ring v. Mississippi River Bridge Co.*, 57 Mo. 496.

⁴ *P. W. & B. R. R. Co. v. High*, 89 Penn. St. 282; *Robinson v. Pittsburgh R. R. Co.*, 57 Cal. 417; *McClinton v. Pittsburgh, &c. R. R. Co.*, 66 Penn. St. 404; *Chicago, &c. R. R. Co. v. Knox College*, 34 Ill. 195; *Congler v. Burlington, &c. R. R. Co.*, 41 Iowa, 419; Gil-

⁵ *Hooker v. N. Y. & New Haven R. R. Co.*, 14 Conn. 146; *Rush v. Milwaukee, &c. R. R. Co.*, 54 Wis. 136; *Justice v. Nesquehoning Valley R. R. Co.*, 87 Penn. St. 28; *Evansville, &c. R. R. Co. v. Dick*, 9 Ind. 433; *Blodgett v. Utica, &c. R. R. Co.*, 64 Barb. (N. Y.) 480; *Murray v. Fitchburg R. R. Co.*, 130 Mass. 99; *Smart v. Portsmouth, &c. R. R. Co.*, 20 N. H. 233; *Buffalo Bayou, &c. R. R. Co. v. Ferris*, 26 Tex. 588; *Drury v. Midland R. R. Co.*, 127 Mass. 571; *Matthews v. St. Paul, &c. R. R. Co.*, 18 Minn. 434; *Tinsman v. Belvidere, &c.*

R. R. Co., 27 N. J. L. 148; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546; *Eaton v. Boston, &c. R. R. Co.*, 51 N. H. 504; *Memphis, &c. R. R. Co. v. Payne*, 37 Miss. 700; *Robinson v. N. Y. & Erie R. R. Co.*, 27 Barb. (N. Y.) 512; *Sherman v. Milwaukee, &c. R. R. Co.*, 40 Wis. 645; *Henry v. Dubuque R. R. Co.*, 10 Iowa, 540; *Hibbs v. Chicago, &c. R. R. Co.*, 39 Iowa, 340; *Indiana R. R. Co. v. Boden*, 10 Ind. 96; *Lee v. Pembroke Iron Co.*, 57 Me. 481; *Cushman v. Smith*, 34 Me. 247.

vails where the company has entered into possession and the proceedings instituted to condemn the land prove to be irregular

man v. Sheboygan R. R. Co., 40 Wis. 653 ; *Levering v. Philadelphia, &c. R. R. Co.*, 8 W. & S. (Penn.) 459 ; *St. Joseph, &c. R. R. Co. v. Callendar*, 18 Kan. 496 ; *Holbert v. St. Louis, &c. R. R. Co.*, 45 Iowa, 23 ; *Smith v. Chicago & Alton R. R. Co.*, 67 Ill. 191 ; *Harrington v. St. Paul, &c. R. R. Co.*, 17 Minn. 215 ; *Cox v. Louisville, &c. R. R. Co.*, 48 Ind. 178 ; *New Orleans v. Selma R. R. Co.*, 70 Ala. 227 ; *Galveston, Harrisburg, & San Antonio R. R. Co. v. Pfeuffer*, 56 Tex. 66 ; *Rusch v. Milwaukee, Lake Shore, & Western R. R. Co.*, 54 Wis. 136 ; *Lozier v. N. Y. Central R. R. Co.*, 42 Barb. (N. Y.) 466 ; *Susquehanna & Wyoming Valley R. R. Co. v. Quick*, 68 Penn. St. 189 ; *Baker v. Long Island R. R. Co.*, 1 How. Pr. (N. Y.) 214 ; *Stewart v. Camden, &c. R. R. Co.*, 38 N. J. L. 115. Where a railroad company had lands condemned for right of way, and the damages were assessed but not paid, and the owner sued and recovered judgment for the damages, but execution was returned "no property found," but the company entered into possession, constructed its road with the consent of the owner, and then leased it to another company, which was occupying and using this right of way when the suit was brought to recover the land, it was held that the suit could not be maintained without notice to quit. *Chicago, Burlington, & Quincy R.R. Co. v. Knox College*, 34 Ill. 195. Ejectment is a proper remedy where land owned in fee by an individual, subject to the public easement of a highway, is appropriated by a railroad company for the use of its road. *Lozier v. New York Central R. R. Co.*, 42 Barb. (N. Y.) 466. Ejectment will not lie to recover an undivided moiety of lands in the possession of a railway company. Thus, a railroad company owning one undivided moiety of land in fee, and the life estate of A. in the other moiety thereof, being in the exclusive possession, duly located its railroad thereon, and appropriated the whole thereof for the ordinary, necessary, and legitimate purposes of the road, and continued to thus use and possess the same after the termination of said

life estate, to the exclusion of the remaindermen, and without the appraisal or payment of land damages, under the statute or otherwise, to the remaindermen. It was held that, on account of the peculiar and extraordinary character of the subject-matter of the case, the remaindermen could not maintain ejectment against said company to recover joint possession of said premises. *Austin v. Rutland R. R. Co.*, 45 Vt. 215. Nor will ejectment lie where the company entered lawfully under proceedings to condemn the land, and deposited the sum assessed and also a bond under the statute, pending an appeal by the land-owner from the assessment, and where the land-owner pending such appeal has accepted the money, even though the proceedings are reversed on appeal. *St. Paul, Alton, &c. R. R. Co. v. Karnes*, 101 Ill. 402. In an action by the owner of the fee to recover land used by a railway company for its road-bed, where the defendant claimed only a right of possession, the presiding judge charged the jury that the plaintiff had the title, and they must find for him the land in dispute, and damages. It was held erroneous, as the right of title does not necessarily carry with it the right of possession ; and for such error a new trial was granted. And no interference with the terms of the deed being alleged or proven, it was held that the plaintiff could not recover possession or damages for its detention. *Tutt v. Port Royal, &c. R. R. Co.*, 16 S. C. 865. In an action of ejectment for possession of an undivided interest in a tract of land, it was held that it was not necessary to allege in the complaint that the defendant had not since its entry upon the premises acquired the right to the possession by condemnation for the purposes of its road. This would be a matter of defence. Neither was it necessary to allege that the defendant was not the owner of the other undivided interest or in possession under the owner. This would also be a matter of defence. *Hennessy v. St. Paul, &c. R. R. Co.*, 30 Minn. 55. In ejectment for land occupied by the defendant's railroad and depot, the defendant in effect pleaded that it

and defective ; and such proceedings are no defence either in ejectment or trespass.¹

had entered by permission of the plaintiffs, and had paid plaintiffs for the right of way over the land, and for the privilege of maintaining a depot ; and that thereupon the plaintiffs had granted to the defendant said right and privilege. The court did not find on this issue, but in effect found that the plaintiffs had consented to the erection of the depots, and had recognized the land as the property of the defendant, and had waived error in the location of the premises. It was held that the finding was beyond the issue, and that the findings were defective in not finding upon the issue presented. *Robinson v. Pittsburgh R. R. Co.*, 57 Cal. 417. *Stewart v. Camden, &c. R. R. Co.*, 33 N. J. L. 115. An action for consequential damages to adjoining land cannot be joined with an action for possession of land unlawfully taken by a railway company. *Welsh v. Chicago, &c. R. R. Co.*, 34 Wis. 494. A complaint in ejectment for land described by reference to monuments need not aver positively the existence of such monuments. Thus, when the land is described as all that part of a designated lot lying within one hundred feet on either side of a certain railroad track, it is no objection to the complaint that it does not positively aver that there is a track on the land. *May v. St. Paul, &c. R. R. Co.*, 26 Minn. 74. In ejectment where the defendant claimed title to the whole premises, disclaiming as to no part thereof, it was held immaterial that the defendant was in actual possession of only a part. *Colorado Central R. R. Co. v. Smith*, 5 Col. 160. Ejectment having been brought in C. county for lands then situate in that county, the subsequent inclusion of the lands within another county by act of the legislature did not divest the jurisdiction of the Circuit Court for C. county in the absence of any provision in the act upon that subject. *Cornell University v. Wisconsin Central R. R. Co.*, 49 Wis. 158. Upon forfeiture of a lease an action of ejectment may be maintained to recover possession. *Horton v. New York Central, &c. R. R. Co.*, 12 Abb. N. Cas. (N. Y.) 30. Occupancy of land

by a railway in course of construction is constructive notice of the company's rights therein. *Detroit, &c. R. R. Co. v. Brown*, 37 Mich. 533. Where land has been appropriated by a railroad company without the payment of compensation therefor, and the defendant corporation seeks to have the amount of the plaintiff's damages assessed on the trial pursuant to the statute, the damages are to be assessed *as of the time of the trial*. *Morin v. St. Paul, Minneapolis, & Manitoba R. R. Co.*, 30 Minn. 100. Mere silence and inaction for the time being on the part of a landowner, when informed that a railroad company is constructing its track over his property, will not be construed into acquiescence so as to estop him from his action of ejectment. *Walker v. Chicago, &c. R. R. Co.*, 57 Mo. 275. But the owner may by his own act estop himself from demanding actual payment of compensation as a condition precedent to the taking for public uses ; and if he expressly consents, *or, with full knowledge of the taking makes no objection, but permits a public corporation to enter upon his land and expend money, and carry into operation the purposes for which it is taken*, he will not be permitted to eject the parties from possession for want of payment of the compensation. *Pryzbylowicz v. Missouri River R. R. Co.*, 17 Fed. Rep. 492. So where the owner has knowledge of the fact that a company is proceeding to locate and construct its road on his land, and allows it to expend large sums of money in improvements for this purpose without interfering, he is estopped from evicting it by ejectment. *New Orleans, &c. R. R. Co. v. Jones*, 68 Ala. 48. A judgment for possession of real estate against a party not in possession, and who holds only a naked legal title, does not affect the rights of one not a party to the action who has possession and full equitable title. *Kansas Pacific R. R. Co. v. McBrotney*, 12 Kans. 1.

¹ *Ewing v. St. Louis*, 5 Wall. (U.S.) 513 ; *Peoria R. R. Co. v. Schertz*, 84 Ill. 135 ; *Blaisdell v. Winthrop*, 118 Mass. 138 ; *Bathe v. Dayton, &c. R. R. Co.*, 37 Ohio St. 147.

A recovery of damages in an action of trespass is no concession of the right of the railway company, nor are the damages recovered in any sense a substitute for the damages given under statutory proceedings, but as a rule only cover the past injury;¹ and in subsequent proceedings by the corporation to condemn the land, the damages recovered in an action of trespass for the wrongful entry are not to be deducted from the damages assessed.² The remedies are entirely distinct from each other in their nature and purposes,³ and the pendency of an action of trespass is not a bar to proceedings to condemn,⁴ nor is the pendency of proceedings to condemn a bar to an action of trespass where the entry was unlawful.⁵ If the

¹ *Anderson R. R. Co. v. Kernodle*, 54 Ind. 314; *Blodgett v. Utica, &c. R. R. Co.*, 64 Barb. (N. Y.) 540; *Hartz v. St. Paul R. R. Co.*, 21 Minn. 358; *Harrington v. St. Paul R. R. Co.*, 17 id. 215; *Adams v. Hastings R. R. Co.*, 18 id. 260.

² *Blodgett v. Utica R. R. Co.*, 64 Barb. (N. Y.) 580; *Harsh v. St. Paul R. R. Co.*, 17 Minn. 439; *Oregon R. R. Co. v. Barlow*, 3 Oregon, 311; *Chicago & Iowa R. R. Co. v. Davis*, 86 Ill. 20; *Leber v. Minneapolis, &c. R. R. Co.*, 29 Minn. 256. In such cases the damages should include compensation for the actual injury, and punitive damages if warranted by the circumstances, but not the value of the land. *Anderson, &c. R. R. Co. v. Kernodle*, 54 Ind. 314. The owner of land which has been unlawfully taken and occupied by a corporation authorized by law to appropriate land cannot maintain an action for the value of the land so taken and also damages accruing by reason of such appropriation, if the circumstances are such that he may recover the land itself. In such case the owner may recover compensation and damages by special proceedings under the statute, or the land itself, as in other cases of unlawful entry. *Atlantic & Great Western R. R. Co. v. Robbins*, 35 Ohio St. 531. Thus, an action was brought in trespass to try title against a railway company, and for damages for destruction of fences and orchards, for fencing in twenty acres, and other items of damage, with a prayer in the alternative, — for restoration of the premises, for damages and injunction; or, if the railway company was entitled to have a right of way condemned, that it be

set aside by metes and bounds. The plaintiff, it was shown, had conveyed by deed a right of way over the land to the company. It was held that the admission of evidence showing the depreciation of the value of the entire property by reason of the location and construction of the railway, connected with the fact that the greater part of the charge related to the condemnation of the right of way and measure of damages in such cases, all of which resulted in an inconsistent verdict, was such error as to require a reversal of the judgment. *Houston, &c. R. R. Co. v. Adams*, 58 Tex. 476. Where a railway company entered upon the land of C. and built its railway, and C. brought an action of trespass *quare clausum fregit* against the company, and recovered judgment, which was paid, and C. afterwards peaceably retook possession of the premises, after which the railway again entered and rebuilt its track, it was held that C. might recover damages in a second suit. *Illinois, &c. R. R. & Coal Co. v. Cobb*, 82 Ill. 183. When damage is done to lands held by a corporation, the party by whose negligence such injury was caused cannot escape liability by showing that the corporation was not permitted by its charter to acquire title to the property, or that it acquired it for purposes unauthorized by law. *Farmers' Loan & Trust Co. v. Green Bay, &c. R. R. Co.*, 11 Biss. (U. S. C. C.) 334.

³ *Loop v. Chamberlain*, 17 Wis. 504.

⁴ *Secombe v. Milwaukee R. R. Co.*, 23 Wall. (U. S.) 108.

⁵ *Coburn v. Pacific Lumber Co.*, 46 Cal. 31.

company, after a wrongful entry, commences proceedings to condemn the land, the damages arising from the trespass are not to be considered,¹ nor, if they are so included, does it bar an action of trespass in favor of the owner when the entry was made.² If a building is erected upon land without the assent and agreement of the owner of the land, it becomes at once a part of the realty, and is the property of the owner of the freehold. Hence, where a railroad company, having obtained a decree for the condemnation of a tract of land without the knowledge of the owner, erected upon it a building of a permanent character for a depot, and afterward the decree was adjudged to be void, it was held that the building had become a part of the realty, and could not be removed by the company; and it made no difference that it was set upon posts and could be taken away without injury to the ground.³

So a railway company which has constructed its track upon a person's land, without filing a written location or presenting a plan thereof, or paying or tendering any damages for the land so taken, cannot enter upon the land for the purpose of removing the track laid upon the road-bed, and structures placed upon the land; such property becomes a part of the realty; and the fact that the original entry and construction were made without objection by a mortgagor in possession cannot avail against the title acquired by the mortgagee by the subsequent foreclosure of his mortgage.⁴ So where the trespass consisted in constructing a railroad across a farm without the right to do so having been acquired by ascertaining and paying compensation to the owner, it was held that if the ties and rails increased the value of the farm, that should be considered in determining the amount of damages; but if the farm was in no way benefited or enhanced in value by the ties and rails being laid across it, no deduction from the damage done to the farm should be made on account of the value of the ties and rails. In other words, conceding that the ties and rails became the property of the land-owner, their value could not be set off against the damage occasioned by the trespass.⁵

¹ *Blodgett v. Utica, &c. R. R. Co.*, 64 Barb. (N. Y.) 580; *McClinton v. Pittsburgh, &c. R. R. Co.*, 66 Penn. St. 404; *Missouri, &c. R. R. Co. v. Ward*, 10 Kan. 352; *Selma, &c. R. R. Co. v. Keith*, 53 Ga. 178; *Praetz v. St. Paul R. R. Co.*, 17 Minn. 163.

² *Harrington v. St. Paul & S. C. R. R.*

Co., 17 Minn. 215; *Pierce v. Worcester, &c. R. R. Co.*, 105 Mass. 199; *Central R. R. Co. v. Hetfield*, 29 N. J. L. 206.

³ *Hunt v. Missouri Pacific R. R. Co.*, 76 Mo. 115.

⁴ *Meriam v. Brown*, 128 Mass. 391.

⁵ *Schroeder v. De Graff*, 28 Minn. 299.

If a land-owner, knowing that a railway company has entered upon his land and is engaged in constructing its road without having complied with the statute, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein;¹ but such acquiescence will not deprive him of his statutory remedy, unless the statutory limitation has expired.² So too, where a railroad company enters upon and occupies land for the use of its road, without complying with the requirements of the statute, without the consent of the owner, and the owner has done no act which amounts to a waiver of his rights, the corporation has no title thereto as against the owner; consequently neither does a mortgagee or lessee of the road acquire any; and a court of equity, upon a bill brought by the owner for that purpose, will enjoin the corporation, or any person claiming under it, from using the land for the purposes of such road, unless they pay the land damages to the owner within a time specified in the decree.³

Where a railway company enters upon lands under proceedings to condemn it, which are afterwards declared void, if it subsequently takes the same under valid proceedings, the owner of the land cannot maintain trespass against it for the first entry. Thus, in a Michigan case,⁴ a railroad company instituted proceedings to condemn land, and an award was made and the amount deposited subject to the land-owner's order. The company immediately entered the land, digging up the trees and fences and building

¹ *Lexington, &c. R. R. Co. v. Ormsby*, 7 Dana (Ky.), 276; *Hurlow v. Marquette, &c. R. R. Co.*, 41 Mich. 336; *Cairo, &c. R. R. Co. v. Turner*, 31 Ark. 494; *Pettibone v. La Crosse, &c. R. R. Co.*, 14 Wis. 443.

² *Gay v. Maine Central R. R. Co.*, 72 Me. 95; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453; *Smart v. Portsmouth, &c. R. R. Co.*, 20 N. H. 233; *Western Penn. R. R. Co. v. Johnston*, 59 Penn. St. 290.

³ In *Kendall v. Missisquoi, &c. R. R. Co.*, 55 Vt., the defendant constructed its road across the land of the oratrix, a married woman, without complying with the statute as to taking land for railroad purposes, without her consent, and without any action of hers that amounted to an

estoppel. After the road was surveyed and located, but before her land was taken, the railroad was mortgaged to secure its bonds owned by the defendant, the C. Railroad Company, and leased to the defendant, the E. Railroad Company. The mortgage was foreclosed and the title established in the bondholders. A bill having been brought to enjoin the defendants from occupying the oratrix's land, it was held that the defendants should be enjoined unless they pay the land damages.

⁴ *Dunlap v. Toledo, &c. R. R. Co.*, 50 Mich. 470. Nor in such case is the landowner entitled to have the value of the track assessed to him as damages. *California, &c. R. R. Co. v. Armstrong*, 46 Cal. 85.

their road-bed. On *certiorari*, the proceedings to condemn were declared void for improper service of notice. The proceedings were immediately renewed and a valid condemnation made, which resulted in a larger award to the owner on account of the injury done. It was held that trespass could not be maintained by the owner for the damage done by the railroad company.¹ There is no doubt that a right in action, where it comes into existence under common-law principles, and is not given by statute as a mere penalty or without equitable basis, is as much property as any tangible possession, and as much within the rules of constitutional protection.² If the railroad company takes possession of land, cuts down trees, and removes the soil, under pretence of a judgment, which proves to be utterly void, and which could therefore constitute no protection whatever, the land-owner has his remedy for the trespass. And even though the company commenced subsequent legal proceedings which resulted in a regular condemnation, while the right of the owner to recover would have been defeated thereby, yet if he had sold the land to a third person, the purchaser's right to recover from the railroad company would have remained unaffected, for the injury was already inflicted, and the injurious consequences which had resulted, or were likely to result, would be taken into account in determining the price.³ But where the railroad itself proceeds to condemn the reversion to its own use, and in doing so takes and pays for the owner's interest according to its value before the wrongful acts were committed, the new and regular proceedings are a substitute for the first and wrongful proceedings, and so far as the wrongful acts worked an injury to the land, the consequences are by the new proceedings appropriated to and taken and borne by the company itself. The owner ceases to have any reversion to which continuous injury can attach, and his previous right of action, so far as it looked to the future and was continuous, has ceased to exist, for the reason that by the necessary effect of the condemnation proceedings it has been estimated and taken into account, and the owner, by the payment made, has been satisfied for it.⁴

¹ *Bloodgood v. Mohawk, &c. R. R. Co.*, 18 Wend. (N. Y.) 9; *Blodgett v. Railroad Co.*, 64 Barb. (N. Y.) 580; *Powers v. Hurmer*, 51 Mo. 136.

² *Johnson v. Jones*, 44 Ill. 142; *Hu-*

bard v. Brainerd, 35 Conn. 563; *Griffin v. Wilcox*, 21 Ind. 370.

³ *McFadden v. Johnson*, 72 Penn. St. 335.

⁴ *Dunlap v. Toledo &c. R. R. Co.*, 50 Mich. 470.

A court of equity has jurisdiction to restrain the commission or continuance of trespasses to lands. But when the title is purely legal, and the property not of peculiar value, the court will not intervene unless the remedy at law is inadequate, or there is a necessity for intervention to prevent irreparable injury.¹ There must be such an injury as from its nature is not susceptible of being compensated by damages at law, or such as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot be prevented otherwise but by an injunction.² There is no authority which authorizes the interference of the court to prevent the mere taking possession of lands and holding them *vi et armis*; nor is there any authority which will justify interference because of the mere continuance of a tortious possession. The entry and possession, however long it may continue, forms but one grievance, a single and indivisible cause of action, capable of full redress by legal remedies.³ The general rule is, that a corporation having the right to take lands in the exercise of the power of eminent domain, if it enters upon them without making just compensation to the owner, a court of equity will intervene for the protection of the owner until just compensation is made, if he applies seasonably. In the case of railway companies entering upon lands, without right, to lay their tracks, etc., courts of equity make an exception to the rule, upon the ground of necessity to prevent irreparable injury.⁴ But the application must be made seasonably; the right to relief is lost by *laches* in seeking the protection of the court. In a New Hampshire case,⁵ the court say: "Another principle which is held to govern the discretion of the court in these cases is that the application for an injunction must be seasonably made; and therefore if it appears that the owner of the property supposed to be affected by a nuisance, has allowed it to exist for several years, with a knowledge of its existence and without any objection, and especially if he has acquiesced in the claim of another to use and enjoy the subject of complaint as of right, and to expend money upon the strength of it, with his knowledge and without objection, courts of equity will decline to grant an injunc-

¹ M. & W. P. R. R. Co. v. Walton, 14 Ala. 207; Burnett v. Craig, 30 id. 135; Brooks v. Diaz, 35 id. 599; Nevers v. Myer, 52 id. 198; Boulo v. R. R. Co., 55 id. 480.

² 2 Story Eq. § 925

³ Ballantine v. Town of Harrison, 37 N. J. Eq. 560; 45 Am. Rep. 667.

⁴ Johnston v. Hyde, 25 N. J. Eq. 454; Southmayd v. McLaughlin, 24 id. 454.

⁵ Bassett v. Salisbury Mfg. Co., 47 N. H. 439.

tion, but leave him to his remedy at law."¹ Considerations of public policy, as well as recognized principles of justice between parties, require that the courts should hold that the property of the owner cannot be reclaimed, and that there only remains to him a right of compensation. This is the generally recognized doctrine; and it is rigidly applied even by those courts which interfere most liberally for the protection of land-owners against the unlawful entry of railroad or similar corporations.² As a rule, legal rights, except in cases of absolute necessity, are to be asserted and established in courts of law; and even in cases where a court of equity does interfere, it will not assume jurisdiction over the legal aspects of the case.

SEC. 248. **Statutory Remedy is exclusive.** — It is now almost universally held that where the statute permits land to be taken for public uses, and provides a remedy therefor, that such remedy is exclusive, and the common-law remedy is merged therein. Thus, in a Rhode Island case,³ the statute empowered the city of Providence

¹ *Goodin v. Cincinnati R. Co.*, 18 Ohio St. 169.

² *Binney's Case*, 2 Bland Ch. (Md.) 99; *Morris, &c. R. Co. v. Prudden*, 20 N. J. Eq. 530; *Eastern v. New York, &c. R. Co.*, 26 N. J. Eq. 359; *Traphagen v. Mayor*, 29 N. J. Eq. 206.

³ *Smith v. Tripp*, 14 R. I. 112. See also sustaining the same view, *Perley v. Boston, &c. R. Co.*, 57 N. H. 212; *Orr v. Quimby*, 54 N. H. 590; *Eaton v. Boston, &c. R. Co.*, 5 N. H. 504; *Dearborn v. Boston, &c. R. Co.*, 24 N. H. 179; *Henniker v. Contoocook Valley R. Co.*, 29 N. H. 146; *Clark v. Boston, &c. R. Co.*, 24 N. H. 114; *Troy v. Cheshire R. Co.*, 23 N. H. 83; *Lafayette Plank Road Co. v. New Albany, &c. R. Co.*, 13 Ind. 90; *Indiana Central R. Co. v. Oaks*, 20 Ind. 9; *Green v. Boody*, 21 Ind. 10; *Teick v. Carver County*, 11 Minn. 292; *Lindell v. Hannibal, &c. R. Co.*, 36 Mo. 543; *Clark v. Hannibal, &c. R. Co.*, 36 Mo. 202; *Pettibone v. La Crosse, &c. R. Co.*, 14 Wis. 448; *Sherman v. Milwaukee, &c. R. Co.*, 40 Wis. 645; *Kennedy v. Milwaukee, &c. R. Co.*, 22 Wis. 581; *Ford v. Chicago, &c. R. Co.*, 14 Wis. 609; *Stowell v. Flagg*, 11 Mass. 364; *Perry v. Worcester*, 6 Gray (Mass.), 544; *Stevens v. Middlesex Canal Co.*, 12 Mass. 466; *Mellen v. Western R. Co.*, 4 Gray (Mass.), 301; *Sabin v. Vt. Central R. Co.*, 25 Vt. 363; *Vermont Central R. Co. v. Baxter*, 22 Vt.

365; *Mason v. Kennebec, &c. R. Co.*, 31 Me. 215; *Boothbay v. Androscoggin, &c. R. Co.*, 51 Me. 318; *Gowen v. Penobscot, &c. R. Co.*, 44 Me. 140; *McCormack v. Terre Haute, &c. R. R. Co.*, 9 Ind. 283; *Null v. Whitewater, &c. Canal Co.*, 4 Ind. 431; *Lewiston v. Junction R. R. Co.*, 7 Ind. 597; *Lafayette, &c. R. Co. v. Smith*, 6 Ind. 249; *New Albany, &c. R. Co. v. Connelly*, 7 Ind. 32; *Furness v. Hudson River R. Co.*, 5 Sandf. (N. Y.) 551; *Selden v. Delaware, &c. Canal Co.*, 29 N. Y. 634; *Calking v. Baldwin*, 4 Wend. (N. Y.) 667; *Cairo, &c. R. Co. v. Turner*, 31 Ark. 494; *Stodgill v. Chicago, &c. R. Co.*, 43 Iowa, 26; *Daniels v. Chicago, &c. R. Co.*, 35 Iowa, 129; *McIntire v. Western North Carolina R. Co.*, 67 N. C. 278; *Tennessee, &c. R. Co. v. Adams*, 8 Head (Tenn.), 596; *Colcough v. Nashville, &c. R. Co.*, 2 Head (Tenn.), 171; *Brown v. Beatty*, 34 Miss. 227; *Fuller v. Edings*, 11 Rich. (S. C.) 239; *McLaughlin v. Charlotte, &c. R. Co.*, 5 Rich. (S. C.) 583; *Little Miami R. Co. v. Whiteacre*, 8 Ohio St. 590; *Hueston v. Eaton, &c. R. Co.*, 4 Ohio St. 685; *Philadelphia, &c. R. Co. v. Yeiser*, 8 Penn. St. 366; *McKinney v. Monongahela Nav. Co.*, 14 Penn. St. 65; *Fehr v. Schuykill Nav. Co.*, 69 Penn. St. 161; *Philadelphia, &c. R. Co. v. Williams*, 54 Penn. St. 103; *Koch v. Williamsport Water Co.*, 65 Penn. St. 288; *Cumberland Valley R. Co. v. Mc-*

to take land for public water-works, and provided that the owner of condemned land might recover compensation by filing his petition in the Supreme Court "at any time within, but not after one year from the time of the taking," if he did not agree with the city upon the price of the land. A., the owner of land taken, permitted the statutory time to elapse without agreeing upon the price, and then brought *assumpsit* against the city, declaring first on an implied promise to pay him just compensation, second on a promise to pay the value of the land with interest, and third on a promise to pay for the permissive taking and use of the land. The city pleaded the statute, the failure to agree for the price, and the lapse of the statutory time in bar of the suit. To this plea A. demurred. It was held that the plea was good and that A. was remediless, the statutory remedy being exclusive.¹ The few cases which hold otherwise are exceptional. It is well settled that a reasonable limitation of the time for pursuing the statutory remedy is constitutional.²

Laohan, 59 Penn. St. 23; *Johnson v. St Louis, &c. R. Co.*, 32 Ark. 758. But in Georgia it is held that the statutory remedy is not exclusive, and that trespass may be maintained by the owner. *Atlantic, &c. R. Co. v. Fuller*, 48 Ga. 423; *Carr v. Georgia R. Co.*, 1 Ga. 524. And in Texas, where the company alone can institute proceedings to condemn, it is held that under the statute, where a railroad company enters upon land without condemnation, the land-owner is entitled to bring action for its value in the courts; and it is not a defence to his action that he has not sought relief under a statute for condemning land. When a statute provides a tribunal and mode of procedure by which property may be condemned to a public use, such tribunal has an exclusive jurisdiction, and the person or corporation to whom the statute gives the right to institute a proceeding to condemn land cannot resort to any other. In this State, the right to institute a proceeding to condemn land for the roadway of a railroad is given to the company seeking it, and to no other person; and if a company fails to avail itself of this right, and without the consent of the owner enters upon his land, such owner is entitled to resort to any court having jurisdiction, by reason of the amount of damage claimed, for redress of the wrong. *International, &c. R. Co. v. Ben-*

itos, 59 Tex. 326; 10 Am. & Eng. R. Cas. 122.

Where lands have been entered upon and appropriated without authority, a statute subsequently passed which authorizes the appointment of commissioners to appraise the damages already sustained, and which makes the award and payment or tender of the sum awarded a bar to any action to recover damages, is unconstitutional in that it deprives the land-owner of his right to a trial by jury. *In re Townsend*, 39 N. Y. 171.

¹ *Colcough v. Nashville, &c. R. Co.*, 2 Head (Tenn.), 171; *Stevens v. Middlesex Canal*, 12 Mass. 466; *Heard v. Middlesex Canal*, 5 Met. (Mass.) 81; *Perry v. Worcester*, 6 Gray (Mass.), 544; *Spring v. Russell*, 7 Me. 273; *Mason v. Kennebec, &c. R. Co.*, 31 Me. 215; *Henniker v. Contoocook Valley R. Co.*, 29 N. H. 146; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359; *Calking v. Baldwin*, 4 Wend. (N. Y.) 667; *McKinney v. Monongahela Nav. Co.*, 14 Penn. St. 65; *Harper v. Richardson*, 22 Cal. 251; *McCormack v. Terre Haute, &c. R. Co.*, 9 Ind. 283; *Dyer v. Tuscaloosa B. Co.*, 2 Port. (Ala.) 296.

² *Cooley Const. Lim.* 501; *Rexford v. Knight*, 11 N. Y. 308; *Taylor v. Marcy*, 25 Ill. 518; *Harper v. Richardson*, 22 Cal. 251; *Cupp v. Commissioners*, 19 Ohio St. 173; *Simms v. Memphis, &c. R. Co.*, 12 Heisk. (Tenn.) 621.

These cases plainly presuppose that the statutory remedy is exclusive; for otherwise any limitation shorter than that of the proper common-law action would amount to nothing.¹ If an express promise on the part of the corporation is relied upon to avoid the effect of the limitation clause in the statute, in order to be provable under the pleadings it must have been general in its terms and nugatory because without consideration, whether made during the year or after its expiration.²

But where the company is alone clothed with the right to institute proceedings, if they fail to do so, but enter into possession without the consent of the owner, the latter may resort to any court having jurisdiction, to redress the injury either by an action of ejectment or trespass to recover the value of the land.³ Thus, in a Texas case,⁴ an action was brought by the plaintiff to recover damages for an entry into his lands by the defendant to construct its railway, without first instituting proceedings to condemn the land and without the owner's consent. The petition alleged that the fencing around the lot was torn down and destroyed, and that by reason of the failure of the company to restore it, he was prevented

¹ *Coe v. Wise*, L. R. 1 Q. B. 711.

² *Markman v. Shepherdson*, 11 Ad. & El. 411; *Shepard v. Rhodes*, 7 R. I. 470; *Eastwood v. Kenyon*, 11 Ad. & El. 438; *Mills v. Wyman*, 3 Pick. (Mass.) 207; *Cook v. Bradley*, 7 Conn. 57; *Bartholomew v. Jackson*, 30 Johns. (N. Y.) 28; *Ehle v. Judson*, 24 Wend. (N. Y.) 97; *Porterfield v. Butler*, 47 Miss. 165. The true doctrine has never been better stated than by Lord DENMAN in *Beaumont v. Reeve*, 8 Q. B. 483: "An express promise cannot be supported by a consideration from which the law could not imply a promise, except when the express promise does away with a legal suspension or bar of a right of action, which but for such suspension or bar would be valid." See also *Roscorla v. Thomas*, 3 Q. B. 234. The idea that a promise can be supported by a mere moral obligation, simply because the promise is express, involves a logical inconsistency.

³ *Bentonville, &c. R. Co. v. Baker*, 45 Ark. 252; *Cairo, &c. R. Co. v. Trout*, 32 Ark. 17; *Smith v. Chicago, &c. R. Co.*, 67 Ill. 196; *Atlantic v. Georgia R. Co.*, 48 Ga. 423; *Bliss v. Chicago, &c. R. Co.*, 43 Wis. 192; *Kansas, &c. R. Co. v.*

Streeter, 8 Kan. 135; *Goulard v. St. Louis*, 36 Mo. 532; *Davis v. Russell*, 47 Me. 443; *Stein v. Burden*, 24 Ala. 146; *Loop v. Chamberlain*, 20 Wis. 135; *Pettibone v. La Crosse, &c. R. Co.*, 14 Wis. 443; *Blesch v. Chicago, &c. R. Co.*, 43 Wis. 183; *Cushman v. Smith*, 34 Me. 237; *Gowen v. Penobscot R. Co.*, 44 Me. 140; *Hall v. Pickering*, 40 Me. 548; *Eward v. Lawrenceburgh, &c. R. Co.*, 7 Ind. 711; *Sherman v. Milwaukee, &c. R. Co.*, 40 Wis. 645. The statutory remedy does not include cases of trespass committed by the company before its possession of the land became lawful, and a separate action for such damages may be sustained. *Selma, &c. R. Co. v. Keith*, 53 Ga. 178; *Stodghill v. Chicago, &c. R. Co.* 43 Iowa, 26; *Missouri, &c. R. Co. v. Ward*, 10 Kan. 352; *Parsons v. Howe*, 41 Me. 218; *Proprietors, &c. v. Nashua, &c. Locks Co.*, 10 Cush. (Mass.) 385; *Matthews v. St. Paul, &c. R. Co.*, 18 Minn. 434; *In re Townsend*, 39 N. Y. 171; *Whitaker v. Delaware, &c. R. Co.*, 87 Penn. St. 34; *Pomeroy v. Chicago, &c. R. Co.*, 25 Wis. 641; *Bell v. Midland Ry. Co.*, 10 C. B. n. s. 287.

⁴ *Internat. &c. R. Co. v. Benitos*, 59 Tex. 326; 10 Am & Eng. R. Cas. 122.

from making a crop on the land. The plaintiff claimed both the damages *and the value of the land*, and the court held that both could be recovered in the action.¹ This would be the rule in all the

¹ STAYTON, J., said: "It is claimed that the District Court had no jurisdiction of the cause, and that the sole remedy which the appellees had was by a proceeding under the statute to condemn the land to the use of the railroad. This position cannot be maintained. It is held by the great weight of authority that when a statute provides a tribunal and mode of procedure by which property may be condemned to a public use such tribunal has an exclusive jurisdiction, and that the person or corporation to whom the statute gives the right to institute a proceeding to condemn land cannot resort to any other. In this State the right to institute a proceeding to condemn land for the roadway of a railroad is given to the company seeking it, and to no other person; and if a company fails to avail itself of this right, and without the consent of the owner enters upon his land, such owner is entitled to resort to any court having jurisdiction by reason of the amount of damage claimed for redress of the wrong. *Atlantic v. Georgia R. R. Co.*, 48 Ga. 423; *Sherman v. the Milwaukee L. S. & W. R. R. Co.*, 40 Wis. 652; *Bliss v. the Chicago & N. W. R. R. Co.*, 43 Wis. 192; *Kansas Pacific R. R. Co. v. Streeter*, 8 Kan. 135; *Stein v. Burden*, 24 Ala. 146; *Goulard v. the City of St. Louis*, 36 Mo. 532. In this case the plaintiffs have elected to receive compensation for the value of the land taken, and we see no reason why the District Court has not jurisdiction under the amounts in the petition, the defendant having failed to pursue the statutory method of condemnation to award to the plaintiffs such compensation as they may be entitled to, and in the same proceeding to vest in the defendant the right of way. In speaking upon this subject, BRUCE, J., delivering the opinion of the court, said: 'They were required and were bound to take the initiatives. No burden is thrown upon the owner of the land. Whilst *mandamus* is the proper remedy in many cases against such a corporation, this is not one of them.

Here the corporation was, without authority of law, taking possession of appellant's land, and the question is, shall they be allowed to rob the appellant at defiance, and compel him to institute proceedings by which he is to be deprived of his land? Two remedies, it seems to us, were open to the appellant,—this action of ejectment, or an action to recover the value of the land taken.' *Smith v. C. & A. St. L. R. R. Co.*, 67 Ill. 196. In the case of *Gilman v. Sheboygan, &c. R. R. Co.*, 40 Wis. 660, COLLE, J., said: 'Doubtless an action of ejectment would lie against the defendant to recover the possession of the property. But the plaintiff has not seen fit to resort to that remedy, but seeks by an action in equity to compel the defendant either to abandon the possession and use of his land, or to pay him for it. His right to that equitable relief is founded upon the fact that he is owner of the land, or upon his title to the property. His land having been taken for public use, the defendant company having adopted and ratified the original taking, it would seem plain that the owner should either have his just compensation required by the Constitution to be paid, or have relief by way of permanent injunction.' It would seem that a recovery of the value of the land taken, without a decree vesting the right of way in the defendant, would be a bar to another action based upon the original taking, or the continued possession, and that the reception of the full value would, at least, operate as a dedication of the right of way to the public use to which it has been applied. *Goulard v. St. Louis*, 36 Mo. 534. While it is true that upon a prior possession a suit of ejectment or of trespass may be maintained against a wrong-doer, and while it is true that in a proceeding instituted by a railway company under the statute to condemn land for a public use, in which the application alleges the ownership, it is not necessary for the alleged owner to make proof of his title, yet, even then, an inquiry can be made into the character of

States, as we have seen, if the company entered without performing the conditions precedent imposed by the statute.

SEC. 249. Statute authorizing Proceedings to Condemn: Provision for Compensation. — The character of the proceedings to condemn lands, as well as the question as to who shall take the initiative therein, or whether the corporation alone, or the land-owner also may bring proceedings, is dependent entirely upon the provisions of the statute in that respect; and as the statutes differ essentially upon these points, it will not be advisable to attempt to outline those matters in this work, as they are questions easy of solution in a given jurisdiction, from the statute itself. If an adequate and certain provision for compensation is not provided, then the statute is void and the land-owner is entitled to remedies legal and equitable to protect his property against condemnation under the statute.¹ But it has been

the estate which the alleged owner has, in order to regulate and determine the extent of compensation to which he is entitled; for that must depend upon the interest which such owner has in the land to be taken. It is believed, however, where, as in this case, the proceeding is instituted by the person who claims to be the owner of the land, that the burden of showing the interest which he has in the land rests upon him; for it is part of his case necessary to be determined in order to measure the damage to which he is entitled." *Peoria & Rock Island R. R. Co. v. Bryant*, 57 Ill. 479; *Robbins v. Milwaukee H. R. R. Co.*, 6 Wis. 644; *Directors of the Poor v. Railroad Co.*, 7 W. & S. (Penn.) 236.

¹ *Hamilton v. Annapolis, &c. R. R. Co.*, 1 Md. Ch. 107; *Perry v. Wilson*, 7 Mass. 393; *Lee v. Pembroke Iron Co.*, 57 Me. 481; *Tuckahoe Canal Co. v. Tuckahoe, &c. R. R. Co.*, 11 Leigh (Va.), 42; *Cushman v. Smith*, 34 Me. 247; *Walther v. Warner*, 25 Mo. 277; *Stevens v. Middlesex Canal Co.*, 12 Mass. 466; *Drury v. Middlesex R. R. Co.*, 127 Mass. 571; *Bellinger v. N. Y. Central R. R. Co.*, 23 N. Y. 42; *Dimmock v. Broadhead*, 75 Penn. St. 464; *Simickson v. Johnson*, 19 N. J. L. 129; *Seneca Road Co. v. Auburn R. R. Co.*, 5 Hill (N. Y.), 170; *Conn. River R. R. Co. v. County Comm'rs*, 127 Mass. 100; *Bonaparte v. Camden & Amboy R. R. Co.*, *Baldw.* (U. S. C. C.) 205;

Thacher v. Dartmouth Bridge, 18 Pick. (Mass.) 501. Whenever in pursuance of law the property of an individual is to be divested by proceedings against his will, there must be a strict compliance with all the provisions of the law which are made for his protection and benefit. These provisions must be regarded as in the nature of conditions precedent, which must not only be complied with before the right of the property owner is disturbed, but the party claiming authority under the adverse proceeding must affirmatively show such compliance. A party's land cannot, under any guise or pretext, be taken for a highway until compensation, ascertained by a jury as prescribed by the statute, is paid to him, and the record must affirmatively show that the law has been observed. Where the verdict of the jury shows that benefits were allowed against the value of the land, it will, under the order establishing the road, be absolutely void. Such defect goes to the jurisdiction of the commissioners. The owner of land condemned for a highway for the use of the public is entitled to be paid in money for the full value of the land actually taken, and he cannot be paid therefor in benefits to result from the laying out of the highway. As to damages, he may be thus compensated. *Carpenter v. Jennings*, 77 Ill. 250; *Hayes v. O. O. &c. R. R. Co.*, 54 id. 373; *Todd v. Kankakee I. R. R. Co.*, 78 id. 120; *Marsh v. Ches-*

held that such an omission may be cured by a subsequent act providing a remedy; but while such subsequent act will validate the former act,¹ it will not give validity to proceedings brought under such act to condemn lands before the subsequent act took effect;² and in the case last cited it was held that the land-owner is entitled to a writ of prohibition to the County Commissioners to prevent them from proceeding with the assessment of damages.³ But as this provision is for the benefit of the land-owner, he may waive the want of such a provision as well as any other defects which are for his benefit alone.⁴ Not only must adequate and certain compensation be provided, but the statute must also provide *a certain and adequate remedy for the assessment of the damages and their prompt payment.*⁵

If a definite fund is provided out of which payment is to be made,⁶ or if adequate provisions for payment and recovery are provided, it is sufficient.⁷ But the mere circumstance that a right of action is given, leaving the land-owner to collect his judgment from the corporation if he can, and placing his remedy in that respect upon the plane of an ordinary debt, is not a compliance with the provisions of the Constitution.⁸ The land cannot be *taken*, until compensation is made therefor. The language of this restrictive

nut, 14 Ill. 225; *Smith v. Chicago, &c. R. Co.*, 67 Ill. 191; *Mitchell v. Illinois & St. L. R. Co.*, 68 Ill. 236; *Chicago, &c. R. Co. v. Smith*, 78 Ill. 96; *Hyslop v. Finch*, 99 Ill. 171.

¹ *Shute v. Chicago, &c. R. Co.*, 26 Ill. 436; *Bonaparte v. Camden, &c. R. Co.*, 1 Baldw. (U. S.) 205; *State v. Seymour*, 35 N. J. L. 47.

² *Conn. River R. Co. v. County Com'rs*, 127 Mass. 100.

³ In this case it was provided in the statute that the damages should be paid out of the earnings of the railway company, and the court held the act unconstitutional even if such earnings would probably be sufficient to pay the land damages.

⁴ *Rickner v. Warner*, 22 Ohio St. 275; *Johnston v. Rankin*, 70 N. C. 550; *Burns v. Milwaukee, &c. R. R. Co.*, 9 Wis. 450; *Haskell v. New Bedford*, 108 Mass. 208; *Brooklyn Park Comm'rs v. Armstrong*, 45 N. Y. 234; *Provolt v. Chicago, &c. R. R. Co.*, 57 Mo. 256; *Brown v. Worcester*, 13 Gray (Mass.), 31; *Eanbury v. Connor*, 8 N. Y. 511.

⁵ *Ash v. Cummings*, 50 N. H. 591; *Orr v. Quimby*, 54 id. 590; *Shearer v. Commissioners*, 13 Kan. 145; *St. Louis, &c., R. R. Co. v. Wilders*, 17 Kan. 239; *Bloodgood v. Mohawk, &c. R. R. Co.*, 18 Wend. (N. Y.) 9; *McClinton v. Pittsburgh, &c. R. R. Co.*, 66 Penn. St. 404; *Shepardson v. Milwaukee, &c. R. R. Co.*, 6 Wis. 605; *Powers v. Bears*, 12 Wis. 213; *Buffalo Bayou, &c. R. R. Co. v. Ferris*, 2 Tex. 588; *Chambers v. Cincinnati, &c. R. R. Co. (Ga.)*, 10 Am. & Eng. R. R. Cas. 376.

⁶ *Conn. River R. R. Co. v. County Comm'rs*, 127 Mass. 56. If provision is made that the State shall pay, it is sufficient, but a provision that the corporation shall pay out of an uncertain fund, as, out of the earnings of the road is not a compliance with the Constitution, and a statute making such a provision is absolutely void. *Conn. River R. R. Co. v. Franklin Co. Comm'rs*, 127 Mass. 50.

⁷ *Orr v. Quimby*, 54 N. H. 590.

⁸ *Ash v. Cummings*, 50 N. H. 591; *Orr v. Quimby, ante*; *Bohlman v. Green Bay, &c. R. R. Co.*, 30 Wis. 105.

clause in the Federal Constitution is, "Nor shall private property be taken for public uses without just compensation;" and similar language is employed in most of the State constitutions. It is held that this provision does not apply to a merely temporary occupation of the land for preliminary purposes, but only to an actual subjection of the property to an easement, or its final transfer.¹ Therefore, compensation need not precede the preliminary entry upon the land by the corporation, *but it must be made, tendered, or secured before the title passes, or before the land is subjected to the easement.* The constitutional provision does not permit the legislature to provide for an entry upon the land by the corporation, and the construction of its road without either a pre-payment of the compensation, or an adequate security for its payment, when the amount thereof is ascertained.²

In a leading case³ under this head WALWORTH, Chancellor, said: "A very important question which arises in this case is, whether the

¹ Cushman v. Smith, 34 Me. 247. In *Livernore v. Jamaica*, 23 Vt. 361, it is said, "To bring a case within the Constitution, *there must be such a taking of property as divests the owner of all title or control over the land, and amounts to an unqualified appropriation thereof.*"

² Jones v. New Orleans, &c. R. Co., 70 Ala. 227; 14 Am. & Eng. R. Cas. 214; Covington, &c. R. Co. v. Piel, 87 Ky. 267; 33 Am. & Eng. R. Cas. 449. See the numerous cases cited *ante*, §§ 241, 246.

³ Bloodgood v. Mohawk, &c. R. Co., 19 Wend. (N. Y.) 9. Where a railroad corporation enters into possession of the land of an individual for the use of the road, without his consent, and without first having assessed and tendered the damages, he may maintain an action against the company to recover possession of the land. *Graham v. Columbus, &c. R. Co.*, 27 Ind. 260. But in Maine, where a railroad corporation have taken exclusive possession of land, they are allowed a reasonable time to obtain the title or an easement in it. But where such occupation is under a claim of title in fee-simple under a deed from the owner, when in fact no such right of occupation exists, they are not entitled to a reasonable time for making the compensation, but are immediately liable to the owner in trespass; and a delay to

take proper measures to make compensation and obtain title or easement is evidence of a design not to take those measures; and a continued occupation will be a trespass. *Hall v. Pickering*, 40 Me. 548. And where an incorporated company neglect to pay to a land-owner the compensation, determined in pursuance of the charter, for injury done to his property by flowage from the erection of a dam, a court of equity will, at the suit of the land-owner, interfere to abate the dam, if the company refuse to pay the award. *Ackerman v. Horicon Iron & Mfg. Co.*, 16 Wis. 150; *Twieg v. Horicon Iron & Mfg. Co.*, 17 Wis. 362. Where a street is taken by a railroad company, the remedy of an abutter, for an injury thereby, is not by statute, but the ordinary one at law to recover for a consequential injury. The lot and street adjoining, as to the owner of the former, constitute but one piece of property, and an injury to the latter is an injury to the former, and to the whole property. *Protzman v. Ind., &c. R. Co.*, 9 Ind. 467. The title to land taken by a company under a charter which provides that they "should be deemed to be seized" of lands, on payment or deposit of their appraised value, does not vest in the company by the location of the road, or filing an appraisement of damages, until

legislature in fact authorized the defendants to enter upon the private property of the plaintiff and to construct their railroad thereon

such payment or deposit. The payment or deposit of the money awarded is a condition precedent to the right of the company to enter upon the land for the purpose of constructing their road. *Stacey v. Vt. Central R. R. Co.*, 27 Vt. 39. Nor does it pass by the filing of a survey in the office of the Secretary of State. *Hetfield v. Central R. R. Co.*, 29 N. J. L. 571. Where the charter of a railroad company required the company to pay or tender the damages for land taken for their road to the owner, before they should break ground upon the same, and if such damages could not be agreed upon by the parties, provided for their assessment by commissioners, from whose decision an unconditional right of appeal was given, it was held that the company could not, by tendering the amount of damages found by the commissioners, gain the right to enter upon the land, except for the purposes of survey, pending an appeal from the commissioners' award. *Browning v. Camden & Woodbury R. R. Co.*, 4 N. J. Eq. 47. Under an act incorporating a railroad company, which provided that the company, having paid the sum awarded into court, where the owner refused to receive it, should be seised of the estate, it was held that after the award and payment of money by the corporation, they were owners of the land, though a *certiorari* had issued to remove the proceedings to the Supreme Court. *Schuler v. Northern, &c. R. R. Co.*, 3 Whart. (Penn.) 555; *Burlington, &c. R. R. Co. v. Sater*, 1 Clarke (Iowa), 421. The damages assessed for land taken for a railroad must be tendered before a right to enter can accrue; but if it is important for the railroad to enter immediately and before an appeal from the assessment can be determined, the tender and acceptance so made will not preclude them from having the damages reduced on the appeal. *Indianapolis & Cincinnati R. R. Co. v. Brower*, 12 Ind. 374. The designation of lands required, the appointment of commissioners, and their report of the compensation to be made, vests no right, either in the company to the lands, or in the owners to the money awarded. Until

an order of court is made, confirming the report, and directing the payment of the money, the proceeding may be set aside or abandoned. *Hudson River R. R. Co. v. Outwater*, 3 Sandf. (N. Y.) 689. A statute enabling a city to supply pure water, and to take land upon valuation by a jury, and compensation to the owners, provided that where "such valuation was paid or tendered to the owner or owners" of the property, it should "entitle the city to the use, estate, and interest in the same, thus valued, as fully as if it had been conveyed by the owners." It was held that the city was not bound by the mere inquisition and judgment thereon, but could rightfully abandon the location, and that payment or tender under the statute was indispensable to the vesting of the title; but that it could be made liable, in another form of proceeding, to the landowner, for any loss or damage sustained by reason of the conduct of its authorities in the premises. *Graff v. Mayor, &c. of Baltimore*, 10 Md. 544. When the route of a railroad is, before payment of the damages, shifted so as to avoid the land, this is an abandonment, and no interest in the land remains to the company, and no damages can be recovered against them under the award. *Stacey v. Vermont Central R. R. Co.*, 27 Vt. 39. When public officers have proceeded under statutory authority to condemn lands for the public use, and an appraisal of the value of the lands and damages has been made, but not yet confirmed by the court in pursuance of the statute, such proceedings may be discontinued against the assent of the land-owners; otherwise when the report of the appraisers has been accepted by the court. *Water Commissioners of Jersey City, Matter of*, 31 N. J. L. 72. But where proceedings have been in conformity with its charter, its title becomes perfect on the filing and recording of the rule of court made on the certificate of the commissioners, and payment or deposit of the compensation awarded; and an order vacating the proceedings does not divest the title. *Visscher v. Hudson River R. R. Co.*, 15 Barb. (N. Y.) 37. After prop-

before his damages were actually assessed and paid or offered to be paid to him; and if such is the construction of the law, whether

erty has been taken for a public use, a statute repealing the statute under which proceedings to determine the compensation were to be had, and declaring such proceedings void, is unconstitutional. The fact that the proposed public use was abandoned, and the property has been relinquished again to the owners, does not affect their vested right to the compensation; though, perhaps, it might have been competent for the legislature, in such a case, to direct a reassessment of the compensation. *People v. Supervisors of Westchester*, 4 Barb. (N. Y.) 64. The charter of a railroad company provided that damages for land should be assessed by a sheriff's jury, whose inquisition should be confirmed by the county court, if no cause to the contrary should be shown, and that the valuation so assessed, when paid or tendered to the owner of the land, should entitle the company to the estate and interest therein as fully as if it had been conveyed to them by the owner. It was held that before payment or tender by the company of damages so assessed, the company were not bound, and could refuse to take the land at the assessment; and hence an act of the legislature passed after the county court had confirmed an assessment, but before tender of the amount, directing the court to set aside the inquisition and order a new one, was not unconstitutional, as impairing the obligation of a contract. *Baltimore & Susquehanna R. R. Co. v. Nesbit*, 10 How. (U. S.) 395. Under a constitutional provision "that no person's property shall be taken or applied to public use without the consent of the legislature, and without a just compensation first made therefor," an offer of compensation is a condition precedent to the seizure of the land; and, therefore, a provision in the charter of a railroad corporation authorizing the company to take the land of individuals, without providing for such previous compensation, is void. *Thompson v. Grand Gulf R. R., &c. Co.*, 5 Miss. 240. And the title to land appropriated, against the consent of the owner, by a company, under their act of incorporation, for the purposes of its works, does not vest in the corporation until compensation is made or adequate security is given therefor. *Borough of Easton's Appeal*, 47 Pa. St. 255; *Carr v. Georgia R. R. & Banking Co.*, 4 Ga. 524; *Milwaukee & Mississippi R. R. Co. v. Eble*, 4 Chand. (Wis.) 72; *Ramsden v. Manchester, &c. Ry.*, 5 Eng. Ry. Cas. 552; *Bloodgood v. M. & H. R. R. Co.*, 14 Wend. (N. Y.) 51; 18 id. 59. Where the charter of the company provides that after the appraisal of land for their use, "*upon the payment of the same*," or deposit (as the case may be), the company shall be deemed to be seised and possessed of all such lands, they must pay or deposit the money before any such right accrues. The payment or deposit of the money awarded is a condition precedent to the right of the company to enter upon the land for the purposes of construction, and without compliance with it, they may be enjoined by a court of equity, or prosecuted in trespass at law for so doing. The right of the land-owner to the damages awarded is a correlative right to that of the company to the land. If the company have no vested right to the land, the land-owner has none to the price to be paid. *Stacey v. Vermont Central R. R. Co.*, 27 Vt. 39. If the owner of land through which a company wishes to run a railroad agrees to refer to arbitrators the question of damages to be paid by the company for the right of way, and there is no express agreement that time shall be given for the payment of the damages awarded, they must be paid before the right of way can vest in the company. *Stewart v. Raymond R. R. Co.*, 15 Miss. 568. Railroad companies in New York have no right to enter upon a turnpike or plank-road without the consent of the owners, except upon the condition of first paying the damages sustained by the turnpike or plank-road company, after the same shall have been ascertained under the statute. *Ellicottville, &c. Plank-Road Co. v. Buffalo, &c. R. R. Co.*, 20 Barb. (N. Y.) 644. Under the general railroad law of Missouri, no entry for the purpose of constructing a railroad upon land taken under the right of eminent domain can be justified until

such a power is authorized by the Constitution. In an early case¹ this court decided that where private property was taken for public use it was not necessary that the amount of the compensation should be actually ascertained and paid before such property was appropriated to the public use; that it was sufficient *if a certain and adequate remedy was provided by which the individual could obtain such compensation without any unreasonable delay*. This decision has been followed by the courts of several of our sister States. To this extent the opinion of Chancellor KENT² must be considered as the settled construction of the constitutional provision on this subject, at least in this State. I cannot, however, agree with my learned predecessor in his subsequent reasoning in that case, upon which he

the compensation has been actually paid. But the legislature may authorize the entry upon land without compensation, for the purpose of making the preliminary examinations and surveys before the location of the road. *Walther v. Warner*, 25 Mo. 277. Upon payment of the compensation assessed by commissioners, and taking possession afterward, the title of the company is perfected, as against the party to the proceedings. *Bath River Navigation Co. v. Willis*, 2 Eng. Ry. Cas. 7. Where a corporation has pursued the course prescribed by the statute to obtain land, the title of the company to it is perfect, though the proprietor of the land obstinately refuses to accept the money awarded. *Montgomery, &c. R. R. Co. v. Walton*, 14 Ala. 207. A corporation acquiring lands by a statutory proceeding, for its corporate uses, derives its title from the statute, and not from the judgment of the court; and the court in the absence of an express authority cannot give it possession by process. If the owner forcibly prevents the company from taking possession, the remedy is by action. *Niagara Falls & Lake Ontario R. R. Co. v. Hotchkiss*, 16 Barb. (N. Y.) 270. And if the former owner threatens resistance, he may be restrained by injunction. *Montgomery R. R. Co. v. Walton*, 14 Ala. 207. Where a company, under color of law, enter upon land for the purpose of constructing their works, without having complied with the requirements relative to such entry, an injunction will be granted to restrain them. *Browning v. Camden & Woodbury R. R.*

Co., 4 N. J. Eq. 47; *Mercer v. Williams*, Walk. Ch. (Mich.) 85. Where a charter requires that before taking and appropriating lands the company shall pay or tender payment of all damages to the owners of the lands to be taken, unless the owners consent thereto, if the company enter upon lands in violation of this provision, an injunction will issue to restrain them. *Ross v. Elizabethtown & Somerville R. R. Co.*, 4 N. J. Eq. 422. Under the constitution of Maryland, it is held to be sufficient ground for an injunction to prevent a company from entering on land, that they have not paid or secured the damages. And an averment in the bill of irreparable injury is not necessary. *Western Maryland R. R. Co. v. Owings*, 15 Md. 199. And in Mississippi, where a railroad company neglects to pay a landowner the damages awarded him for the right of way through his land, and he is exposed to the transit of the cars of the company over his land for an indefinite period, with but little prospect of compensation, an injunction will lie to restrain the further use of the land. *Stewart v. Raymond R. R. Co.*, 7 S. & M. (Miss.) 568. So an injunction properly lies to prevent a corporation from appropriating private property for a turnpike, before just compensation is assessed and tendered. *Sidenar v. Norristown, Hope, & St. Louis Turnpike Co.*, 23 Ind. 623.

¹ *Rogers v. Bradshaw*, 20 Johns. (N. Y.) 735.

² In the case of *Rogers v. Bradshaw*.

afterwards acted,¹ that it is not necessary to the validity of a statute authorizing private property to be taken for the public use that

¹ In the case of *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 344. Full compensation must be first made in money, or secured by a deposit of money, before any right of way can be appropriated to the use of a corporation. *St. Joseph, &c. R. R. Co. v. Callendar*; 13 Kan. 496; *Chesapeake, &c. R. R. Co. v. Patton*, 6 W. Va. 147. And it is held in New York that the general railroad law cannot be construed as purporting to authorize a railroad company to enter upon, and use and occupy, the land of an individual, for the purpose of constructing its road, or to take and appropriate the timber thereon against the consent of the owner, *before having ascertained the compensation to which such owner is entitled under the Constitution, and the payment thereof*. And no such right can be conferred upon a railroad company. *Blodgett v. Utica, &c. R. R. Co.*, 64 Barb. (N. Y.) 580. A tenant for life of land taken by a railroad is entitled to compensation therefor, as well as a trustee of the fee in remainder. *Passmore v. Philadelphia, &c. R. R. Co.*, 9 Phila. (Penn.) 579. The legislature may grant to a railroad company the right to construct a street railroad in a public street, without providing for compensation to the owners of lots abutting on such street, even though they may own the fee to the soil of the street itself. *Carson v. Central R. Co.*, 35 Cal. 325. But where an ordinary commercial railroad operated by steam is constructed in a street, the rule is different since such a railway constitutes an additional burden upon his land. *Ante*, Chapter XIII.; *Stetson v. Chicago, &c. R. Co.*, 75 Ill. 74; *Cox v. Louisville, &c. R. Co.*, 48 Ind. 178; *Gray v. St. Paul, &c. R. Co.*, 13 Minn. 315. Although one railroad track has been laid through a street, and the owners of property abutting on the street have received compensation for damages, the location of another railroad in the same street may inflict additional damages, for which the owners of such property will be entitled to compensation. *Southern Pacific R. Co. v. Reed*, 41 Cal. 256. The use of a portion

of a turnpike road for the purposes of a passenger railway is held not to be a new and distinct servitude, entitling the owners of land along the line of such turnpike, who have already been compensated for the condemnation of their property, to fresh compensation. The construction of a railroad track upon a portion of the bed of a turnpike road, in such a way as to leave abundant room for the vehicles of travellers who do not use the railroad, is not a new use, but only a modification of the old one. And an alteration in the grade of the turnpike road, so as to permit the laying of a railroad track thereon, does not entitle the owners of land abutting on such road to compensation for damages resulting from such alteration, when damages were awarded and paid to them at the time the turnpike was first laid out and graded, and the alteration of grade is within the limitations of the original charter of the turnpike company. *Peddicord v. Baltimore, &c. R. R. Co.*, 34 Md. 463. Where lands taken by a canal company for the use of their canal, for which taking the owner had damages, were afterwards, under authority of an act of the legislature, transferred to a railroad company, for the use of its road, and the owner claimed damages as for a second taking by the railroad company, on the ground that by the abandonment of the canal the lands had reverted to him, disencumbered of any easement, it was held that he could not recover the full value, but only compensation for such additional burdens and inconveniences, not common to the general public, as accrued to him and his entire tract on which the easement was imposed, by reason of the change of uses to which the lands appropriated had been subjected. The easement in the land, appropriated by the canal company, was regarded when taken as a perpetual easement; it was so looked upon by both parties; courts and juries awarded compensation to the owner on this basis; and he could not claim, with any semblance of justice, to be paid over again for the same thing. The general purposes to which the easement was applied by both

a remedy for obtaining compensation by the owner should be provided. On the contrary, I hold that before the legislature can

companies are the same, — the purposes of a public way, to facilitate the transportation of persons and property. In this case the entire tract of land had been cut asunder by the canal company in the construction of its canal; and the railroad company afterwards, in the construction of its railroad, threw up embankments and excavated cuts across a common public highway, skirting the tract, and constituting the only convenient means of access between the parcels into which the tract had been severed. It was held that the increased inconvenience and danger of access thus occasioned between the two parts of the tract were peculiar to the owner of the tract in the use of his property, — not common to the public at large, — within the meaning of the rule above stated; and for this increase of inconvenience and danger, the owner was entitled to compensation from the railroad company. *Hatch v. Cincinnati, &c. R. R. Co.*, 18 Ohio St. 92.* Where a company which had made a canal through one's land afterwards constructed a railroad over his land and abandoned the canal, the fact that the canal was a cheap and sufficient means of conveying his products was held to be material in the assessment of compensation for the construction of the railroad, and that the amount of the compensation received by him for the construction of the canal was not material. *Pennsylvania, &c. R. R. Co. v. Bunnell*, 81 Penn. St. 414. One railroad company cannot appropriate for the construction of its road, without compensation, the franchises or property of another. The fact that property has been taken for a particular public use does not make it public property for all purposes; and the property rights of a railroad company, in its right of way, are protected by the same restrictions against appropriation by any other railroad company, for railroad purposes or other public use, as is afforded in the case of the private property of an individual. *Grand Rapids, &c. R. R. Co. v. Grand Rapids, &c. R. R. Co.*, 35 Mich. 265; *Cincinnati, &c. R. R. Co. v. Danville, &c. R. R. Co.*, 75 Ill. 113. A railroad company which

has acquired the right to construct its road through a high embankment of another, and on a grade many feet — in this case twenty feet — below the track of the other company, is under no obligation to erect or maintain a bridge to support the track of the other company. Hence the cost of the erection and maintenance of such a bridge is properly included in the assessment of damages for the right of way; and such damages may include the loss and inconvenience necessarily incidental to the construction and keeping in repair of all works requisite to a secure condition of the track. *Chicago, &c. R. R. Co. v. Springfield, &c. R. R. Co.*, 67 Ill. 142. A railroad company, across whose road another railroad or a highway is laid out many feet above such railroad, — in this case twenty feet, — is not entitled to damages for the interruption and inconvenience occasioned to its business, nor from the increased liability to accidents, nor for increased expense for ringing the bell, or maintaining a flag-man, or other safeguards ordered by the county commissioners, — as here, by reason of the abutments of the new road obstructing the view. *Massachusetts, &c. R. R. Co. v. Boston, &c. R. R. Co.*, 121 Mass. 124. Under a statute authorizing one railroad company to take for a passenger station land occupied by another railroad company, and providing that all general laws relating to the taking of land for railroad purposes should govern the proceedings, if the latter company is deprived of part of its business by such use of the land taken, compensation must be made for the loss. *Eastern R. R. Co. v. Boston, &c. R. R.*, 111 Mass. 125. Occupancy by a railroad pending an appeal from the assessment of damages for right of way is not a taking of private property for public use without compensation. *Peterson v. Ferreby*, 30 Iowa, 827. But a statute which permits a court or judge, pending proceedings for the condemnation of land for the use of a railroad company, to make an order allowing the company to enter into possession and use the land sought to be condemned during the pendency of the

authorize the agents of the State and others to enter upon and occupy, or destroy or materially injure the private property of an indi-

proceedings, without providing compensation for the use and waste committed if the proceedings finally fail, is unconstitutional. *Davis v. San Lorenzo R. R. Co.*, 47 Cal. 517; *California Pacific R. R. Co. v. Central Pacific R. R. Co.*, id. 528. Where a railroad company pending proceedings for condemnation enters on land and constructs its road across the land in such manner that the road is imbedded in the soil and becomes a part of the realty, and subsequently the proceedings are dismissed and new proceedings commenced for the condemnation of the same land, the owner is not entitled to have the value of the ties and iron constituting the track included in his damages upon the final condemnation. *California, &c. R. R. Co. v. Armstrong*, 46 Cal. 85. In order to secure the land-owner in his constitutional right, and at the same time to spare the company unnecessary delay, the court may permit the company to take possession of the land on their paying the land-owner so much of the compensation as is undisputed, and the costs, and paying into court an amount sufficient to cover the disputed claim, so as to secure what may be adjudged to him by the court of law. *Metler v. Easton, &c. R. R. Co.*, 25 N. J. Eq. 214. *Re Hewitt*, id. 210. An order which, instead of directing the compensation to be paid to the party claiming to own the land, orders that it be deposited in bank, subject to the order of the court, is not on that account repugnant to the constitutional prohibition of taking private property for public use without just compensation. The money when deposited becomes in law the property of the parties entitled to the compensation, and the fund is subject to the same claims to which the land was before being taken. *Matter of N. Y., &c. R. R. Co.*, 60 N. Y. 116. Where a railroad company tendered a bond with sureties to a land-owner, who refused it, and the bond was afterwards approved, it was held that under a constitutional requirement to "give adequate security therefor" before such property shall be taken, trespass would lie against the officers, contractor, etc., en-

tering on the land before such approval. *Dimmick v. Broadhead*, 75 Penn. St. 464. A railway company cannot avail itself of the power of entering on land before purchase, conferred by the lands clauses consolidation act of 1845, unless there is an urgent necessity for immediate entry. An entry subsequent to the companies act, 1867, cannot be made upon a previous valuation under the lands clauses act, 1845. Therefore, where a railway company had valued the land only under § 85 in 1865, and had entered after August 20, 1867, on depositing the amount of valuation, it was held that the entry was irregular, and injunction granted restraining the company from continuing in possession of the land until the proper deposit had been made. *Field v. Carnarvon, &c. Ry. Co.*, L. R. 5 Eq. 190. In proceedings under the Missouri statutes to acquire lands for the use of a railroad company, no title to the lands will pass unless it appears affirmatively from the record that the owner refused to relinquish his right of way to the company. *Ells v. Pacific R. R.*, 51 Mo. 200. Compare *Anayle v. M. K. & T. R. R. Co.*, 63 Mo. 465. But the provision of the general railroad act of New York, making it a prerequisite to proceedings *in invitum* to acquire title to lands, that the company shall be "unable to agree for the purchase," does not mean an impossibility to purchase at any price, however large, but that the owner must be either unwilling to sell at all, or only willing to sell at a price which, in the judgment of the agents of the corporation is excessive. *Matter of Prospect Park, &c. R. R. Co.*, 67 N. Y. 371. In an English case, a railway company, after the compulsory powers of their original act had expired, and the railway was open to traffic, obtained another act enabling them to widen their line and enlarge their stations, and to take additional pieces of land. It was held that under the circumstances the company could not proceed to take a piece of land subject to the compulsory powers of both acts under a notice to treat given under their original act. *Richmond v. North London Ry. Co.*, L. R. 3

vidual, except in cases of actual necessity which will not admit of any delay, an adequate and certain remedy must be provided whereby the owner of such property may compel the payment of his damages, or compensation; and that he is not bound to trust to the justice of the government to make provision for such compensation by future legislation. *I do not mean to be understood that the legislature may not authorize a mere entry upon the land of another for the purpose of examination, or of making preliminary surveys, etc., which would otherwise be a technical trespass, but no real injury to the owner of the land, although no previous provision was made by law to compensate the individual for his property if it should afterwards be taken for the public use.* But it certainly was not the intention of the framers of the Constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the legislature to provide him a compensation therefor. *The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided and upon an adequate fund; whereby he may obtain such compensation through the medium of the courts of justice, if those whose duty it is to make such compensation*

Ch. App. 679. It is no answer to an action against a railway company for not issuing their warrant under § 39 of the land's clauses act, 1845, for the assessment of compensation for land which they have given notice of their intention to purchase that the undertaking was intended to be carried into effect by means of a certain capital, and that the whole amount has not been subscribed as required by § 16; the notice to treat not, necessarily, being an exercise of the powers of the act in relation to the compulsory taking of land. *Guest v. Poole, &c. Ry. Co.*, L. R. 5 C. P. 553. A company empowered to take land for its undertaking gave to the owner notice to treat under 8 Vict. ch. 18, and he gave notice under § 23 of his desire to have the compensation settled by arbitration, naming his arbitrator; and the company named its arbitrator. The arbitrators appointed an umpire, and on two occasions enlarged the time for making their award. The company after this made an offer which was not accepted; and the arbitration proceeded. The umpire having awarded a less sum than that

offered, it was held that the offer was too late, and that the claimant was entitled to costs under § 34. *Re Gray*, L. R. 1 Q. B. D. 696. Notice to an owner residing on the lands sought to be condemned, of the proceedings of commissioners of assessment, is essential. *Lohman v. St. Paul, &c. R. R. Co.*, 18 Minn. 174. Where the charter of a railway company required notice by publication to the owner or occupier, or unknown owners of land sought to be condemned, of the application to appoint commissioners, and such notice was published as to one who had held a life-estate only, but who was dead, not naming the remainderman, it was held that the proceedings were not binding upon the remainderman. *Chicago, &c. R. R. Co. v. Smith*, 78 Ill. 96. All the tenants in common of land sought to be condemned for railroad purposes must be before the court. It is not competent to proceed separately against the owners of an undivided interest, while another undivided interest remains outstanding. *Grand Rapids R. R. Co. v. Alley*, 34 Mich. 16.

*refuse to do so.*¹ In the ordinary case of lands taken for the making of public highways, or for the use of the State canal, such a remedy is provided; and if the town, county, or State officers refuse to do their duty in ascertaining, raising, or paying such compensation in the mode prescribed by law, the owner of the property has a remedy by *mandamus* to compel them to perform their duty. The public purse, or the property of the town or county upon which the assessment is to be made, may justly be considered an adequate fund.² He has no such remedy, however, against the legislature to compel the passage of the necessary laws to ascertain the amount of compensation he is to receive, or the fund out of which he is to be paid. In the case under consideration, if this company were authorized to take possession of the plaintiff's property and complete the construction of their road before his damages were assessed and paid, or offered to be paid to him, he might have been wholly without redress, as he has no power to compel the assessment of damages, and no adequate fund was provided for the payment of the damages when ascertained. The citizen whose property is thus taken from him without his consent is not bound to trust to the solvency of an

¹ *Simms v. Memphis, &c. R. R. Co.*, 12 Heisk. (Tenn.) 621; *Wagner v. New York, Chicago, &c. R. R. Co.*, 38 Ohio St. 32; *Rexford v. Knight*, 11 N. Y. 308; *Chapman v. Gates*, 54 N. Y. 132; *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 9; *White v. Nashville, &c. R. R. Co.*, 7 Heisk. (Tenn.) 518; *Hauckins v. Lawrence*, 8 Blackf. (Ind.) 266; *Fox v. Western Pacific R. R. Co.*, 31 Cal. 538; *Lehigh Valley R. R. Co. v. McFarlan*, 31 N. J. Eq. 706; *Johnson & Joliet R. R. Co.*, 23 Ill. 202; *Jeffersonville, &c. R. R. Co. v. Dougherty*, 40 Ind. 33; *New Albany, &c. R. R. Co. v. Connelly*, 7 id. 32. In Ohio it is held that there must be a verdict and a judgment confirming it, and a deposit of the amount, before the company is entitled to enter, except for temporary purposes. *Wagner v. New York, Chicago, &c. R. R. Co.*, 38 Ohio St. 32. In Kansas (*Pryzbylowicz v. Missouri River R. R. Co.*, 17 Fed. Rep. 492), Georgia (*Chambers v. Cincinnati, &c. R. R. Co.*, 10 Am. & Eng. R. R. Cas. 376), and Mississippi (*Williams v. New Orleans, Mobile, &c. R. R. Co.*, 60 Miss. 689), prepayment is held to be essential.

² Compensation need not precede the actual appropriation of lands for a public use by the State, or by a municipal corporation by State authority. It is sufficient if an adequate remedy is provided, which the party may resort to on his own motion to recover compensation. In this respect there is a distinction between a taking by a public municipal corporation and by an individual or private corporation. *Loweree v. Newark*, 38 N. J. L. 151. Where the power is conferred on a State, county, or town, these corporate bodies will be presumed responsible for those damages; but in case of an individual or a corporation, if the damages be not paid before the taking, provision should be made not only for an assessment and collection thereof, but also for some definite and certain fund for the payment thereof. *Ash v. Cummings*, 50 N. H. 591. But in Mississippi it is held that for county authorities to open a public road across private property without first paying the owner his damage, is unlawful. *Cameron v. Supervisors of Washington*, 47 Miss. 264.

individual, or even of an incorporated company, for corporations as well as individuals are sometimes unable to pay all their just debts; especially those corporations which are authorized to incur heavy responsibilities in anticipation of the payment of their capital by the subscribers for the stock; and if the true construction of this charter was such as is contended for by the defendants' counsel, I should hold that the provision which authorized the appropriation of the plaintiff's property to the use of the corporation before the damages had been ascertained and paid, was unconstitutional and void.

I cannot, however, agree with the learned judge who delivered the opinion of the Supreme Court in this case, that such is the fair and legitimate construction and meaning of the defendants' charter. It is a primary rule in the construction of statutes in those countries where the limits of the legislative power are restricted by the provisions of a written constitution, to endeavor, if possible, to interpret the language of the legislature in such a manner as to make it consistent with the constitution or fundamental law. Applying that principle to the statute under consideration, and having ascertained that it *would be inconsistent with the fundamental law of the State to authorize the defendants to take possession of the lands of an individual without having made an adequate and certain provision for the recovery of the damages which he would necessarily sustain by such permanent occupation of his property for the purposes of the road,*¹ there appears

¹ In *Cushman v. Smith*, 34 Me. 247, SHEPLEY, C. J., said: "There has been a serious difference of opinion respecting the requirements and construction of those constitutional provisions which declare in the same or similar terms that 'private property shall not be taken for public uses without just compensation.' How far legislation may proceed to authorize acts to be done without first making or tendering compensation, and where it becomes arrested by the provision, has been considered by many of the ablest men and most distinguished jurists of the country. . . . It is believed to have been the long-established course of proceeding, in this part of the country at least, to authorize the exclusive occupation of land required for such public uses as the laying out of highways and streets, by making provision by law for compensation to the owner, to be subsequently paid, and in many cases authorizing the damages to be finally ascertained

as well as paid subsequently. This course of proceeding existed, so far as is known, without complaint long before the Revolution which cast off the British dominions; and of course was well known to the framers of the Constitution which first contained this prohibitory clause for the protection of private property. Was it the intention to interrupt such course of proceeding and to provide a remedy for a grievance already experienced, or only to prevent private property from being taken from the owner and permanently appropriated to public use without compensation? Constitutional provisions are often and legitimately explained by considering the actual state of facts at the time of their adoption. Thus, the provision in the Constitution of the United States for the regulation of commerce is explained to include navigation by reference to the state of facts existing at the time. By these or other considerations

to be no difficulty in giving such a construction to this statute as will be consistent with the Constitution and also with the

many minds appear to have been led to the conclusion that private property might be absolutely taken and permanently appropriated to public use without compensation being first made, when provision was made by law for compensation to be subsequently made from the treasury of the State, or of a county, city, or town. Does experience teach that the owner, in such cases, will always be certain to obtain compensation? History informs us that kingdoms and States have not always paid their just debts in full, that they have often paid them only in promises which would not command gold or silver without a large discount. When the private property of citizens residing in a county, city, or town may be taken to pay the debts of the corporation, there may be reason to expect that its debts will be certainly paid. But the law making private property liable to be taken for payment of the debts of such corporations may at any time be repealed or altered; and the corporation in its corporate capacity may not have property from which payment can be obtained. Is the distinction attempted to be made between taking private property without first making compensation, when provision is made for payment by a State, county, city, or town, and when it is made for payment by a private corporation, a sound one? Can that be a correct construction of the provision which would authorize legislation by which the owner of an estate might be deprived of it without being first paid, whenever in the judgment of some court or tribunal it might be morally certain that he could afterwards obtain compensation, and which would not authorize it whenever in the judgment of such court or tribunal it was not so certain that he could obtain it? That would make the title pass from the owner to the public use, not upon payment of compensation, but upon the opinion of certain official persons that a fund or other means had been provided from which he might obtain payment. If such be a correct construction, it would follow that the title to private property may be made to pass from the owner to a private corporation for public use when that corporation should be found to possess the means or to furnish security which would render it as certain that compensation could be subsequently obtained from it as from the treasury of a State, county, city, or town. These and other considerations present themselves as serious objections to a construction which would permit an owner of property to be deprived of it without compensation actually paid or tendered to him, whether it be taken for public use by a State, county, city, town, or private corporation. If such a construction be inadmissible, as well as one which would prevent an exclusive occupation of a temporary character without payment of compensation, the inquiry is suggested, whether by a correct construction such results may not be avoided. This provision of the Constitution was evidently not intended to prevent the exercise of legislative power to prescribe the course of proceeding to be pursued to take private property and appropriate it to public use; nor to prevent its exercise to determine the manner in which the value of such property should be ascertained, and payment made or tendered. The legislative power is left entirely free from embarrassment in the selection and arrangement of the measures to be adopted to take private property and appropriate it to public use, and to cause a just compensation to be made therefor. The provision was not introduced or intended to prevent legislation authorizing acts to be done which might be more or less injurious to private property not taken for public use. It is not unusual to find that private property has been greatly injured by public improvements, when there has been no attempt to take it for public use. The records of judicial proceedings show that private property in railroads, turnpike roads, toll-bridges, and ferry-ways has been often greatly injured, and sometimes quite destroyed by acts authorized by legislation, which, according to judicial decisions, did not violate any provision of the Constitution. Private property is often injured by

probable intention of the legislature. This may be done effectually by considering what is very inartificially appended as a proviso to

the construction and grading of highways and railways, when no attempt has been made to change its character from private to public property. The cases of *Day v. Stetson*, 8 Me. 365; *Callender v. Marsh*, 1 Pick. (Mass.) 418; *Canal Appraisers v. The People*, 17 Wend. (N. Y.) 571; and *Susquehanna Canal Co. v. Wright*, 9 W. & S. (Penn.) 9, present examples of it. The provision was not designed, and it cannot operate to prevent legislation which should authorize acts operating directly and injuriously as well as indirectly upon private property when no attempt is made to appropriate to public use. An instance of this kind of legislative action will be found in the case of the *Com. v. Tewksbury*, 11 Met. (Mass.) 55, where a person was held indictable for the removal of gravel from his own land contrary to a statute provision, which did not assume to appropriate to public use or to make compensation for it. The design appears to have been simply to declare that private property shall not be changed to public property, or transferred from the owner to others for public use without compensation; to prevent the personal property of individuals from being consumed or destroyed for public use without compensation, — not to protect such property from all injury by the construction of public improvements; not to prevent its temporary possession or use, without a destruction of it or a change of its character. It was designed also to prevent the owner of real estate from being deprived of it, or of an easement in it, and to prevent any permanent change of its character and use without compensation; while it was not designed to prevent legislation which might authorize acts upon it which would by the common law be denominated trespasses, including an exclusive possession for a temporary purpose, where there was no attempt to appropriate it to public use. Such acts of legislation might be very unjust, and it may be presumed that no legislative body would make such enactments without making provision for the compensation of injuries to private property occasioned by acts designed to pro-

mote the public good. The claim upon the justice of the State for compensation might be perfect, while compensation would not be secured by any provision of the Constitution. If this provision of the Constitution does not prevent enactments authorizing an exclusive possession of land owned by an individual for a temporary purpose without compensation, when there is no attempt to appropriate it to public use, will it operate to prevent an exclusive occupation of it temporarily as an incipient proceeding to the acquisition of a title to it or to an easement in it? Will it prohibit legislation authorizing acts to be done when the intention is, by them and by other means to be adopted, to secure finally a title to the land or to an easement in it for public use, and allow the same acts to be done upon the same land when done without any such intention? Was it the design to make the intention with which the act was performed the criterion to determine whether it could or could not be authorized by the legislative department? This leads to a further inquiry to ascertain the sense in which the word 'taken' was used in the Constitution. That word is used in a variety of senses, and to communicate ideas quite different. Its sense as used in a particular case is to be ascertained by the connection in which it is used, and from the context, the whole being applied to the state of facts respecting which it was used. It cannot well be denied, and it is generally admitted, to have been used in constitutions containing this clause to require compensation to be made for private property appropriated to public use by the exercise on the part of the government of its superior title to all property required by the necessities of the people to promote their common welfare. This appears to have been denominated the right of eminent domain, of supereminent dominion, of transcendental propriety. These terms are of importance only to disclose the idea presented by them, that the right to appropriate private property to public use rests upon the position that the government or sovereignty claims it by

the seventh section, as in the nature of a *condition precedent*, not only to the acquisition of the legal title to the land, but also to the right

virtue of a title superior to the title of the individual, and that by its exercise the individual and inferior title becomes wholly or in part extinguished, — extinguished to the extent to which the superior title is exercised. To take the real estate of an individual for public use is to deprive him of his title to it, or of some part of his title, so that the entire dominion over it no longer remains with him. He can no longer convey the entire title and dominion. The exclusive occupation of that estate temporarily as an initiatory proceeding to an acquisition of a title to it, or to an easement in it, cannot amount to a taking of it in that sense. The title of the owner is thereby in no degree extinguished. He can convey that title while thus exclusively occupied as he could have done before. Should he do so by a conveyance containing a covenant that it was free of all encumbrances, that covenant would not make him liable for such an exclusive occupation, unless it be admitted that a title to the land or to an easement in it can be acquired without making compensation, and this is denied. A construction of the provision which would permit legislation authorizing private property to be exclusively occupied without first making compensation as an incipient proceeding to the acquisition of a title to it or to an easement in it, and which would not authorize the title of the owner to be extinguished or impaired without compensation may be somewhat novel, but it will not be found to be unsupported by positions asserted and maintained in judicial opinions. It is generally admitted in them that examinations and surveys may be authorized by legislative enactments without a violation of the constitutional provision, and without provision for previous compensation. Where is to be found the limit of the legislative power to authorize trespasses of a more extensive and injurious character, which do not extinguish or intrench upon the title of the owner? Does that provision of the Constitution permit the legislative power to authorize trespasses not very injurious to private property, without providing for

previous compensation, and prohibit it from authorizing those of a little more or much more injurious character, which do not in any degree impair or affect the title of the owner? It was not the intention to make the exercise of the legislative power depend upon the extent of the injury which the authorized acts might occasion, if the title was not invaded. There are cases in which an opinion is expressed that all injuries to private property authorized by the legislative power can only be authorized by the exercise of the right of eminent domain; and that a temporary injury or occupation amounts to a taking of the property. If it be admitted that such an injury or occupation of the property amounts to a taking of it, in the sense in which the word 'taken' is used in the Constitution, it will follow that measures must be taken to ascertain the damages occasioned thereby, and that compensation must be actually made before it can be so injured or occupied; or that the right to do it without compensation first made must be admitted, leaving the party injured to the chance of obtaining compensation as he may best be able. If the former alternative be adopted, private property cannot be injured or temporarily occupied, however urgent and immediate may be the public necessity, without waiting for the final completion of all proceedings to ascertain the compensation. And how the amount of compensation can be satisfactorily ascertained before the acts occasioning damages have been performed, it is not easy to perceive. If the latter alternative be adopted, and the right to cause a temporary occupation or injury be admitted before compensation is made, the party injured must depend upon a legislative provision for his compensation, and the prohibitory clause of the Constitution will fail to secure to him, with entire certainty, a compensation. In other words, it will of itself afford him no protection against such temporary injury or occupation, and would leave him in the position in which he would be by a construction of that clause which would only protect him

to enter and take the permanent possession of the land for the use of the corporation. Indeed, such appears to me to be the more reasonable and fair construction of this section, independent of any constitutional difficulty in the way of a different construction. For upon the supposition that no injustice was intended by the legislature, it can hardly be presumed they meant to authorize the

against a permanent appropriation of his property, or an extinguishment or diminution of his title to it. Many of the judicial opinions urgently restrictive of the legislative power assert that the title to land taken, or to an easement in it, cannot be transferred from the owner to others for public use without compensation actually made, — that the acts of payment and of transfer are simultaneous. If this be true it is immaterial, so far as it respects the acquisition of a title to land, or to an easement in it for public use, when compensation is made. It can only be material to insist that compensation shall be made before an exclusive occupation is permitted, to prevent a temporary inconvenience and loss. An attempt has already been made to show that such was not the design of the prohibitory clause. In *Bradshaw v. Rogers*, 20 Johns. (N. Y.) 103, SPENCER, C. J., says, 'It is true that the fee-simple of the land is not vested in the people of the State until the damages are appraised and paid, but the authority to enter is absolute, and does not depend on the appraisal and payment.' [See also *Callender v. Marsh*, 1 Pick. (Mass.) 430; *Hooker v. New Haven, &c. Co.*, 14 Conn. 146; *Bloodgood v. Mohawk, &c. R. Co.*, 18 Wend. (N. Y.) 9; *People v. Hayden*, 6 Hill (N. Y.), 359; *Smith v. Helmer*, 7 Barb. 416; *Rubottom v. McClure*, 4 Blackf. (Ind.) 505; *Thompson v. Grand Gulf R. Co.*, 3 How. (Miss.) 240, all reviewed and quoted from by the court.] In *Pittsburg v. Scott*, 1 Penn. 309, it was decided that it was not necessary that compensation should be actually ascertained and paid before private property is appropriated to public use; that it was sufficient that an adequate remedy was provided by which compensation could be obtained without any unreasonable delay. To the construction of the prohibitory clause proposed, it may be

objected that it will not prevent the exercise of legislative power to authorize the commission of serious injuries upon private property without making provision for compensation. A construction so broad as to prevent this would greatly limit the legislative power, and bring it within a much narrower sphere of action than it was accustomed to claim and exercise without complaint before the constitutions containing this clause were framed. Reliance must be placed upon the justice of legislation, and upon the administration of the laws for a recompense for such injuries, and not upon a provision of the Constitution not designed for such a purpose. Another objection to this construction may be that the owner will not be able to recover compensation for the exclusive occupation of his land, and for the injuries thereby occasioned, when the proceedings are not so completed and compensation made as to transfer any title to land, or to an easement in it for public use. This objection is believed to be founded upon an incorrect position. If compensation be not made within a reasonable time after the land has been exclusively occupied, the right to continue that occupation will become extinct. It being authorized only as a part of the proceedings permitted for the acquisition of title, when it becomes manifest by an unreasonable delay that the avowed purpose is not the real one, or that, if real, it has been abandoned, the measures permitted for that purpose will no longer be authorized; and if the occupation be continued after that time the occupants will be trespassers, and liable to be prosecuted as such. The damages occasioned before the right of exclusive occupation became extinct may be recovered by an action of trespass, or by an action on the case, containing in the declaration averments that an exclusive occupation was authorized

company to enter upon the lands of individuals, pull down their buildings, etc., and then take their own time to get the damages

for the purpose of acquiring title for public use, and that no such proceedings have taken place as would transfer any title within a reasonable time, with other suitable averments. If the occupants should be regarded as trespassers *ab initio*, it would not be, as has been supposed, because they had omitted to make compensation, but because they had continued to occupy or commit trespasses after it had become manifest that their avowed was not their real purpose, or after their real purpose had been abandoned. It is not necessary to decide whether such an action could be maintained, for the distinction between the actions of trespass and case has been abolished in this State. After some difference of opinion, it may now be regarded as settled that enactments which authorize private property to be taken for public use must provide the means or course to be pursued to have compensation made for it. The conclusions to which this discussion leads are: 1. The clause in constitutions which prohibits the taking of private property for public use was not designed to operate, and it does not operate, to prohibit the legislative department from authorizing an exclusive occupation of private property temporarily, as an incipient proceeding to the acquisition of a title to it, or to an easement in it. 2. It was designed to operate, and it does operate, to prevent the acquisition of any title to land, or to an easement in it, or to a permanent appropriation of it from an owner for public use, without the actual payment or tender of a just compensation for it. 3. That the right to such temporary occupation, as an incipient proceeding, will become extinct by an unreasonable delay to perfect proceedings, including the actual payment or tender of compensation to acquire a title to the land, or of an easement in it. 4. That an action of trespass *quare clausum* may be maintained to recover damages for the continuance of such occupation, unless compensation, or a tender of it, be made within a reasonable time after the commencement of such occupation. 5. That under such circumstances an action of trespass, or an action

on the case may be maintained to recover damages for all the injuries occasioned by the prior occupation. In this case, as no compensation or tender of it was made to the plaintiff within a reasonable time after his estate was occupied by the corporation, no title to it or to an easement in it has been acquired, and the occupation, although legally commenced, has ceased to be legal. As the corporation acquired no title to the land, or to any easement in it, the defendant could acquire none by his conveyance from that corporation." The charter of a railway company authorizing it to purchase, or take and hold so much of the land of private persons, or other corporations, as may be necessary for the location, construction, and convenient operation of said railway, and to take, remove, and use for the construction and repair of said railway and appurtenances, any earth, gravel, stone, timber, or other materials on or from *the land so taken*, does not authorize the servants of that corporation to go upon lands *not taken*, under the charter, and in accordance with its provisions, and take materials therefrom for the construction of their road, against the will, and without the consent of the owners of such lands. *Parsons v. Howe*, 41 Me. 220. Where the charter of a railway company provided that the company might enter upon any lands contiguous to the railway, or the works connected therewith, and take materials necessary for building or repairing the road; and providing, in case of disagreement between the owners of the land and the company as to the compensation to be paid, that the amount should be determined by commissioners, the court held that the commissioners need not be called out to appraise damages until after the materials had been ascertained; and that this was the only practicable mode of proceeding in such case, if they would come to a reasonable and just determination in regard to such damages. And it was admitted such, from necessity, had been the practical construction put upon that provision of the charter. *Vt. Central R. R. Co. v. Baxter*, 22 Vt. 370. In this case the question

appraised and to pay the same,—leaving the individuals injured thereby to seek for some uncertain remedy by action, if the company neglected to get the damages assessed within a reasonable time.

“The conclusion at which I have arrived, therefore, is, that the defendants’ plea is imperfect in not averring that the damages had been regularly assessed and paid before the defendants entered upon the plaintiff’s land and appropriated it to the use of the road; and that if they in fact entered and commenced the construction of the road before the damages were actually assessed and paid, the plaintiff has a technical right to recover in this action for all damages which he really sustained by such unauthorized entry, although these requisites of the statute were afterwards complied with. In that case the defence arising from the subsequent assessment and payment of the damages, can only be pleaded to that part of the declaration which charges a continuance of the trespass after the damages were assessed and paid as required by the statute.

“For these reasons I think the demurrer is well taken, and that the judgment of the Supreme Court should be reversed, with liberty to the defendants to amend their plea upon the payment of costs in this court and of the demurrer in the Supreme Court.”

The clause in constitutions which prohibits the taking of private property for public use, was not designed to operate, and it does not operate, to prohibit the legislative department from authorizing an exclusive occupation of private property temporarily, as an incipient proceeding to the acquisition of a title to it or an easement in it. But it was designed to operate, and it does operate, to prevent the acquisition of any title to land or to an easement in it, or to a permanent appropriation of it from an owner for public use, without the actual payment or tender of a just compensation for it.¹

was not made or considered by the court, whether the company itself had any right to take materials for building its road beyond the limits of the survey. In *Stacey v. Vt. Central R. R. Co.*, 27 Vt. 39, it was held that the Vermont Central Railway Company, under their charter, acquired no title to lands surveyed and designated for the use of their railway, or to any easement growing out of it, from the fact of their having so surveyed it, or by having placed their survey on record, or by having the damages appraised by commission-

ers and causing their award to be recorded. The payment or deposit of the money awarded is a condition precedent to the right of the company to enter upon the land for the purpose of constructing their road, and without compliance with it they may be enjoined in a court of equity, or prosecuted at law in an action of trespass. It was also held that, if the company had no vested right to the land, the owner of the land has none to the damages awarded him for it.

¹ *Cushman v. Smith*, 34 Me. 247.

In most of the States, either payment by the company of the sum assessed or a tender of the amount, or security therefor, either by a deposit of money or of a bond with sufficient sureties approved by a certain officer, and in each case the amount to be determined in the manner named in the statute, is made a condition precedent to the right of the corporation to enter into possession to construct its road; and an entry for such purpose without the performance of such conditions will render it a trespasser, and its right of temporary occupation ceases.¹ Indeed, under such circumstances, unless all the

¹ *Dimmick v. Broadhead*, 75 Penn. St. 464; *New York Central R. R. Co., in re*, 60 N. Y. 116; *Shute v. Chicago, &c. R. R. Co.*, 26 Ill. 436; *Curtis v. St. Paul, &c. R. R. Co.*, 21 Minn. 497; *Bohlman v. Green Bay, &c. R. R. Co.*, 30 Wis. 105; *Frees v. Southern Penn. R. R. Co.*, 85 Penn. St. 73; *Kennedy v. Milwaukee, &c. R. R. Co.*, 22 id. 581; *Avery v. Fox*, 1 Abb. (U. S.) 246; *Fox v. Western Pacific R. R. Co.*, 31 Cal. 538; *Wadham v. Lackawanna, &c. R. R. Co.*, 42 Penn. St. 503; *Powers v. Bears*, 12 Wis. 213; *Gray v. St. Paul, &c. R. R. Co.*, 13 Minn. 315; *Warren v. St. Paul, &c. R. R. Co.*, 18 Minn. 384; *Weir v. St. Paul, &c. R. R. Co.*, 18 Minn. 155; *Raleigh, &c. R. R. Co. v. Davis*, 2 D. & B. (N. C.) 451. In *Chambers v. Cincinnati, &c. R. R. Co.*, 10 Am. & Eng. R. R. Cas. (Ga.) 377, *SPEER, J.*, says: "It is a primary requisite in the appropriation of lands for public purposes, that compensation shall be made therefor; and this compensation must be pecuniary in its character because it is in the nature of a payment for the compulsory purchase. *Cooley Const. Lim.* 699. It amounts to nothing more than a power to oblige him to sell and convey when the public necessities require it. The time when the compensation must be made may depend upon the peculiar constitutional provisions of the State. In some of the States by express constitutional direction compensation must be made before the property is taken. It is true private property may be entered upon and temporarily occupied for the purpose of a survey and other incipient proceedings, with a view of determining whether the public needs require the appropriation or not, and if so, what the proper location shall be; when, how-

ever, the land has been viewed, and it is determined to appropriate it, the question of compensation is to be considered. When private property is sought to be appropriated by a private corporation, acting under the authority of the State, it is certainly proper, and it has sometimes been questioned whether it is not absolutely essential even in the absence of constitutional provision, that payment be actually made before the owner could be divested of his freehold. Chancellor KENT has expressed the opinion that compensation and appropriation should be concurrent. He says: 'The settled and fundamental doctrine is that government has no right to take private property for public uses without giving just compensation, and it seems to be necessarily implied that the indemnity should in cases which will admit of it be previously and equitably ascertained, and ready for reception concurrently in point of time with the actual exercise of the right of eminent domain.' 2 Kent, 339, note. While this is not an inflexible rule, yet it is so just and reasonable that statutory provisions for taking private property very generally make payment precede or accompany the appropriation, and by several of the State Constitutions this is expressly required. The Constitution of Florida provides that private property shall not be taken or applied to public use, unless just compensation be first made therefor. So likewise are found similar provisions in the Constitutions of Colorado, of Georgia, Iowa, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nevada, Ohio, Pennsylvania. The Constitutions of Indiana and Oregon require compensation to be first made, except when the property is appropriated

conditions imposed upon the corporation by the statute, are complied with, the land-owner is entitled to possession, and may obtain

by the State. It would be an unwise and unjust rule to deprive the owner of his property and turn him over to an action at law against a corporation which may or may not prove responsible, and to a judgment of uncertain efficacy. The consequences would be in some cases the party might lose his estate without redress, in violation of the inflexible maxim upon which his right is based. The land should either be his or he should be paid for it. Whenever, therefore, the public locates the public work and declares the appropriation, the owner becomes absolutely entitled to the compensation. In some of the States it is held, 'If a street is legally established over the land of an individual, he is entitled to demand payment for his damages without waiting for the street to be opened,' — as in Pennsylvania, Maryland, Massachusetts, Iowa, Illinois, and New Hampshire. And if a railway line is located across his land and damages are appraised, his right to payment is complete before exclusive entry and occupancy. In the case of *Young v. McKensie*, 3 Ga. 45, Judge WARNER says: 'We do not intend to say that the company could not have entered on the land and made the necessary survey and examination of the premises under the authority of the legislature, but we do intend to say that the company had no authority to appropriate the private property of the defendants for the permanent and exclusive use of the company, until just compensation has first been made therefor in the manner pointed out by the charter. See also 3 Ga. 333. In the case of *Rome v. Perkins*, 30 Ga. 154, this court held: 'The owner of land is entitled to just compensation before it can be taken for public use.' In that case the court hold impliedly that the landholder could have enjoined the corporation from taking his property until compensation made, or he might recover by suit in trespass its value. The remedy by injunction to restrain one who seeks to enter upon and build upon the right of way before compensation paid, is also recognized by this court in the case of *Gammage v. Georgia Southern R. R.*

Co., 65 Ga. 614. But we need look no further in support of this complainant's right to this injunction against the respondents than to our own constitutional provision contained in art. i., sec. iii., part i.: 'Private property shall not be taken or damaged for public purposes, without just and adequate compensation being first paid.' The framers of this instrument, taught by the sad experience of many whose property had been taken for public purposes, and who in vain have sought redress in the courts, owing to the insolvency of the companies, threw this shield around every property-holder, that no one should take or appropriate his property for a public use until just and adequate compensation being 'first paid.' All that the legislature can do is to oblige the owner to alienate his possessions for a reasonable price for public use, — but then the Constitution interposes its protective shield and affixes the condition that the owner receive first 'just and adequate compensation.' We can see no other construction to give to this clear and plain requirement of the fundamental law. We have neither authority nor desire to emasculate its clear and intelligent meaning by a construction which would be hostile to its justice and inconsistent with its terms. We have nothing to do with the inconveniences or embarrassments such a construction may entail. It is one of the great bulwarks created for security to property against legislative action, deeply imbedded in this bill of rights, which the aggrandizing spirit of the age is so prone to invade. If the respondent below seeks an appeal to the courts against what he deems to be an unjust and excessive assessment by the appraisers, let him abide until the result is known, pay first the just and adequate compensation finally awarded, and then no constitutional barrier will stand against his entry and occupancy on the lands for the purposes for which it was condemned." In *Wagner v. New York, Chicago, &c. R. R. Co.*, 38 Ohio St. 32, it was held that in proceedings by a corporation to appropriate private property, there must be a

it by an action of ejectment,¹ or a court of equity in a proper case will enjoin the corporation from continuing in possession.² In refer-

judgment confirming the verdict of the jury, before the corporation is entitled, by a deposit of the amount of such verdict, to possession of the property appropriated. An act authorizing telegraph companies to construct their lines upon the right of way of railroad companies, was held to be unconstitutional, in failing to provide any compulsory process, to enforce payment of just compensation for the property taken. *Southwestern R. R. Co. v. Southern, &c. Tel. Co.*, 46 Ga. 43. The legislature cannot constitutionally deprive an individual of the advantages of a stream of water in its natural flow over his lands, or create an easement in his land of the right to overflow, — as by letting a corporation erect a wing-dam causing back flowage, etc., — without providing compensation for the injury. *Trenton Water-Power Co. v. Raff*, 36 N. J. L. 335. The right to use the water of a stream is property, as much under protection of the constitution as is the land on which it flows; and a provision of a corporate charter, giving the corporation power to take such water for manufacturing purposes, without compensation to others who are already using it for similar purposes, is unconstitutional. *Harding v. Stamford Water Co.*, 41 Conn. 87. The right to compensation for injuries inflicted

on private property by the appropriation of the street to a public use, — as a railroad — not contemplated when it was opened and dedicated as a highway for ordinary travel, is in no wise affected by the question whether the city authorities did, or did not consent to such appropriation. *Southern Pacific R. R. Co. v. Reed*, 41 Cal. 256. *Compensation is only necessary when private property is to be taken.* Thus, as the lands lying under navigable waters within New Jersey belong absolutely to the State, an act of the legislature, authorizing the construction of a bridge over a navigable river, gives authority to appropriate the lands under water, belonging to the State, without compensation. When the State authorizes a corporation or an individual to build roads or bridges upon its own property, inasmuch as the duty to be performed is that of the sovereign delegated to a citizen, the right to proceed without compensation is implied. *Pennsylvania R. R. Co. v. New York, &c. R. R. Co.*, 23 N. J. Eq. 157. So, the legislature may authorize the construction of a public work which will interfere with the enjoyment of a public right of navigation, without providing for compensation for the injury. *Sugar Refining Co. v. Mayor, &c. of Jersey City*, 26 N. J. Eq. 247. The owner of land, who stands

¹ *Graham v. Columbus, &c. R. R. Co.*, 27 Ind. 260; *Cox v. Louisville, &c. R. R. Co.*, 48 id. 178; *Daniels v. Chicago, &c. R. R. Co.*, 41 Iowa, 53; *Pearson v. Johnson*, 54 Miss. 259; *Levering v. Philadelphia, &c. R. R. Co.*, 8 W. & S. (Penn.) 459; *St. Joseph, &c. R. R. Co. v. Callendar*, 13 Kan. 496; *McClinton v. Pittsburgh, &c. R. R. Co.*, 66 Penn. St. 404; *Wilmington, &c. R. R. Co. v. High*, 89 Penn. St. 282; *Chicago, &c. R. R. Co. v. Hopkins*, 90 Ill. 316; *Smith v. Chicago, &c. R. R. Co.*, 67 id. 191; *Conger v. Burlington, &c. R. R. Co.*, 41 Iowa, 419; *Carpenter v. St. Louis, R. R. Co.*, 24 N. Y. 655; *Harrington v. St. Paul, &c. R. R. Co.*, 17 Minn. 215; *Halbert v. St. Louis, &c. R. R. Co.*, 45 Iowa, 23.

² *Evans v. Missouri, &c. R. R. Co.*, 64 Mo. 453; *Browning v. Camden, &c. R. R. Co.*, 4 N. J. Eq. 47; *Penrice v. Wallis*, 37 Miss. 172; *White v. Nashville, &c. R. R. Co.*, 7 Heisk. (Tenn.) 518; *Morris & Essex R. R. Co. v. Hudson Tunnel R. R. Co.*, 25 N. J. Eq. 384; *Sidener v. Norristown, &c. T. Co.*, 23 Ind. 623; *Henderson v. N. Y. Central R. R. Co.*, 78 N. Y. 423; *Richards v. Des Moines Valley R. R. Co.*, 18 Iowa, 259; *New Central Co. v. George's Creek Coal & Iron Co.*, 37 Md. 357; *Diedrich v. Northwestern Union R. R. Co.*, 33 Wis. 219; *Norristown, &c. T. Co. v. Burket*, 26 Ind. 53; *Northern Pacific R. R. Co. v. Burlington, &c. R. R. Co.*, 2 McCrary (U. S. C. C.), 203.

ence to the entry of a railway company to construct its road, it must be remembered that the decision of the question must depend entirely upon the provisions of the State constitution and the statute. Because, as previously stated, if the statute provides a sure and effectual remedy through which the land-owner may recover the damages, it may authorize an entry without the damages being either paid or secured. Thus in Kansas¹ it is held that the legislature, in

hy, without objection, and sees a public railroad constructed over it, cannot, after the road is completed, or large expenditures have been made thereon upon the faith of his apparent acquiescence, reclaim the land, or enjoin its use by the railroad company. In such case there can only remain to the owner a right of compensation. *Goodin v. Cincinnati, &c. Canal Co.*, 18 Ohio St. 169. A squatter, one who is merely in possession of land without title or interest, cannot recover damages on the taking of the land for the uses of a railroad company. *Rosa v. Missouri, &c. R. R. Co.*, 18 Kan. 124. An attempt to enter upon and take permanent possession of land of an individual for public use, without the assent of the owner, and without the damages having been first ascertained, and paid or tendered to him, is, or would, if consummated, be in the nature of an irreparable injury, for the prevention of which the writ of injunction constitutes the proper remedy, and should, unless some peculiar reasons be shown for denying it, be issued when applied for in due form by the party whose constitutional rights are thus unlawfully invaded or threatened to be. *Bohlman v. Green Bay, &c. R. R. Co.*, 30 Wis. 105. As the payment of compensation to the land-owner, or a deposit for him of the amount in money, is a condition precedent, under Kan. Const. art. 12, § 14, to the appropriation of the property for public use, an injunction lies to restrain a corporation, public or private, from proceeding to take possession without making such payment or deposit, if there is a probability of irreparable injury. *Eidemiller v. Wyandotte City*, 2 Dill. (U. S. C. C.) 376. Although a statutory grant of authority to a company to take lands contains a proviso that they shall not take possession until they have paid or

tendered the compensation assessed, yet if the company has lawfully obtained possession, pending an appeal from the assessment, a court of equity will not enjoin them from constructing their works on the ground that the question of the amount of compensation is yet in suspense. *Cooper v. Chester R. R. Co.*, 19 N. J. Eq. 199. Where upon the hearing of a rule to show cause why an injunction should not issue to restrain the defendants from building their railroad on the shore of the Passaic river, in which the tide ebbs and flows, in front of the complainant's lands, until compensation should be made in the manner prescribed by law, the complainant claimed as shore-owner by adjacency; also under the wharf act of New Jersey, of March 18, 1851, (Nix. Dig. 871), it was held that the injunction should be refused, on the grounds that the right claimed by the complainant was doubtful, and depended upon a question not yet settled by the courts of the State, and that there was no evidence that the complainant had not sufficient access to his lands by a road in the rear or on the side. *N. J. Chan.* 1869; *Stevens v. Paterson, &c. R. R. Co.*, 20 N. J. Eq. 126. Any peculiar benefit to the owner of lands taken for a public improvement, which is derived from such an improvement, in respect of which he may lawfully be compelled to contribute towards the costs and expenses, may be taken as part of his compensation for lands taken; and the legislature may constitutionally provide that the assessment for benefits may be set off in an action by the owner to recover the assessment for the damages for the taking of lands. 1875, *Loweree v. Newark*, 38 N. J. L. 151.

¹ *Shearer v. Commissioners*, 13 Kan. 145. In *Perkins v. Maine Central R. R. Co.*, 72 Me. 95, it was held that a railroad

providing for the taking of private property for public uses may also prescribe the manner in which compensation therefor shall be made, and, if such manner is free from any unreasonable requirements, may provide that a failure to seek compensation in that manner shall be deemed an absolute waiver of all claims therefor. And in New Hampshire it is held that such statutes are not unconstitutional, because they do not require an assessment of damages, and payment or tender of the sum assessed, before the entry upon and injury to lands therein authorized, nor provide for a definite and certain fund to secure the payment of compensation, provided the remedy given is effectual and prompt.¹ In some of the States the constitution makes payment or tender of the damages a condition precedent to an entry,² and in others the statute makes such provision, when the constitution itself is silent in reference thereto,³ while in other States the courts hold that this is essential even though the constitution of the State does not in express terms so provide.⁴ In some of the States, the corporation alone can bring proceedings to have the damages assessed, while in others the remedy is open to both parties, and in some it is provided that if the land-owner does not bring proceedings within a certain time his remedy shall be barred, and this limitation is held to be constitutional.

SEC. 250. Mode of ascertaining Damage: Notice.—The legislature may and does provide the mode in which the damage shall be ascertained, but it has no power to assess the damage itself, and as

location can never become legal except by a deed, a payment of land damages, or prescription. In this case the court held that while the lapse of six years from the time when an action for land damages accrued might, unexplained, constitute a waiver of damages, yet, that, where circumstances show that there has been no waiver in fact, and no title has been acquired by prescription, a simple lapse of time would not bar the land-owner's right to bring suit against the company for an obstruction which amounts to a continuous trespass, *although the recovery of damages must be limited to six years next preceding the date of the writ.* See also *Rusch v. Milwaukee, &c. R. R. Co.*, 54 Wis. 136, where it was held that the mere failure of a land-owner to order a railroad company off from his land, or to bring his action against it as a trespasser until near the end of the

statutory period of limitation, will not operate as a consent to its occupation and use of the land.

¹ *Orr v. Quimby*, 54 N. H. 590.

² *Hibbs v. Chicago, &c. R. R. Co.*, 39 Iowa, 340; *Pearson v. Johnson*, 54 Miss. 259; *Doughty v. Somerville, &c. R. R. Co.*, 7 N. J. Eq. 51; *Teick v. Carver County*, 11 Minn. 292; *Aurora, &c. R. R. Co. v. Miller*, 56 Ind. 88.

³ *McAulay v. Western Vt. R. R. Co.*, 33 Vt. 311; *Marion, &c. R. R. Co. v. Ward*, 9 Ind. 123.

⁴ *Patterson v. Chicago, &c. R. R. Co.*, 75 Ill. In *Jamaica, &c. Plank-Road Co. v. Manhattan Beach R. R. Co.*, 25 Hun (N. Y.), 585, it was held that where the property or franchise of another corporation is condemned, the damages must be assessed and paid before possession can be taken.

we have seen, the mode so provided is exclusive of all other remedies. A board of commissioners, viewers, appraisers, or some tribunal with competent powers is established to assess the damages, from whose decision, usually, an appeal is permitted to some court of general jurisdiction. The tribunal established by the statute may not only view the premises, but also hear evidence upon the question of damage. Being a special tribunal, they have no powers other than those specially conferred upon them by the statute, and any act of theirs in excess of such powers, is void. It is held that a jury trial in cases of this character is not required under the Constitution, inasmuch as there are no issues of fact, as to the *necessity* of taking the land, etc., but only questions relating to the damages for the taking,¹ — although in some of the States it is held to be a judicial inquiry, and one in which either party is entitled to a jury.² In any event, the tribunal must be an impartial one, although neither party can object that some of the persons appointed had an interest favorable to him.³ In some of the States provision is made for a sheriff's jury. But it will not be practicable to enter into details upon these matters, as they are purely local and depend upon the statutory provisions of each State. In the bringing of proceedings, the statute requirements must be strictly complied with, and the statutory methods must be pursued. In some of the States, the company only can bring proceedings, and in that case they must be brought within a reasonable time after entry, or it becomes a trespasser; while in other States either party may avail itself of the remedy, and in such case, if the period within which the proceed-

¹ *Lake Erie, &c. R. Co. v. Heath*, 9 Ind. 558; *Bruggerman v. True*, 25 Minn. 128; *Pennsylvania R. Co. v. Lutheran Cong.*, 53 Penn. St. 445; *Bonaparte v. Camden, &c. R. Co.*, 1 Baldw. (U. S.) 205; *Beekman v. Saratoga, &c. R. Co.*, 3 Paige (N. Y.), 45; *Ames v. Lake Superior, &c. R. Co.*, 21 Minn. 241; *Whiteman v. Wilmington, &c. R. Co.*, 2 Harr. (Del.) 514; *Houston, &c. R. Co. v. Milburn*, 34 Tex. 224; *in re Mt. Washington Road*, 35 N. H. 134; *Buffalo, &c. R. Co. v. Ferris*, 26 Tex. 588; *Raleigh, &c. R. Co. v. Davis*, 2 D. & B. (N. C.) 451; *Louisiana, &c. Plank R. Co. v. Pickett*, 25 Mo. 535; *Dronberger v. Reed*, 11 Ind. 420; *Kramer v. Cleveland, &c. R. Co.*, 5 Ohio St. 140.

² *Cook v. South Park Com'rs*, 61 Ill. 115; *Louisville, &c. R. Co. v. Dryden*, 39 Ind. 393; *Isam v. Miss. Cent. R. Co.*, 36

Miss. 300. In some cases the statute provides for a jury, in which case twelve persons are required. *Lamb v. Stone*, 4 Ohio St. 167; *Chicago, &c. R. Co. v. Sanford*, 23 Mich. 418; but the legislature may provide a less number, and also that a majority shall prevail. *Cruger v. Hudson River R. Co.*, 12 N. Y. 190.

³ *Strang v. Beloit, &c. R. Co.*, 16 Wis. 635; *Powers v. Bears*, 12 Wis. 213; *Ames v. Lake Superior, &c. R. Co.*, 21 Minn. 241; *People v. Mich. So. R. Co.*, 3 Mich. 496. Provisions of a railroad charter prescribing a general mode for assessing compensation for land taken by the company, may be applied to the interest of a turnpike company in land covered by their road, and in the road itself, as being a species of tangible property. *White River Tp. Co. v. Vt. Central R. Co.*, 21 Vt. 590.

ings shall be brought is limited, unless the land-owner brings proceedings within that period, his remedy is lost. These proceedings are regarded as being in the nature of a suit at law, and where they arise between citizens of different States they are removable into the national court.¹

Generally the statute requires that notice shall be given to the parties in interest of an application for the appointment of appraisers, etc., as well as of the time when, and place where they will meet to hear the parties, and also the kind of notice which shall be given; and even if the statute makes no such provision, there is no question but that the courts may direct that reasonable notice shall be given;² as it cannot be said that a man's property

¹ Boom Co. v. Patterson, 98 U. S. 403.

² In *Polly v. Saratoga, &c. R. R. Co.*, 9 Barb. (N. Y.) 441. The service of the notice of a motion for confirmation is only a step in the proceedings, and a matter of practice. The failure to give it will not deprive the court of the jurisdiction already acquired, or render the order liable to be attacked collaterally. *Allen v. Utica, Ithaca and Elmira R. R. Co.*, 15 Hun (N. Y.), 80. Jurisdiction to appoint commissioners of appraisal cannot be conferred by notice served only on a person who is in no way connected with the land-owner, and has only gone on the land to receive service by collusion with those interested in the condemnation. *Dunlap v. Toledo, Ann Arbor, & Grand Trunk R. R. Co.*, 46 Mich., 190. In Virginia it is held that the general statute relating to corporations confers no jurisdiction on a county court to take or appropriate land or other property of individuals or corporations for a railway company. Its only jurisdiction in such a case is to appoint commissioners to ascertain and report what compensation and damages the owner of the property is entitled to receive where he and the company cannot agree upon the question, and to determine what shall be a just compensation, upon the payment of which the statute vests the fee-simple title of the property in the company. *Alexandria & Fredericksburg R. R. Co. v. Alexandria & Washington R. R. Co.*, 75 Va., 780. In West Virginia it is held that the circuit court has no jurisdiction in a case where a railway company seeks to condemn

lands, the jurisdiction in such cases being confined to the county court. *Chesapeake & Ohio R. R. Co. v. Hoard*, 16 West Va., 270; *Chesapeake, &c. R. R. Co. v. Patton*, 9 ib., 648. An accurate description of the land is essential to the validity of the proceedings. *New York Central & Hudson River R. R. Co., in re*, 90 N. Y., 342. All interested parties must be notified or the proceedings will be invalid. *Morgan's La. & Tex. R. R. Co. v. Bourdier*, 1 McGloin (La.), 232; *Peoria & Rock Island R. R. Co. v. Warner*, 61 Ill., 52. Where a judgment, purporting to be a judgment for the condemnation of the right of way for a railway company, is rendered against the company, and it does not appear that the condemnation proceedings were instituted by it, or that the company was a party to them, *or even that it had any notice of them, and no summons was served upon the railway company*, it was held that such judgment is void. *Junction City & Fort Kearney R. R. Co. v. Silver*, 27 Kans., 741. In Illinois, under the statute, the circuit and county courts are held to be always open for proceedings to condemn land for right of way; and when the summons is quashed, the court may order an *alias* summons returnable in vacation; and when so issued and served ten days before the return day, the court will acquire jurisdiction to assess the compensation to be paid for the right of way. *Leibengut v. Louisville, New Albany, & St. Louis R. R. Co.*, 103 Ill., 431. Where service is had upon the land-owner, but not ten days before the day set by the judge for

has been taken by due process of law, where he has had no opportunity to be heard upon the question of compensation; and in New

the hearing of a petition presented in vacation, the service, though not in time for the purposes of a trial, will give the court jurisdiction of the person of the defendant, and the petition gives jurisdiction of the subject matter and of the person of the petitioner, and the court will have the power to continue the cause, and such a continuance will not abate the proceeding. *Bowman v. Venice & Carondelet R. R. Co.*, 102 Ill., 472. But notice sent by mail to an improper address confers no jurisdiction. *Morgan v. Chicago & Northwestern R. R. Co.*, 36 Mich., 428. The plaintiff's premises being injuriously affected by the works of "The Blackburn Railway Company," he served the secretary, at its office, with a notice containing the particulars required by statute, but addressed to "The Blackburn & Clitheroe Railway Co.;" and it was held that the notice was sufficient. *Eastham v. Blackburn Ry. Co.*, 9 Exchq. 758. In Maine the jurisdiction of the railway commissioners being given by statute, and the petition presented to them being the foundation of their action, they obtain jurisdiction only when the petition presents a case within the provisions of the statute. *Spofford v. Bucksport & Bangor R. R. Co.*, 66 Me., 26. If the statute has determined specifically what facts must appear on the face of the petition, the court or judge cannot take any action until a petition is filed containing the statutory requirements; for it is by the petition jurisdiction is obtained of the subject matter. *Smith v. Chicago & Western Indiana R. R. Co.*, 105 Ill. 511. Allegations set out in the petition for the appointment of commissioners that the owner has refused to relinquish the land or to make a voluntary conveyance of it, and that he received five days' notice previous to the presentation, state facts sufficient to give the court jurisdiction of the person of the owner and of the subject matter of the proceeding. *Quayle v. Missouri, Kansas, & Texas R. R. Co.*, 63 Mo. 465. In New Jersey on an application for the appointment of commissioners to condemn lands, when a petition duly verified is presented to the

judge, making a *prima facie* case, with due proof of notice, the appointment should be made as a matter of course. All uncertain and debatable questions should be certified to the Supreme Court. *State v. Hudson Tunnel R. R. Co.*, 38 N. J. Law, 548. In proceedings by a railway company to acquire title to lands under the water of the Hudson river which had been granted by the State to the owners of the uplands, the petition contained an offer on the part of the company to construct a drawbridge to give access from the river to the docks of the land-owners. After an order had been made and appealed from appointing commissioners on application of the company, an order was granted, giving it leave to withdraw the offer, and to amend the petition accordingly. It was held that the court had no power to so amend the petition; that no such power was given by the provision of the general railroad act, which authorizes the correction of "any defect or informality." *New York & West Shore R. R. Co., in re*, 89 N. Y., 453; s.c. 27 Hun (N. Y.), 57. In a proceeding by the land-owner for the assessment of damages against a railway company which had constructed its line across his farm, the application particularly described the whole tract of land; but that part of it occupied by the defendant's railway was described as "extending diagonally through said tract of land, from a point near the northeast corner to a point near the southwest corner." It was held that the description was fatally defective on demurrer. *Indianapolis & Vincennes R. R. Co. v. Newsum*, 54 Ind., 121. A railway company gave a bond to plaintiff to secure the payment of damages which the plaintiff might sustain by reason of the location of the railway through his farm. On the back of the bond was a stipulation that if, from any cause, the quantity of land and fencing through the property required by the location of the road, as at present located, should be changed or lessened, a stated deduction should be made from the face of the bond. In debt upon the bond, the company offered to prove that the land actually taken for its line was

York it has been held that a statute which provides for the taking of a person's property for public purposes, without providing for notice to him, would be unconstitutional.¹ Therefore, whether the

materially lessened from the quantity named in a draft annexed to the bond. This evidence was rejected by the court below, but it was held that it should have been admitted. *Wilmington & Reading R. R. Co. v. High*, 89 Penn. St. 282; *Curran v. Shattuck*, 24 Cal. 427; *Whitcher v. Benton*, 48 N. H. 157; *Dickey v. Tension*, 27 Mo. 373; *Mo. River, &c. R. R. Co. v. Shepard*, 9 Kans. 647; *Baltimore v. Grand Lodge*, 44 Md. 436; *State v. Orange*, 32 N. J. L. 49; *Peoria R. R. Co. v. Warner*, 61 Ill. 52; *Robinson v. Mothwick*, 5 Neb. 252; *Stanford v. Worn*, 27 Cal. 171; *State v. Anderson*, 39 Iowa, 274; *Peabody v. Sweet*, 3 Ind. 514; *Molitt v. Keenan*, 22 Ala. 484; *Comm'r's Court v. Bowie*, 34 Ala. 461.

¹ In *Stuart v. Palmer*, 74 N. Y. 183, the court say: "The constitutional requirement of due process of law, extends to administrative and executive, as well as judicial proceedings." *Johnson v. Joliet, &c. R. R. Co.*, 23 Ill. 202. But see *Swan v. Williams*, 2 Mich. 427, where it was held that an act authorizing the taking of land which failed to provide for notice to the owners, was not unconstitutional for that reason alone, as the courts could order notice to be given, and would infer that the legislature intended that a reasonable notice should be given. But when the act excludes such an inference, it would be clearly unconstitutional and void, and an attempt to exercise the power without notice would be illegal. In *Baltimore & Ohio R. R. Co. v. Pittsburgh, Wheeling, & Ky. R. R. Co.*, 17 W. Va. 812, it was held that the court in condemnation cases has under the statute jurisdiction of the subject matter and parties; and its judgments, unless reversed in some appellate proceeding, would therefore be conclusive upon the parties; and independent of statutory proceedings a judgment of a court of competent jurisdiction in such proceedings is as conclusive upon the parties thereto as any other judgment. But before the court can enter judgment upon an application made to appropriate

land to public use, the owner of the land must have notice of such application; but at whatever stage of the proceedings the owner of the land is notified to appear, after such notice he has the right to contest the appropriation of his land to the petitioner's use. Where a statute authorizes a legal proceeding against any one, and does not expressly provide for notice to be given, it is implied that an opportunity shall be offered him to appear in defence of his rights, unless the contrary clearly appears. In legal proceedings, where actual service cannot be had on the defendant, constructive service, if authorized by statute, will be regarded as "due process of law." When the use for which private property is appropriated is public, and the legislature has acted upon the question, the expediency or necessity of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But when the sovereign power attaches conditions to the exercise of the right of eminent domain, the inquiry whether the conditions have been observed is a matter of judicial cognizance. Where the statute in condemnation proceedings does not declare that the judgment shall be final, the judgment of the inferior court must stand as all other judgments, and the aggrieved party is entitled to the benefit of the general law regulating writs of error and *superedeas*. While objections to the taking or condemnation of the land may be raised by exceptions to the commissioner's report, yet it is a practice that should be discouraged. The first question to be decided is: Shall the land be condemned for the use of the petitioner? And it is the better practice to determine this question before the commissioners to assess value are appointed. In settling this question while it may be done without formal pleading, yet there can be no irregularity in

statute makes provision for notice or not, it has been held that it will—especially where an appeal is allowed, or the commissioners are

raising the objections to the condemnation by proper pleas, as it thus states the defence with legal precision. While a jury on the question of the appropriation of the land is not required by the statute, yet under section 5 of chapter 131 of the Code, the court was authorized to direct that the issues be tried by a jury. As the party seeking the appropriation of the land has the affirmative of the issues upon the right to take it, such party is entitled to open and conclude the argument to the jury on that question. In these proceedings a juror is not incompetent because he is a citizen of the county in which the land is, and liable to the county levies, though the county may be interested in the suit. It is no obstacle in the way of the appropriation of land owned by one railroad company to the use of another, that merely to prevent its condemnation, the former has put the land to a use not necessary for the proper exercise of its franchise. The jury or court may find that a portion of the land sought to be condemned may be taken and the residue may not. Property belonging to a railroad company and not in actual use, necessary to the proper exercise of the franchise thereof, may be taken for the purposes of another railroad under the general railroad law of the State. An express legislative enactment is generally required in order to take such property in use by a railroad company, except where the proposed appropriation would not destroy, or greatly injure, the franchise of the company, or render it difficult to prosecute the object thereof. Private property can only be taken for a public use, and no more of such property can be taken than is necessary for such use, which must be determined, when proper, from the statute on the subject and the facts appearing in the case. Upon a motion for a new trial in a condemnation case, as in any other case, evidence that is not relevant to any issue before the jury will not be considered by the court. Unless the owner of the land who is before the court in some form denies that the land sought to be condemned is necessary for the use of the petitioner, he

will be deemed in the appellate court to have waived any such objection to the condemnation. A small portion of the buttress of a bridge, belonging to one railroad company and not necessary to the support of the bridge and to the exercise of the franchise of the company, may be taken for the use of another railroad company. Where a State constitution provides that private property shall not be taken for public use without just compensation, the damage to the residue of the tract, where a part is taken, is an element of damage to be considered by the commissioners or jury, as the case may be. The facts upon which a petitioner bases his right to the removal of a case from a State to a Federal court must be made to appear to the satisfaction of the court, before the order of removal can be made. The petition becomes a part of the record and should state facts which, taken in connection with such as already appear, entitle the petitioner to a removal of the case. With the question of the appropriation of the land sought to be taken, the United States government,—a separate sovereignty,—unless it is the party seeking the condemnation, has nothing to do. A foreign corporation cannot in the courts of the United States condemn the land of a citizen of a State for the use of such corporation; and if the Federal courts have not original jurisdiction for such purposes, a proceeding of that kind instituted in a State court cannot be removed to the Federal courts, because the Federal courts can under no circumstances have jurisdiction of such a case. A railroad corporation may have an existence in more than one State, if chartered or licensed to build its road and do business in more than one. The Baltimore & Ohio Railroad Company is a domestic corporation in the State of West Virginia, and as such liable to be sued here. When sued in the courts of this State by a citizen thereof, such suit cannot be removed to the Circuit Court of the United States, as that court has no jurisdiction of such a case. Whether a repealing act shall have the effect to arrest proceedings in pending cases depends upon

empowered to hear evidence, or the parties are required to attempt to agree on the damages — be presumed that it was intended that notice should be given;¹ and the courts will usually order that the parties shall be notified before they will proceed.² Of course, the legislature may provide what kind of notice shall be given, and having done so, the notice therein required must be given.³ If the statute provides

the intent of the legislature. That intent must be gathered from the action of the legislature itself, but not necessarily from the repealing act alone; but if it can be gathered from any act upon the same subject passed by the legislature at the same session, that it was the legislative intent that pending actions or proceedings should be saved, it is sufficient to effect that purpose.

¹ *Atlantic, &c. R. R. Co. v. Cumberland Co. Comm'rs*, 51 Me. 36; *Swan v. Williams*, 2 Mich. 427; *Dickey v. Tension*, 27 Mo. 373; *Peoria R. R. Co. v. Warner*, 61 Ill. 52; *Booneville v. Ormrod*, 26 Mo. 193; *Skinner v. Lake View Av. Co.*, 57 Ill. 151; *Johnson v. Joliet & Chicago R. R. Co.*, 23 Ill. 102. The form of notice is not material. *Doughty v. Somerville, &c. R. Co.*, 21 L. J. L. 442; *Ross v. Elizabethtown, &c. R. Co.*, 20 N. J. L. 230.

² *Swan v. Williams*, 2 Mich. 427. The notice should be such as to apprise the party of the nature of the application and the time and place when and where it is to be heard, and what property is intended to be taken. *Van Wickl v. Camden, &c. R. R. Co.*, 3 N. J. Eq. 162; *Castor v. N. J. R. R. Co.*, 24 N. J. L. 730; *Vail v. Morris, &c. R. R. Co.*, 21 id. 189; *In re New York Elevated R. R. Co.*, 70 N. Y. 327; *Reitenbaugh v. Chester Valley R. R. Co.*, 21 Penn. St. 100; *Quincy, &c. R. R. Co. v. Kellogg*, 54 Mo. 334; *Quincy, &c. R. R. Co. v. Taylor*, 43 Mo. 35. A warrant issued to a sheriff, commanding him to summon a jury to assess the compensation due, "if any," to C., was held not to affect the validity of the warrant, or vary the duties of the jury. *Regina v. Lancaster & Preston Ry. Co.*, 6 Q. B. 759. Upon an application to confirm the report of commissioners appointed to appraise the damages caused by the taking of land for railway purposes, the

court at special term has power to refuse to confirm the report and direct a rehearing, upon the application of a land-owner who shows that he has not received proper and adequate notice of the meetings of the commissioners, and that by reason thereof he has been absent therefrom. *New York, Lackawanna, & Western R. R. Co., in re*, 29 Hun (N. Y.), 602. Under a provision in a railway charter requiring notice in condemnation proceedings to be given to "the persons interested," a mortgagee of the lands condemned, if not notified, is not bound by the proceedings in condemnation. *Platt v. Bright*, 29 N. J. Eq. 128. Before the court can enter judgment upon an application made to appropriate land to public use, the owner of the land must have notice of such application; but at whatever stage of the proceedings the owner is notified to appear, after such notice he has the right to contest the appropriation of his land to the petitioner's use. *Baltimore & Ohio R. R. Co. v. Pittsburgh, Wheeling, & Ky. R. R. Co.*, 17 W. Va. 812; *Tracy v. Elizabethtown, &c. R. R. Co.*, 80 Ky. 259. In Wisconsin, under the general railway act, the initiative in the exercise of the right of eminent domain belongs exclusively to the corporation. *Sherman v. Milwaukee, Lake Shore, & Western R. R. Co.*, 40 Wis. 645.

³ *Warwick Institution v. Providence*, 12 R. I. 144; *Norton v. Walkill Valley R. R. Co.*, 68 Barb. (N. Y.) 77; *People v. Kinskern*, 54 N. Y. 52; *Morgan v. Chicago, &c. R. R. Co.*, 36 Mich. 428; *Chicago, &c. R. R. Co. v. Smith*, 78 Ill. 96; *Hood v. Finch*, 8 Wis. 381; *New Orleans, &c. R. R. Co. v. Frederic*, 46 Miss. 1; *People v. Lockport, &c. R. R. Co.*, 13 Hun (N. Y.), 211; *Salem v. Eastern R. R. Co.*, 98 Mass. 431. The proceeding is *in rem*, against the land, and the legislature may specify how notice shall be given. *Weir v. St. Paul, &c.*

that notice shall be given, but does not prescribe the manner in which it shall be given, it will be presumed that personal notice was intended;¹ and where notice was served upon one of the parties

R. R. Co., 18 Minn. 155; Missouri River, &c. R. R. Co. v. Shepard, 9 Kan. 647; New Orleans, &c. R. R. Co. v. Hemphill, 35 Miss. 17; Empire City Bank, *in re*, 18 N. Y. 199; Cupp v. Seneca County, 19 Ohio St. 173; Owners v. Albany, 15 Wend. (N. Y.) 374. And the giving of such notice is a prerequisite to the exercise of the power. *In re Long Island R. R. Co.*, 45 N. Y. 364. Thus, it may provide that it shall be given by advertisement even to resident owners. *Polly v. Saratoga, &c. R. R. Co.*, 9 Barb. (N. Y.) 449; *Wilkin v. St. Paul, R. R. Co.*, 16 Minn. 171. In the case of unknown owners, the only notice possible is constructive notice, and it may be given by advertisement in newspapers, *Secombe v. Milwaukee R. R.*, 2 Dill. (U. S. C. C.) 469; *Wilson v. Hathaway*, 42 Iowa, 173; by posting, *Hildreth v. Lowell*, 11 Gray (Mass.), 345; *Taylor v. Hampden*, 18 Pick. (Mass.) 309; or by mail, *Crane v. Camp*, 12 Conn. 464. And as constructive notice is a creature of statute, that notice may also be dispensed with. *Johnson v. Joliet R. R.*, 23 Ill. 202; *Cowan v. Glover*, 3 A. K. Mar. (Ky.) 357. The statute may require service of personal notice on owners in actual occupancy; and if not in actual occupancy, by publication. *Hunt v. Smith*, 9 Kan. 137. In Wisconsin, the owner of the land proposed to be taken, when known and living within the city, should have personal notice of the time and place of the appointment of the jury, and when they will meet to view the premises, in order that he may object to the selection of any unfit person on the jury, and have a full opportunity to be heard before them on the question of necessity. The failure of a city charter to provide for such notice to resident owners renders the proceedings void. Notice by advertisement may properly be given to non-resident owners, but not to resident owners, or those having tenants or resident agents. *State v. Fond du Lac*, 42 Wis. 287. Where the statute requires service of notice personally on an agent

of an owner residing in the State, or on a non-resident owner of land personally, wherever he may be, or by publication in a newspaper for six weeks, and by sending to the land-owner by mail, if known and non-resident, if his residence is known, a copy of the petition and notice of hearing, thirty days before the time of presentation, the record should show that there was no resident agent; and a service by mail on a non-resident owner would not be sufficient if the record was silent as to the existence or non-existence of a resident agent. *Morgan v. Chicago, &c. R. R.*, 36 Mich. 428. Notice by advertisement should be directed to the person by name, when known. If not known, he may be described as unknown. *Chicago, &c. R. R. Co. v. Smith*, 78 Ill. 96. The posting of notices in public places is a proper means of bringing home notice to the owners of property. This notice must be given strictly according to the statutory requirement, or else the proceedings will be void as to non-residents. *Curran v. Shattuck*, 24 Cal. 427. If the statute does not require the proof of the posting to be in writing, the record declaring that such notice has been given is presumptive evidence of its having been properly done. *McCollister v. Shuey*, 24 Iowa, 362; *The State v. Prine*, 25 Iowa, 231. Where the charter requires notice to be given by publication to the owner or occupier, or "unknown owners of land" sought to be condemned, of the application to appoint commissioners, and the company publishes such notice as to one who had held a life estate only, but who was dead, not naming the remainderman, it was held that the subsequent proceedings condemning the land for right of way were not binding upon the remainderman, and that he might recover the land appropriated by ejectment. *Chicago & Alton R. R. Co. v. Smith*, 78 Ill. 96.

¹ *Rathbun v. Acker*, 18 Barb. (N. Y.) 393; *McDermott v. Board of Police*, 25 id. 635.

by leaving it at his dwelling-house with his wife, he not being absent from the State, the court doubted whether it was sufficient,¹ but intimated that it might have been sufficient if the party had been absent from the State. Of course a party may waive notice, and he is treated as having done so when he appears and contests the proceedings upon the merits,² but not by an appearance merely to question the regularity of the proceedings.³ The proceedings being *in rem*, against the land, the judgment is conclusive against all parties interested, whether they had notice of the proceedings or not; as the seizure itself is constructive notice, and the court obtains jurisdiction over the land seized;⁴ and in some of the States it has been held that it is not essential to give notice when the statute does not require it;⁵ and it may occur that the exigency is such as not to admit of it,⁶ although in the case of lands taken for railway purposes such an exigency could hardly arise; but the principle remains that, where the statute does not require notice to be given, the courts may direct such notice to be given as the circumstances seem to demand, or may proceed without any notice being given other than such as arises from the seizure of the land.⁷ If the statute does not require notice to be given of the appointment of commissioners, none need be given;⁸ but under such circumstances the courts will require all the proceedings to be in strict conformity to the statute, and if they are not they will be set aside.⁹ But usually the statute requires that notice shall be given, and when this is the case jurisdiction cannot be obtained without it,¹⁰ although jurisdiction will be

¹ *People v. Niagara Bridge, &c. R. Co.*, 13 Hun (N. Y.), 213. Where a person is alleged in the petition to be a resident of a certain place, a notice mailed and addressed to him at another place, is void. *Morgan v. Chicago, &c. R. Co.*, 36 Mich. 428.

² *Dyckman v. Mayor*, 5 N. Y. 441; *People v. Quigg*, 59 N. Y. 83; *Cruger v. Hudson River R. Co.*, 10 N. Y. 190; *Long Island R. Co. v. Burnett*, 10 Hun (N. Y.), 91; *Anderson v. Wood*, 80 Ill. 15; *Peavy v. Wolfboro*, 37 N. H. 286; *Roerhborn v. Schmidt*, 16 Wis. 519.

³ *Boston, &c. R. Co. v. Folsom*, 46 N. H. 64; *Roberts v. Stark*, 47 N. H. 223; *Concord R. Co. v. Greely*, 17 N. H. 47; *Mohawk, &c. R. Co. v. Archer*, 6 Paige Ch. (N. Y.) 83; *Cruger v. Hudson River R. Co.*, 12 N. Y. 190; *Seifert v. Brooks*, 34 Wis. 443; *Quincy, &c. R. Co. v. Kel-*

logg, 54 Mo. 334; *Spurrier v. Wertner*, 48 Iowa, 486; *People v. Osborn*, 20 Wend. (N. Y.) 186.

⁴ *Cupp v. Com'rs of Seneca Co.*, 19 Ohio St. 173; *Wilson v. Hathaway*, 42 Iowa, 172; *Stewart v. Police Board*, 25 Miss. 479.

⁵ *Kramer v. Cleveland R. Co.*, 5 Ohio St. 140; *Harper v. Lexington R. Co.*, 2 Dana (Ky.), 227.

⁶ *George's Creek Co. v. Coal Co.*, 40 Md. 425.

⁷ *Wilson v. Hathaway*, 42 Iowa, 172.

⁸ *Weir v. St. Paul, &c. R. Co.*, 18 Minn. 155. But the courts will usually direct notice to be given. *Booneville v. Ormrod*, 26 Mo. 193.

⁹ *Hood v. Finch*, 8 Wis. 331.

¹⁰ *Cruger v. Hudson River R. Co.*, 12 N. Y. 190.

presumed when the record shows that the court decided that sufficient notice had been given.¹ And where jurisdiction has once attached, subsequent proceedings will not be invalidated by a failure to give notices required,² and if notice is given to some of the parties and not to others, the proceedings will be valid as to those to whom notice was given.³ Where proceedings are had without the notice required by statute they are invalid, and will be set aside on *certiorari* or other proper remedy.⁴

SEC. 251. **Commissioners, Viewers, Appraisers, Sheriff's Jury, etc.** — The appointment of commissioners, etc., is usually committed to some court of record, and if it refuses to appoint, it can be compelled to do so by *mandamus*.⁵ The appointment is a judicial act addressed to the judgment and discretion of the court, therefore it cannot be decided by lot, nor can it be confined to persons previously selected by some other body.⁶ Generally the statute provides that they shall be disinterested, and usually that they shall be freeholders, and when this is the case the facts should appear in the record of appointment;⁷ although in some of the cases it is held that unless the question is raised by the answer, in the absence of any statement upon that subject in the record, it will be conclusively presumed that the commissioners possessed the requisite statutory qualifications.⁸ The word "disinterested" as used in these statutes, is held to exclude stockholders of the corporation.⁹ In some of the States it is held that the species of interest requisite to disqualify is a *pecuniary* interest, and does not necessarily exclude relatives within the

¹ *State v. Prime*, 25 Iowa, 231; *State v. Anderson*, 39 id. 274.

² *Commissioners v. Espen*, 12 Kan. 531.

³ *State v. Easton R. R. Co.*, 36 N. J. L. 181; *Kidder v. Jennison*, 21 Vt. 108.

⁴ *State v. Jersey City*, 25 N. J. L. 309; *Seifert v. Brooks*, 34 Wis. 443; *Stone v. Boston*, 2 Met. (Mass.) 220; *Wood v. Commissioners*, 62 Ill. 391; *Case v. Thompson*, 6 Wend. (N. Y.) 634; *Atlantic R. R. Co. v. Comm'rs*, 51 Me. 36; *Ware v. Commissioners*, 38 Me. 492; *Anderson v. Tuberville*, 6 Coldw. (Tenn.) 150; *Skinner v. Lake View Av. Co.*, 57 Ill. 151; *People v. Supervisors*, 36 How. Pr. (N. Y.) 544; *Joliet R. R. Co. v. Barrows*, 24 Ill. 562.

⁵ *Western R. R. Co. v. Dickson*, 30 Wis. 389.

⁶ *Menges v. Albany*, 56 N. Y. 374.

⁷ *State v. Jersey City*, 25 N. J. L. 309; *Judson v. Bridgeport*, 25 Conn. 428.

⁸ *Kellogg v. Price*, 42 Ind. 360; *App's Road*, 17 S. & R. (Penn.) 388. But the fact of jurisdiction must appear from the record, and will not be inferred or presumed. *Miller v. Brown*, 56 N. Y. 383.

⁹ *Rock Island R. R. Co. v. Lynch*, 23 Ill. 645; *Friend appellant*, 53 Me. 387; *Williams v. Gt. Western Ry. Co.*, 3 H. & N. 869. A person who has a "bond" for a deed of land, is held to be a freeholder. *New Orleans R. R. Co. v. Hemphill*, 35 Miss. 17. In Georgia a stockholder's son has been held to be disqualified because of his near relationship to a person having an interest. *Georgia R. R. Co. v. Hart*, 60 Ga. 550. An employé of the company is disqualified from serving as a juror. *Central R. R. Co. v. Mitchell*, 63 Ga. 173.

fourth degree of consanguinity.¹ But in Indiana it is held to exclude not only those pecuniarily interested, but also relatives within the sixth degree of consanguinity.²

The fact is jurisdictional,³ but if it is known to the parties that one of the commissioners is not a freeholder, or disinterested, and the objection is not taken at the earliest opportunity, it is waived.⁴ But if not known, the report of persons who have not the requisite qualifications is *coram non judice* and void,⁵ although the commissioner who is disqualified did not vote with the majority.⁶ The commissioners must be sworn to the faithful discharge of their duties before they enter upon their discharge, or the proceedings will be quashed;⁷ and the record should show that they were all duly sworn;⁸ and the form of the oath should be such as to meet the statutory requirements.⁹ The commissioners must conform to the order of the court appointing them, both as to the time and place of meeting,

¹ In *Chase v. Rutland*, 47 Vt. 393, it was held that a statute which required that road commissioners should be "disinterested" freeholders, related to freeholders not "*pecuniarily*" interested in the establishment or non-establishment of the road. In Massachusetts, it is held that the pecuniary interest must be more than that of a simple taxpayer. *Taylor v. Worcester*, 105 Mass. 225; *State v. Crane*, 36 N. J. L. 394. The fact that one of the commissioners or viewers had a claim against the company for damages was held not to disqualify him. *Newbecker v. Susquehanna R. R. Co.*, 1 Pearson (Penn.), 57. Nor that he has expressed an opinion. *Gingrid v. Harrisburgh, &c. R. R. Co.*, 1 id. 74. But one who has given his note to the company to aid the enterprise, is disqualified by reason of his interest, and his disqualification cannot be removed by the agreement of the parties. *Michigan Air Line R. R. Co. v. Barnes*, 40 Mich. 383. But see *Detroit Western Transit Co. v. Crane*, 50 Mich. 182, where it was held that a subscriber to a fund in aid of a railway is not disqualified to act as a commissioner to assess damages against another projected road, simply because such road is to be leased to the road to whose aid-fund he has subscribed.

² *High v. Pitching Assn.*, 44 Ind. 356.

³ *State v. Jersey City*, 25 N. J. L. 309.

⁴ *Town v. Stoddard*, 30 N. H. 23; *Emanuel Hospital v. Metropolitan Ry. Co.*, 19 L. T. N. S. 692; *Groton v. Hulburt*, 22 Conn. 178; *Matter of Wells County Road*, 7 Ohio St. 16; *Baldwin v. Calkins*, 10 Wend. (N. Y.) 167.

⁵ *Daggy v. Green*, 12 Ind. 303.

⁶ *Rock Island R. Co. v. Lynch*, 23 Ill. 645.

⁷ *Fisher v. Smith*, 5 Leigh (Va.), 611; *Frith v. Justices*, 30 Ga. 723.

⁸ *Virginia R. R. Co. v. Lovejoy*, 8 Nev. 100; *Pollard v. Ferguson*, 1 Litt. (Ky.) 196; *Wells County Road*, 7 Ohio St. 16; *Broad Street Road*, 7 S. & R. (Penn.) 444. If commissioners are sworn in the first instance, they need not be sworn when the report is recommitment to them. *Law v. Galena R. R. Co.*, 18 Ill. 324. In some of the States the oath taken should be returned, and any verbal inaccuracies therein are held fatal to the report. *State v. Green*, 15 N. J. L. 88; *State v. Ayres*, 15 id. 479. In *Cambria St.*, 75 Penn. St. 357, an oath to road viewers "faithfully to discharge their duties" was held not to comply with a statutory requirement that they make oath to perform their duties "impartially and according to the best of their judgment." *State v. Hutchinson*, 10 N. J. L. 242; *Hoogland v. Culvert*, 20 id. 387.

⁹ *Cambria St.*, 75 Penn. St. 357.

or their report will be invalid;¹ but having met as required in the order, they may adjourn from day to day until their investigation is completed, and may adjourn to a different place from that named in the order.² "An adjournment publicly announced," says PARDEE, J., in the case last cited, "is the easiest and most common mode of securing the attendance of parties; a written notice signed by the committee and served upon every person interested involves much more labor, but it is equally effective. . . . The committee, having opened the trial at the place specified in the commission from the court, had power to continue it to another place, giving due notice of the change, and being responsible to the court for their action in this respect."

The majority of the commissioners or viewers control, and may make the award, but they must all be notified and attend the meetings.³ If the statute provides for a jury to assess the damages, if the parties agree upon commissioners to act in place of the jury, it is held that all must concur;⁴ although this would doubtless be otherwise where the statute provides that a *majority* of the jurors shall prevail. If there is a vacancy in the board, the board cannot act until the vacancy is filled.⁵ The report is subject to acceptance or rejection by the court for cause, and the same causes will operate to sustain or reject the report, which would operate to sustain or set aside the verdict of a jury.⁶ They act judicially, and proceedings

¹ *State v. Scott*, 9 N. J. L. 17; *Roberts v. Williams*, 13 Ark. 355.

² *Goodwin v. Wethersfield*, 43 Conn. 437.

³ *Virginia R. R. Co. v. Lovejoy*, 8 Nev. 100; *Christy v. Newton*, 60 Barb. (N. Y.) 332; *Griscom v. Gilmore*, 16 N. J. L. 105; *Young v. Buckingham*, 5 Ohio, 485; *Board of Commissioners v. Lansing*, 45 N. Y. 19; *People v. Hynds*, 30 N. Y. 476.

⁴ *McClellan v. Commissioners*, 21 Me. 390.

⁵ *Wentworth v. Farmington*, 49 N. H. 128.

⁶ *Hannibal Bridge v. Schaubacher*, 49 Mo. 455; *St. Louis R. R. Co. v. Almeroth*, 62 Mo. 343; *Matter of N. Y. Central R. R. Co.*, 64 N. Y. 60. In proceedings to set aside the report of commissioners condemning lands for railroad purposes, the entry upon the judge's docket was, "Objections overruled and judgment for

defendant." The law required the judgment for the defendant entered in such case to be one vesting the title in the company, but the clerk, in writing up the order, by mistake made it to read, "that plaintiff take nothing by his action, and that defendant recover his costs." It was held that the entry might be corrected *nunc pro tunc* at a subsequent term. *Lexington & St. Louis R. R. Co. v. Mockbee*, 63 Mo. 348. A finding by the jury that they "did ascertain and determine that it was necessary for said company to take said real estate for public use, to wit, for the purpose of the company's incorporation as and for right of way," is a sufficient finding that the land was necessary and requisite for the public use. *East Saginaw & St. Clair R. R. Co. v. Benham*, 28 Mich. 459. The report of the commissioners as to the amount of damages is *prima facie* correct. *Crawford v. Valley R. R. Co.*, 25 Grattan (Va.), 467. It is

before them are treated as being a civil action.¹ Objections of any kind should be made before them, and unless so made, will not be

not necessary that the adjudication of county commissioners upon the subject-matter of a petition presented by a person whose land has been taken for a railway location should be annexed to or made a part of the warrant for a jury subsequently issued by the commissioners, if a copy of the original petition is incorporated with the warrant. *Childs v. New Haven & Northampton Co.*, 133 Mass. 253. Assessors appointed to assess damages to property caused by the building of a railway must find the value of the land taken. A report containing a lumping charge of all the injury done will be set aside. The court will not refer a report back to viewers for correction when their previous one seems partial. *Poffenberger v. Susquehanna R. R. Co.*, 1 Pearson (Penn.), 45. Under a proper construction of the statute directing the appointment of three commissioners of appraisal, the report of the commissioners is not rendered nugatory by the fact that only two of them acted and signed the report. Such a report is sufficient to authorize the court to render a judgment upon it vesting the title to the land in the company. *Quayle v. Missouri & Texas R. R. Co.*, 63 Mo. 465. In New York, a second award of the commissioners is conclusive upon the question of the amount of damages. *Prospect Park & Coney Island R. R. Co., in re*, 27 Hun (N. Y.), 184. And in Maine, where a second assessment of damages is made, the court must render judgment for the full amount found by the commissioners. If money has been paid into court upon a former assessment, which has since been set aside at the instance of the land-owner, it cannot be treated as a payment or allowed as a credit on the judgment. *Provolt v. Chicago, Rock Island, & Pacific R. R. Co.*, 69 Mo. 633. Where there is a failure to comply by the commissioners with the requirements of the act to provide for the exercise of the right of eminent domain, the court or judge may set aside the report, or re-submit and direct a further find-

ing. *Pueblo & Arkansas Valley R. R. Co. v. Rudd*, 5 Col. 270. For a complete appropriation of real property, compensation should be given in a single proceeding; but for a temporary taking, successive actions for damages may be maintained. *Lehigh Valley R. R. Co. v. McFarlan*, 43 N. J. L. 605. In proceedings to appropriate private property, there must be a judgment confirming the verdict of the jury before the corporation is entitled by a deposit of the amount of such verdict to possession of the property appropriated. *Wagner v. R. R. Co.*, 38 Ohio St. 32. County commissioners have no right to amend their record on a petition for land damages by inserting, as parties, names not embraced in the petition. *Littlefield v. Boston & Maine R. R. Co.*, 65 Me. 248. While a judgment against a railway company for the taking of land on which its road was built remained unpaid, a mortgage of the road with all the property and franchises of the company was foreclosed, and the purchasers organized under the statute a new company, which, with knowledge of the facts, continued to operate its road over said land. It was held that equity will restrain the company from further maintaining and operating the road over the land, except upon payment of the judgment against the old company. The facts that the judgment against the old company was obtained two years before the foreclosure sale, and that the road had been operated over the land during that time, and that no further steps were taken by suit to enforce payment of the damages until the new company had been occupying the land for thirteen years, do not constitute a waiver of the owner's right to compensation. *Gilman v. Sheboygan & Fond du Lac R. R. Co.*, 40 Wis. 653. In another case the complaint, in substance, that plaintiff, in 1859, obtained judgment against the S. & M. R. R. Co., for damages for land taken by it for its road; that in 1861 the property

¹ *Albany, &c. R. R. Co. v. Lansing*, 16 Barb. (N. Y.) 68.

entertained by the court on appeal.¹ Their action must be free from partiality or bias, and their report will be set aside if it is shown to

and franchises of that company were sold under a mortgage; that the purchasers took with notice of the existence and non-payment of said judgment; that they subsequently organized into a new company, which is operating the road built by said S. & M. Co., claiming to own the same and its appurtenances; that, in continuation of the appropriation of plaintiff's said land made by the last-named company, defendant, the new company, entered upon the same, and now holds, and ever since 1861 has held, it to its own exclusive use and benefit, without plaintiff's consent; that plaintiff's judgment is a valid subsisting one, wholly unpaid; and that the S. & M. Co., ever since the mortgage sale, has been insolvent, and has no existence in fact, but has been merged in the defendant. It was held that plaintiff has probably a remedy in equity to compel the defendant to make compensation for the land, or stop running cars over it; but that the defendant is not liable in this action, at law, for a debt upon the judgment. *Gilman v. Sheboygan & Fond du Lac R. R. Co.*, 37 Wis., 317.

¹ *Matter of Clear Lake Water Co.*, 48 Cal. 586; *Grand Junction R. R. Co. v. Middlesex Comm'rs*, 14 Gray (Mass.), 553; *Charles River R. R. Co. v. County Comm'rs*, 7 id. 389; *Eaton v. Framingham*, 6 Cush. (Mass.) 245. The want of publication of notice to parties interested cannot be insisted upon on appeal where all concerned have voluntarily appeared in the cause. *East Saginaw & St. Clair R. R. Co. v. Benham*, 28 Mich. 459. Where an appeal is required to be made by filing a notice of appeal with the clerk of the district court within thirty days after the award is filed, and the appellant failed to perfect her appeal in that manner, but made service of notice upon defendant. It was held that the court acquired no jurisdiction of the case. The defect was not cured so as to give the court jurisdiction by the action of the company in executing and filing a bond immediately after the service of the notice, conditioned to pay appellant whatever sum might be awarded her upon such

appeal, nor by moving the court to dismiss the appeal for such want of jurisdiction. *Klein v. St. Paul, Minneapolis, & Manitoba R. R. Co.*, 30 Minn. 451. And notice of an appeal by the owner of the land from the decision of the commissioners served upon the attorney of the railroad company is insufficient. *Hartman v. Belleville & O'Fallon R. R. Co.*, 64 Ill. 24. Where land has been taken and a question is pending in a court of law as to the amount of compensation to which the land-owner is entitled, he will be protected in his constitutional right to possession of his property until his compensation be ascertained and paid or tendered to him; and the company in whose favor the condemnation is made will not be permitted to take possession of the land on tendering so much of the compensation as is not in dispute, but will be restrained from so doing. To secure the land-owner in his constitutional right, and at the same time to spare the company unnecessary delay, the court will, on the latter paying the land-owner so much of the compensation as is undisputed, and the costs of the suit in this court, and paying into court an amount sufficient to cover the disputed claim, to the end that the land-owner may have the same if adjudged by the court of law to be entitled thereto, permit the company to take possession of the land. *Metler v. Easton & Amboy R. R. Co.*, 25 N. J. Eq. 214. The reversal of a judgment on appeal of the land-owner will not entitle him to bring an action of ejectment for possession. He should have the cause redocketed for another trial as to the amount of damages. *St. Louis, Alton & Terre Haute R. R. Co. v. Karnes*, 101 Ill. 402. No appeal lies from an order of the court confirming an inquisition condemning lands for the construction of a railroad unless the court exceeds its jurisdiction in passing such order. *George's Creek Coal Co. v. New Central Coal Co.*, 40 Md. 425; *Cumberland & Penn. R. R. Co. v. Penn. R. R. Co.*, 57 id. 267; *Brown v. Philadelphia, Wilmington, & Baltimore R. R. Co.*, 58 id. 539. In proceedings under the stat-

be prejudiced, or tainted with any improper elements or influences;¹ or if it is based on improper evidence or erroneous principles; or if

ute, where the commissioners have filed with the clerk their certificate of "ascertainment and assessment," and the court or judge has denied the motion of the petitioner or respondent to vacate or set aside the same, there is such a final determination as will authorize a writ of error or an appeal. *Denver & New Orleans R. R. Co. v. Jackson*, 6 Col. 340. In Wisconsin an order of the Circuit Court condemning land for the use of a railway company is held to be a final order affecting a substantial right in a special proceeding, and is appealable. *Wisconsin Central R. R. Co. v. Cornell University*, 49 Wis. 162. And the railway company as well as the land-owner has the right of appeal to the Circuit Court from the award of commissioners: *Lee v. Northwestern Union R. R. Co.*, 33 Wis. 222. When an appeal is taken by the petitioner from an order of the court confirming the report of commissioners, if there is more than one tract of land, the order may be reversed as to one of the tracts and affirmed as to another. *Stockton & Copperopolis R. R. Co. v. Gagliani*, 49 Cal. 189. In a proceeding to condemn a strip of land for a right of way through a farm, consisting of several tracts, both parties on the trial treated the farm as a single tract, in their examination of witnesses and instructions, and the jury fixed the compensation and the owner's damages as upon one tract. Upon appeal the company for the first time objected that the finding should have applied to each tract separately; it was held that the objection could not be urged for the first time in the appellate court.

Kankakee & Illinois R. R. Co. v. Chester, 62 Ill. 235. The only remedy to redress a mistake in the amount of damages assessed by viewers is by appeal and trial by jury; the court will not pass upon this question on exceptions to the report of viewers. The appeal should be in the same form as that from the award of arbitrators. *Seal v. Northern Central R. R. Co.*, 1 Pearson (Pa.), 108. On an appeal from an assessment of damages at any time pending a motion to strike out exceptions to the assessment, the exceptions may be amended by the filing of an additional exception presenting a question proper to be tried on such appeal as the question of the inadequacy of the damages assessed. *Pittsburgh, Fort Wayne, & Chicago R. R. Co. v. Swinney*, 59 Ind. 100; *Swinney v. Fort Wayne, Muncie & Cincinnati R. R. Co.*, id. 205. One of the claimants in whose favor the award of damages was made by the commissioners was a married woman. Her husband joined in taking an appeal from the award. Upon the trial of the appeal after claimants had rested their case, a motion was made to dismiss the appeal because of such joinder of her husband, and was denied. It was held not error. *Wilkin v. St. Paul, Stillwater, & Taylor's Falls R. R. Co.*, 22 Minn. 177. Where on appeal the damages are increased but not paid, the land-owner is entitled to recover back possession, but the deposit of the original award entitles the company to possession until the determination of the appeal. *Lake Erie & Western R. R. Co. v. Kinsey*, 87 Ind. 514. As a general rule, on appeal interest

¹ *Thompson v. Conway*, 53 N. H. 622; *Pennsylvania R. R. Co. v. Lutheran Congregation*, 53 Penn. St. 445. Conversing with one of the parties relative to the damages, where the other is not present, — *Peavy v. Wolfboro*, 37 N. H. 286, — if the report is in that party's favor, is good ground for setting it aside. *Goodwin v. Wethersfield*, 43 Conn. 437. It has been held that treating the commissioners to liquor invalidates the report. *Agno v.*

Newport Highway, 48 N. H. 433. But entertaining them at the house of one of the parties where there is no hotel near, has been held not to be sufficient ground therefor. *Beardsley v. Washington*, 39 Conn. 265; *State v. Justices*, 24 N. J. L. 413; *State v. Bergen*, 24 id. 342; *Coleman v. Moody*, 4 H. & M. (Va.) 1. But such a course is reprehensible and ought not to be tolerated. *Matter of Magnolia St.*, 8 Phila. (Penn.) 468.

the commissioners are shown to have acted improperly; but not for technical errors, or because the damages assessed are more or less than some other persons may have thought they ought to be.¹ Even

on the damages should be allowed. *Warren v. St. Paul & Pacific R. R. Co.*, 21 Minn. 424. And on a verdict on appeal it is competent for the district court on motion to allow interest from the filing of the award to the time of the entry of judgment thereon, and to include the same in the judgment. *Whitacre v. St. Paul & Sioux City R. R. Co.*, 24 Minn. 311. And if the company is also an appellant, interest should be allowed. By its appeal the award of the commissioners is superseded, and the power of the owner to enforce payment of his compensation is suspended until the issue is tried. *Metler v. Easton & Amboy R. R. Co.*, 37 N. J. L. 222. And even where on appeal the allowance of damages is reduced, the land-owner is not entitled to interest. *Reisner v. Union Depot Co.*, 27 Kans. 382. The proceedings will not be reversed for a mere irregularity. *Louisville, New Albany & Chicago R. R. Co. v. Wunderlick*, 81 Ind. 175. An issue was framed and submitted to a jury in words, "how much compensation is the appellant entitled to for the right of way through his lands?" It was held that the submission was sufficiently specific to justify the jury in accordance with the terms of the statute in estimating not only the value of the land taken, but also such special damage as the construction of the road through his land would cause to the land-owner. *Bowen v. Atlantic, &c. R. R. Co.*, 17 S. C. 574. An appeal taken by the railway company from an award of commissioners brings before the district court the propriety of an *increase* as well as a *decrease* of the damages awarded. *St. Paul & Sioux City R. R. Co. v. Murphy*, 19 Minn. 500. Where the verdict of a jury on an appeal finds that the land *has been taken by the company*, and not merely that it is proposed to be taken, it is proper to award execution on the judgment. *Peoria & Rock Island R. R. Co. v. Mitchell*, 74 Ill. 394. Where the statute requires the jury to be freeholders the appellate court will presume that they were all so qualified,

though not so stated in the record. *Chesapeake & Ohio R. R. Co. v. Patton*, 9 W. Va. 648. Where, in the condemnation of land for railroad purposes, the award of damages was made to the owner and mortgagee jointly on proper notice to both parties, the owner may prosecute an appeal therefrom without uniting the mortgagee as a party to such appeal. *Lance v. Chicago, Milwaukee, & St. Paul R. R. Co.*, 57 Ia. 636. The court may in its discretion set aside a verdict of a sheriff's jury, where questions of law are reserved at the trial, and fail to be certified to the court by reason of the death of the officer presiding at the trial, and without any fault of the party requesting such questions to be certified; and no exception lies to an order made in the exercise of this discretion. But where a judge does not exercise his discretion, and rules as matter of law upon the evidence, that a party is entitled to a new trial, his ruling may be revised on a bill of exceptions. *Wamesit Power Co. v. Lowell & Andover R. R. Co.*, 130 Mass. 455. An appeal from an award of damages for right of way by the sheriff's jury may be taken by serving the opposite party or his attorney; and it is not essential that service be also made upon the sheriff, nor is it requisite that the report of the jury be filed in the appellate court. The notice of appeal constitutes presumptive evidence that an assessment has been made. *Hahn v. Chicago, Omaha & St. Joseph R. R. Co.*, 43 Iowa, 333. Notice of an appeal from the award of commissioners need not be served upon the opposite party. *Weyer v. Milwaukee & Lake Winnebago R. R. Co.*, 57 Wis. 329.

¹ *Pearl Street Case*, 19 Wend. (N. Y.) 651; *California Pacific R. R. Co. v. Frisbee*, 41 Cal. 356; *New York Central R. R. Co., in re*, 15 Hun (N. Y.), 63; affirmed, 64 N. Y. 60. In this case, upon the hearing before the commissioners, certain evidence offered by the owner was excluded. He complained that such exclusion was error, and that for that reason the award ought to be vacated. He of-

in jurisdictions where the commissioners, etc., are held not to be confined to strictly legal evidence, the report will be set aside, if it

ferred to prove before the commissioners that between the hours of five in the morning and nine at night one hundred and twenty trains pass over the new track up, as had been ascertained by actual count since a former meeting of the commissioners, and that a proportionate number of cars pass up and over such new track between the hours of nine at night and five in the morning; and that the cars are heavily loaded and cause great and injurious jar to the walls of such building. This evidence was objected to by petitioners and excluded. The owner also offered to prove that since the laying of the new track his building standing on a lot of which a portion of the street taken for the new tracks is a part has been seriously injured by the jarring caused by the trains, to such an extent as to shake down the walls and partitions, and cause the stairway to be rebuilt, and that the injury caused by the use of said tracks damages the building in question so as to make an expense of \$1,000 a year necessary to keep it in repair. This evidence was objected to by petitioners and excluded. The owner offered to prove that that portion of his lot not proposed to be taken has been depreciated in value by the noise, smoke, and increased danger, and by the jarring caused by the running of the heavy trains on the new tracks. This evidence was also excluded by the commissioners. The owner also offered to prove that the residue of his lot not taken is depreciated in value by the noise, smoke, and increased danger caused by the running of trains over the new track, and would be so depreciated. This evidence was also excluded. Said TAPPAN, J.: "Under the law defining the rule to govern the commissioners and the decisions of the court construing the same, was the evidence offered competent, and ought it to have been received? Section 16 provides that the commissioners are '*to ascertain and determine the compensation which ought justly to be made by the company to the owners or persons interested in the real estate appraised by them; and in fixing the amount of said compensation said*

commissioners shall not make any allowance or deduction on account of any real or supposed benefits which the parties interested may derive from the construction of the proposed railroad, or the construction of the proposed improvements connected with such road, by which such real estate may be taken.' The question as to what construction ought to be put upon this statute has been frequently before the court, and while it can be hardly maintained that any of the cases upon the facts existing in the particular case were erroneously decided, there is apparently some conflict of decision in reference to the principles declared by which the commissioners should be governed. In *Rood v. N. Y. & E. R. R. Co.*, 18 Barb. (N. Y.) 80, it was held that if a party conveyed his land to a railroad company for the roadway, he cannot afterwards recover for damages caused by fire by operating the road, where no negligence is proved, because of the presumption that the parties had that risk in view when the sale was made, and that part of the consideration paid was intended to cover that risk; and it has been held by the court that the rule is the same in a case where the title of the railroad company is acquired by an appraisal; that such appraisal and payment of the sum awarded would give as complete a title to the railroad company, and the right to use it be as extensive as it is when derived by a conveyance from the owner, and the presumption be equally strong that all such risks had been included in the appraisement. *C. & N. R. R. Co. v. Payne*, 16 Barb. (N. Y.) 273; *Matter of Utica, &c. R. R. Co.*, 56 id. 464; *Matter of Prospect Park & Coney Island R. R. Co.*, 13 Hun (N. Y.), 347. The last case of appeal from such an appraisal to which our attention has been called, is that of the *Matter of Prospect Park, &c. R. R. Co.*, *ante*, — GILBERT, J., delivered the unanimous opinion of the court at General Term, in which the rule of damages is laid down in the following language: 'The true inquiry is, what was the whole property from which the railroad was severed fairly worth in the

appears that injustice has been done by the admission of improper evidence. But, as they view the premises, and are presumed to form their opinion largely from their own observation of the situation of the premises, it requires strong evidence of prejudice to a party's interest thereby, to induce the courts to set aside their report because of the admission of evidence not strictly admissible.¹ But unless the commissioners, viewers, or jury, who view the premises, are to be governed by the evidence in making up their award or verdict, it would seem to be wholly useless to present it, and it would seem to be the better rule that the award or verdict must be based upon the evidence, as explained and applied by their view of the premises.² The object of a view of the premises is not necessa-

market before the taking, and what was its value with the railroad upon the land taken?' This is substantially the opinion given by this court at General Term in the Matter of the Utica R. R. Co., 56 Barb. (N. Y.) 456; and the court there say that everything that will depreciate the value of that residue is to be taken into account. If by taking the land acquired access to that remaining is more difficult and dangerous; if the land remaining is located in a city and is valuable only to be built upon and occupied as a dwelling or for business purposes, and is in such close proximity to the established tracks of the railroad that the jarring has affected the structures, and the smoke and noise rendered the remaining premises less valuable for use, from which it can be inferred that the same effect will be produced by the same cause in future, the market value of the remaining land would thereby be affected, and evidence showing these circumstances should have been received by the commissioners. The owner's land can only be taken for a public use. In this case it is proposed to be taken for two additional tracks for this railroad company. To hold that the owners shall not be allowed to show fully the condition of the remaining premises after the additional tracks have been constructed is really to deprive him of the ability to show what the actual market value of such premises is, after the taking, with these additional tracks on the land taken. The whole subject was carefully and ably discussed by Justice Fos-

TER in the Matter of the U. R. R. Co., 56 Barb. (N. Y.) 456, and his reasons for this construction of the law are so cogent and convincing that we do not deem it necessary to pursue the subject further." The report was set aside. *Walker v. Boston & Maine R. R. Co.*, 3 Cush. (Mass.) 1; *Eastern R. R. Co. v. Concord & Portsmouth R. R. Co.*, 47 N. H. 108; *Winnehiddle v. Penn. R. R. Co.*, 2 Grant Penn.), 32; *Piper's Appeal*, 32 Cal. 530; *Virginia, &c. R. R. Co.*, 8 Nev. 165; *Kansas City, &c. R. R. Co. v. Campbell*, 62 Mo. 585; *St. Louis, &c. R. R. Co. v. Richardson*, 45 Mo. 466; *Lee v. Toledo, &c. R. R. Co.*, 53 id. 178; *Hannibal & St. Joseph R. R. Co. v. Muder*, 49 id. 165; *Bennett v. Camden, &c. R. R. Co.*, 3 N. J. Eq. 145; *Virginia, &c. R. R. Co. v. Elliott*, 5 Nev. 358; *New Jersey R. R. Co. v. Suydam*, 17 N. J. L. 25.

¹ *Troy & Boston R. R. Co. v. Lee*, 13 Barb. (N. Y.) 169; *In re William & H. Street*, 19 Wend. (N. Y.) 678; *Troy & Boston R. R. Co. v. Turnpike Co.*, 16 Barb. (N. Y.) 100; *Western Pacific R. R. Co. v. Reed*, 35 Cal. 621; *Virginia, &c. R. R. Co. v. Henry*, 8 Nev. 165. In *Chicago, &c. R. R. Co. v. Hopkins*, 90 Ill. 316, where the jury went upon the ground to view the premises, the court refused to set aside their verdict upon the ground of excessive damages, although the preponderance of the evidence was clearly against such a large assessment. *Willing v. Baltimore R. R. Co.*, 5 Whart. (Penn.) 460.

² *Bangor, &c. R. R. Co. v. McComb*, 60

rily to dispense with evidence as to the damages, but to enable the triers the better to apply the evidence and judge of the amount of damage which, according to the evidence, should be allowed. Indeed, except where the statute especially provides therefor, it is within the discretion of the court whether to allow a view or not.¹ The commissioners must decide questions as to the admissibility of evidence, as well as regulate the order of proceedings before them; and unless a fair hearing is given to the parties, it is a good ground for rejecting their report;² and if improper evidence is admitted the

Me. 290; *Harrison v. Iowa Midland R. R. Co.*, 36 Iowa, 323. If the statute does not otherwise provide, it is held that commissioners, etc., may make their appraisal from their own view of the premises, and are not obliged to hear evidence, although they may do so in their discretion. *Van Wickle v. Camden, &c. R. R. Co.*, 14 N. J. L. 162; *Pennsylvania, R. R. Co. v. Keiffer*, 22 Penn. St. 356; *Lyman v. Burlington*, 22 Vt. 131. *Kramer v. Cleveland R. R. Co.*, 5 Ohio St. 140; *Virginia R. R. Co. v. Henry*, 8 Nev. 165.

¹ *Kansas Central R. R. Co. v. Allen*, 22 Kan. 485; *Snow v. Boston & Maine R. R. Co.*, 65 Me. 230; *Galena, &c. R. R. Co. v. Haslem*, 73 Ill. 494.

² *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247; *Washington R. R. Co. v. Switzer*, 26 Gratt. (Va.) 661; *Jones v. Goffstown*, 39 N. H. 254; *Hawley v. North Staffordshire Ry. Co.*, 2 De G. & S. 33. In estimating the damages caused by the construction of a railroad, evidence that the company had made the petitioner an offer for his damages, is inadmissible. *Upton v. South Reading Branch R. R. Co.* 8 Cush. (Mass.) 600. And such evidence is not admissible to show the price paid by the company for land adjoining the land in question, under an award of arbitrators mutually agreed upon to estimate the same. *White v. Fitchburg R. R. Co.*, 4 Cush. (Mass.) 440. Nor is it competent to show for what price one had contracted to buy land adjoining. *Chapin v. Boston & Providence R. R. Co.*, 6 Cush. (Mass.) 422. County commissioners in Massachusetts, in the exercise of the jurisdiction conferred upon them, relative to the raising or lowering of turnpikes, highways, etc., are required to make a specific, and

not an alternative order. *Roxbury v. Boston & Providence R. R. Co.*, 6 Cush. (Mass.) 424. A corporation was authorized, by a statute, to acquire title to lands by appraisement; and the appraisers were required to assess the value of land taken and damages, without deduction for any benefit; and the defendants, on payment, were to be vested with the fee. The appraisers assessed a certain sum, with a reservation to the owners of the right to open a street, and to drain under the street; and their certificate also stated that they had assessed the value and damages without any deduction for benefit. It was held that the certificate should be set aside. They had no power to arbitrate between the parties; and in attempting to reserve privileges to the owners by way of easement in the lands they were to appraise, they transcended their power, and their award was a nullity. The corporation were entitled to the fee, and the owners to compensation for the fee. *Hill v. Mohawk & Hudson R. R. Co.*, 7 N. Y. 152. It is not necessary that the report should state in detail how the damages accrued. And it is unnecessary for report to show affirmatively the presence of the parties at the time the view is had, or that witnesses were regularly called and sworn. In this respect the presumption is in favor of the regularity of the viewers; and if there is any actual illegality, the facts sustaining it must be shown. *Tucker v. Erie & Northeast R. R. Co.*, 27 Penn. St. 281. In the absence of any statutory provision, compelling payment of compensation to county commissioners for their services performed for the benefit of a corporation, they have no power to order the company to pay

proceedings may be quashed on *certiorari*.¹ The report must be made in writing, and should show that the commissioners were under oath, and the amount of land taken, and a description thereof, unless it is accurately described in the warrant, and if any errors are made therein they cannot be corrected after it is filed.² If the statute requires it, the commissioners must view the premises, and their report should show the fact.³ If any irregularities were committed by them the report should show them, or the court will not, unless the circumstances warrant it, set the report aside.⁴ If an

the cost of their expenses and services. *Atlantic & St. Lawrence R. R. Co. v. Cumberland County Commissioners*, 28 Me. 112.

¹ *Petition of Landaff*, 34 N. H. 163, especially where it appears that the commissioners have misapplied the principles upon which they were to make the assessment. *Troy R. R. Co. v. Northern T. Co.*, 16 Barb. (N. Y.) 100.

² *People v. Mott*, 12 Hun (N. Y.), 672; *Hannibal R. R. Co. v. Morton*, 27 Mo. 317; *Hayes v. Shackford*, 3 N. H. 10. An accurate description of the land is essential to the validity of the assessment. *In re New York Central R. R. Co.* 90 N. Y. 342. And it must be contained either in the petition or report of the commissioners, and if there is a defect in this respect the proceedings will be reversed. *Penn. R. R. Co. v. Foster*, 29 Penn. St. 165. In *Walker v. Boston & Maine R. R. Co.*, 3 Cush. (Mass.) 1, it was held that the warrant issued by county commissioners on the application of a land-owner, to assess damages for lands taken by a railroad company, need not be in any particular form, but should set forth a description of the land and the owner's title thereto. The report of commissioners or viewers as to the laying out of a railroad must describe the land taken with such definiteness and certainty that a jury could go upon the land, and readily discover where the laying out is, or it will be void for uncertainty. *Northern R. R. Co. v. Concord & Claremont R. R. Co.*, 27 N. H. 183.

³ *Albany Northern R. R. Co. v. Lansing*, 16 Barb. (N. Y.) 68.

⁴ *Rochester, &c. R. R. Co. v. Beckwith*, 10 How. Pr. (N. Y.) 108. Objections to the proceedings before a sheriff's jury

impanelled to assess damages, or of commissioners for land taken for a highway or railroad, cannot be taken advantage of on appeal unless the grounds of such objection appear on the record. *Walker v. Boston & Maine Railroad*, 3 Cush. (Mass.) 1. But evidence given before viewers appointed to assess damages done by the location and construction of a railroad through the lands of an individual will not be noticed by the Supreme Court, as it constitutes no part of the record. *Ohio & Pennsylvania R. R. Co. v. Bradford*, 19 Penn. St. 363. On an appeal from a judgment, accepting the verdict of a sheriff's jury impanelled to revise the estimate of county commissioners on an application for damages occasioned by the laying out of a railroad, it cannot be objected that the commissioners had no jurisdiction, by reason of the parties having agreed to refer the damages to arbitration; but such objection, if relied upon, must be taken before the commissioners as a ground for not ordering a jury. *Field v. Vermont & Massachusetts R. R. Co.*, 4 Cush. (Mass.) 150. If commissioners have adopted and acted upon illegal principles in making their valuation of the land, and assessing damages, the proceedings will be set aside. But it is not competent for the court to determine the amount of damages on the merits when the commissioners assessed the damages upon the right principle. *New Jersey R. R. &c. Co. v. Suydam*, 17 N. J. Eq. 25. Under a statute providing to the contrary, an award of arbitrators which takes into consideration the benefit which a land-owner may receive from the construction of a railroad, in a proceeding for damages against such a corporation, is illegal. *McMahon v. Cincinnati, &c. R. R.*

appeal is allowed by statute, and no provision is made by statute for preserving the rulings of the commissioners, etc., they may be proved

Co., 5 Ind. 413; Newcastle & Richmond R. R. Co. v. Brumback, 5 Ind. 543; Evansville, &c. R. R. Co. v. Fitzpatrick, 10 Ind. 120; Evansville, &c. R. R. Co. v. Cochran, 10 Ind. 560. A verdict of a jury will be set aside when it appears to the court that injustice has been done through mistake or misapprehension of the jury. *Cadmus v. Central R. R. Co. of New Jersey*, 31 N. J. Law, 179. A plank-road company authorized to construct their road between two designated points, and to use any portion of the highways for such purpose when necessary, are bound, in cases where such necessity exists, by their charter, to pay the damages resulting from the appropriation of the highway, to be ascertained in the manner pointed out in the charter, and any departure from the directions therein contained, or fraudulent or collusive acts on the part of the company, in relation to the assessment, will vitiate the whole proceeding, and subject them to injunction. *Justices &c. v. Griffin & West Point Plank-Road Co.*, 9 Ga. 475. But the courts will not set aside the award of commissioners except for *substantial* error. The commissioners are bound to be guided in their proceedings by the established rules of evidence, but a technical error in this respect will be disregarded. Otherwise, if the error is of such a character as to show that the commissioners have mistaken the principles that should govern their appraisal, and that the appellant may have been wronged by it. *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. (N.Y.) 100; *N. Y. Central R. R. Co. v. Marvin*, 11 N. Y. 276; *Walker v. Boston & Maine R. R. Co.* 3 Cush. (Mass.) 1. If the court is satisfied that the commissioners have not erred in the principles of their appraisal, no other error will suffice to induce them to send the report back for review. *Troy & Boston R. R. Co. v. Lee*, 13 Barb. (N. Y.) 169. And the court will not interfere upon the ground that the amount of damages awarded was too small or too great, unless the evidence of injustice is palpable on its face. *Rochester & Syracuse R. R. Co. v. Budlong*, 6

How. Pr. (N. Y.) 467. If the proceedings of commissioners have been regular, and they only erred in judgment in fixing the amount of damages for the lands taken, the courts cannot interfere. *Wiggin v. Mayor, &c. of N. Y.*, 9 Paige (N. Y.), 16. As a general rule, reviews of the report of such commissioners can extend to matter of principle only, and not to mere questions of value. *Matter of Furman Street*, 17 Wend. (N. Y.) 649; *Matter of John & Cherry Streets*, 19 id. 659. The courts cannot, in general, revise the assessment upon its merits, and set it aside, upon the mere ground of inadequacy, or excess of damages. *Willing v. Baltimore Railway*, 5 Whart. (Penn.) 460; *Tonica, &c. R. R. Co. v. Unlicker*, 22 Ill. 221; *Tonica, &c. R. R. Co. v. Roberts*, 22 Ill. 224; *Railroad v. Gesner*, 20 Penn. 240; *Winebiddle v. Pennsylvania R. R. Co.*, 2 Grant's Cas. (Penn.) 32. *Bradshaw, &c. R. R. Co., in re*, 12 Jur. 998. But it is now well established that an award may be set aside for excessive damages. *Somerville & Easton Railroad v. Doughty*, 22 N. J. Eq. 495. An adjudication condemning lands for the use of a corporation cannot be impeached in a collateral proceeding. *Hamilton v. Annapolis R. R. Co.*, 1 Md. Ch. Dec. 107; *Evans v. Haefner*, 29 Mo. 141. The owner is entitled to payment of the damages awarded when the assessment has been made and confirmed; and without waiting until the company actually take possession. *Shaw v. Charlestown*, 3 Allen (Mass.), 538; *Neal v. Pittsburgh, &c. R. R. Co.*, 31 Penn. St. 19. Where a railway company agreed with the land-owner that the question of compensation should be settled by arbitration, and thereupon entered upon the land by consent of the owner, and the arbitrator made an award which became the subject of dispute, and the owner thereupon gave the company notice to quit, and brought ejectment, it was held that he could not recover, although the company had not tendered the money awarded, or a conveyance, but that the owner's remedy was to proceed upon the award. The notice to quit under the circumstances did not make the company

by parol, but where the statute makes provision therefor, exceptions should be filed, and the rulings and irregularities brought to the attention of the court through that means.¹ The commissioners may report the testimony, and when the statute requires that they shall "report their proceedings," they should not only report the testimony, but also all their rulings upon the admissibility of evidence, etc.² Either party may except to the report, move to recommit or to quash it, and may support their objections by affidavits, etc., unless the statute makes the action of the commissioners final.³ All rea-

trespassers. *Hudson v. Leeds & Bradford Ry. Co.*, 15 Jur. 946. Where it is shown that the party has, upon consideration, agreed to receive compensation in a particular mode, equity will enjoin him from taking proceedings under the statute, to compel payment. *Duke of Norfolk v. Tennant*, 16 Jur. 398. When the company neglects or refuses to pay for land condemned for their use, the owner may have an injunction to protect his property from injury until the money is paid. *Harness v. Chesapeake & Ohio Canal Co.*, 1 Md. Ch. Dec. 248. The acceptance of land damages, whether fixed by agreement or a verdict, without objection to the right to take, estops the party from afterwards disputing that right. *Burns v. Milwaukee & Mississippi R. R. Co.*, 9 Wis. 450. But where a railroad company had authority to take land one hundred feet in width, and beyond that so much as might be necessary for depots, etc., and under this authority took a lot in a city, part of which was beyond the one hundred feet, and the owner appealed from the award of the commissioners, and had judgment fixing the value of the land taken and described in the pleadings, which judgment was duly paid, it was held that the owner was now estopped from claiming any part of the lot from the railroad company. *Burns v. Dodge*, 9 Wis. 458. A tender, within the statute time, of the amount appraised, made to a party who acted in the proceedings for his co-tenants, by their authority, is sufficient. *Dyckman v. Mayor, &c. of N. Y.* 7 Barb. (N. Y.) 498; aff'd 5 N. Y. 484.

¹ *Allen v. Androscoggin R. R. Co.*, 60 Me. 494.

² *Central Pacific R. R. Co. v. Pearson*,

35 Cal. 247; *Virginia R. Co. v. Henry*, 8 Nev. 165.

³ *Quincy R. R. Co. v. Ridge*, 57 Mo. 599. Where, on an application to set aside the report of commissioners, it appears that they had talked privately with a person from whom they had obtained information discrediting the testimony of the claimant, and that the award to him was greatly inadequate, and that the neglect to oppose the confirmation of the report arose from the neglect or misbehavior of his attorney upon whom the notice of motion was served, it was held that the report was properly set aside. *New York Central & Hudson River R. R. Co., in re*, 5 Hun (N. Y.), 105; 64 N. Y. 60. In New York, the Supreme Court at special term has power to set aside a report and to appoint commissioners. The owner is not confined to the remedy by appeal to the General Term given by the general railroad act. *New York Central & Hudson River R. R. Co., in re*, 64 N. Y. 60; 5 Hun (N. Y.), 105. The court has power to set aside the report of viewers when the sum allowed was exorbitant, but the error must be clearly made out. *Patten v. Susquehanna R. R. Co.*, 1 Pearson (Pa.), 48. In Kentucky, the Supreme Court has jurisdiction of an appeal from a judgment confirming the verdict of a jury in proceedings under writs of *ad quod damnum*, had at the instance of the appellee, to condemn a part of appellant's land for railway purposes. *Tracy v. Elizabethtown, Lexington, & Big Sandy R. R. Co.*, 78 Ky. 309. In reviewing proceedings for the condemnation of lands, the appellate court cannot consider any reasons against the confirmation of the report except those which were presented to the lower court. *Detroit*

sonable presumptions are made in favor of the regularity and correctness of the report, and it will be sustained until good ground for quashing or reversing it is shown,¹ as that the damages awarded are unreasonably large, or small,² or that the commissioners committed

Western Transit & Junction R. R. Co. v. Crane, 50 Mich. 182. An appeal lies directly from the County Court to the Supreme Court. Kankakee & Seneca R. R. Co. v. Straut, 101 Ill. 653. But the Supreme Court has no jurisdiction to entertain an appeal in special cases, and a proceeding to condemn land for the use of a railway company is a special case. Stockton & Copperopolis R. R. Co. v. Galgiani, 49 Cal. 139. An application for a jury to assess damages in Boston cannot be made to the Superior Court at a time later than the next one after the commissioner's estimate is made known to the parties. Roberts v. Boston & Lowell R. R. Co., 115 Mass. 57. A motion to dismiss an appeal because the appeal is not taken in time will not be considered where the motion to dismiss is made too late. St. Louis, Kansas, & Arizona R. R. Co. v. Quinn, 24 Kans. 370. The commissioners made separate awards in favor of the respondents as owners, and one K. as mortgagee. Respondents appealed from the award as respected their damages, but K. did not. Pending the appeal, K. became the owner of the property by a foreclosure of his mortgage and the expiration of the period for redemption, but no steps were taken for a substitution of parties to the record by reason thereof. It was held that on the trial of such appeal before the jury the sole question for its determination was the propriety of the amount awarded by the commissioners to respondents as compensation for their interest and estate in the property, so far as it was injuriously affected or taken by the company; and that such compensation must be ascertained by the jury in reference to the same estate and interest, and as of the same time, as was done by the commissioners in making their award. Trogden v. Winona & St. Peter R. R. Co., 22 Minn. 198. In an appeal by a railway company, where the issue was in the form of trespass *quare clausum fregit*, the court charged that the company had committed a trespass in en-

tering on the land. It was held to be error. Shenango & Allegheny R. R. Co. v. Braham, 79 Penn. St. 447. A trial having commenced at one term of court cannot be completed at a subsequent term. Wright v. Northwestern Union R. R. Co., 37 Wis. 391. Where the verdict rendered upon the trial of an appeal from an award of commissioners is for a gross sum as damages, but is silent as to the time when such damages accrued, the presumption is that the verdict, in this respect, relates to the time when the award appealed from was filed by the commissioners. Whitacre v. St. Paul & Sioux City R. R. Co., 24 Minn. 311. A judgment condemning a strip of land one hundred and twenty feet wide for a right of way for a railway will not be reversed because the land condemned exceeds one hundred feet in width, when it does not appear from the record that the additional twenty feet was not necessary, nor by the pleadings, and no such objection was raised before the court below, either by demurrer or reasons assigned in arrest of judgment. The objection, not being made below, must be considered as waived. Booker v. Venice & Carondelet R. R. Co., 101 Ill. 333.

¹ Cyr v. Dufur, 62 Me. 20; Pennsylvania R. R. Co. v. Porter, 29 Penn. St. 165; Crawford v. Valley R. R. Co., 25 Gratt. (Va.) 467; Commissioners of Central Park, 4 Lans. (N. Y.) 467.

² Chapman v. Groves, 8 Blackf. (Ind.) 308. In Michigan, the Probate Court has authority to set aside the report of the commissioners for good causes shown. If the amount awarded is unreasonable, and indicates that it was the result of prejudice or partiality, or that the commissioners must have acted upon a wrong basis of estimating the damages, it is a good cause for setting aside the report. Chapman v. Groves, 8 Blackf. (Ind.) 308. Evidence as to the value of the property condemned and the resulting damages, while admissible, is not controlling; they are the opinions of witnesses simply, and should not

gross errors in the principles of assessing or in calculating the values.¹ But where the commissioners viewed the premises, and the evidence as to the damages was conflicting, the report will not be set aside either because the damages were assessed at a larger or a smaller sum than the court itself would have assessed them.² - An

ordinarily have greater weight than the official report of the commissioners who have considered all the evidence. *Eastern R. R. Co. v. Concord, &c. R. R. Co.*, 47 N. H. 108. Numerous courts have held that the reports of commissioners may be impeached for partiality, bias, prejudice, or inattention or unfaithfulness in the discharge of their trust, or for error of such extraordinary character or grossness as should furnish a just inference of the existence of such influences. *Mills, Em. Dom.*, § 234, and cases cited in note 7. Commissioners exercise important functions and pass upon valuable rights, and should be free from prejudice or undue influence. In *Peavy v. Wolfboro*, 37 N. H. 286, it was held that they should not converse or discuss with one party in the absence of the other upon the subject under consideration; and in another case the furnishing of liquor by a petitioner for a highway to the commissioners, while engaged in their duties, was held an abuse for which the court would ordinarily set aside a report in favor of the petitioner without inquiring how far the commissioners were affected by it. *Newport Highway*, 48 N. H. 433. In this case an affidavit of one of the commissioners was filed in support of the motion to set aside the report. This was proper. The commissioners are not like a common-law jury, and their own affidavits may be used to impeach their finding, or show that they proceeded upon a wrong principle in the ascertainment of damages. The rule on which they act is a fact, and may be shown as any other fact. *Canal Bank v. Albany*, 9 Wend. (N. Y.) 244; *New Jersey R. & T. Co. v. Suydam*, 17 N. J. L. 25. All parties are entitled to the intelligent judgment of the commissioners upon the appraisal of damages, and any agreement in advance which shall leave the amount as the result of chance cannot be upheld. In the case of *Kansas City, &c. R. R. Co. v. Campbell*, 62 Mo. 585,

the three commissioners put down the amount respectively determined on by them, and divided the sum by three, and returned the quotient as the result, and the finding was set aside by the Supreme Court. See also to the same effect *Donner v. Palmer*, 23 Cal. 40; *Ruble v. McDonald*, 7 Iowa, 90; *Birchard v. Booth*, 4 Wis. 67; *Denton v. Lewis*, 15 Iowa, 301; *St. Martin v. Desnoyer*, 1 Minn. 156 (Gil. 131); *Forbes v. Howard*, 4 R. I. 364; *Marquette H. & O. R. R. Co. v. Houghton*, Michigan Superior Court, 1884.

¹ *Carter v. New Jersey R. R. Co.*, 24 N. J. L. 730; *Matter of Beale Street*, 39 Cal. 495; *New Jersey R. R. Co. v. Suydam*, 17 N. J. L. 25; *Reitenbaugh v. Chester R. R. Co.*, 21 Penn. St. 100; *Chesapeake R. R. Co. v. Park*, 6 W. Va. 397.

² *Western Pacific R. R. Co. v. Reed*, 85 Cal. 621; *Thompson v. Conway*, 53 N. H. 622; *Roudout R. R. Co. v. Field*, 38 How. Pr. (N. Y.) 187; *Pennsylvania R. R. Co. v. Heister*, 8 Penn. St. 445; *Albany R. R. Co. v. Dayton*, 10 Abb. Pr. (N. Y.) U. S. 182; *Antoinette Street*, 8 Phila. (Penn.) 461. An award which requires a railway company to pay a certain sum of money for a right of way, and to build fences, the money to be paid at any time fixed upon by the company, by giving the land-owner three days' notice of the time and place of payment, and requires the land-owner at the same time to deliver to the company a deed for the right of way, is void for uncertainty as to the time for the payment of the money and the delivery of the deed. *Alfred v. Kankakee & Southwestern R. R. Co.*, 92 Ill. 609. Where the report of commissioners has been set aside by the general term, on the ground that they erred in only awarding nominal damages to the owners, and a new set of commissioners has been appointed who have made their report, by which nominal damages only are awarded to the owners, the court will not, in the absence

itemized report may be directed by the court, and if improper items are included in it the court may strike them out.¹ But where either

of fraud, corruption, misconduct, or misapprehension, set aside the last report and appoint a new set of commissioners. Prospect Park & Coney Island R. R. Co., *in re*, 24 Hun (N. Y.), 199; 85 N. Y. 489. Where the damages are grossly excessive, the court below may set aside the report of the viewers. Philadelphia & Erie R. R. Co. v. Cake, 95 Penn. St. 139. A defence based on matters of fact as to liability to pay interest on an award on proceedings to condemn land, available on a trial by jury, but as to which no evidence was offered, nor any request made to the judge to admit any evidence respecting it, though he directed the jury to find against the defendant as to the interest, which direction was considered and sustained, and the liability specially found against the defendant on review by a court of law of competent jurisdiction, cannot be made the ground of relief in a court of equity. Metler v. Easton & Amboy R. R. Co., 26 N. J. Eq. 65. The judgment does not fix the rights of the company absolutely to the land. *It is the tender of payment and the yielding of possession* which fixes the rights of the parties. Williams v. New Orleans, Mobile, & Texas R. R. Co., 60 Miss. 689. A railway company seeking the condemnation of a part of a lot for the purposes of the road has no cause to complain of an order of court fixing the compensation to be paid, and directing the money to be paid to the treasurer of the county for the benefit of the owners of the property affected, or those interested in it. Such an order does not determine who is entitled to the compensation awarded. Chicago & Western Indiana R. R. Co. v. Prussing, 96 Ill. 203. In all cases of condemnation, the owner of lands is entitled to a personal judgment against the company or party instituting the proceedings for the damages awarded. Robins v. St. Paul, &c. R. R. Co., 24 Minn. 191. But in West Virginia, in a proceeding by a railway company to

take lands for the use of its road, against the owner of the land, it is error for the court, on confirming the report of the commissioners and ordering the same to be recorded, to render judgment against the applicant for the amount of damages ascertained by the report. Chesapeake & Ohio R. R. Co. v. Bradford, 6 W. Va. 220. In Minnesota, it is held that the judgment authorized to be entered on a verdict is one not only settling and declaring the right of the company seeking to appropriate the property to the use thereof, upon payment made, but also in favor of the land-owner for the amount of compensation as found by the verdict, and adjudging and declaring his absolute right thereto. Curtis v. St. Paul, Stillwater, & Taylor's Falls R. R. Co., 21 Minn. 497. Where the court has entered judgment upon the award, this judgment is a final adjudication of the controversy until set aside by the court or reversed by writ of error. Pennsylvania R. R. Co. v. Gorsuch, 84 Penn. St. 411. It is not necessary, in rendering judgment in favor of a land-owner for the damages assessed, to provide that a deed shall be executed to the railway company for the land condemned. The title which the company gets is acquired under the statute. Indianapolis & St. Louis R. R. Co. v. Smythe, 45 Ind. 322. And a judgment on an appeal from an assessment of damages, which refers to the verdict wherein the land taken is properly described, is sufficiently definite and certain as to the land for the taking of which the judgment is rendered. Peoria & Rock Island R. R. Co. v. Mitchell, 74 Ill. 394. A judgment of condemnation, rendered by a competent court charged with a special statutory jurisdiction, and when all the facts necessary to the exercise of the jurisdiction are shown to exist, is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction. Secombe v. R. R. Co.,

¹ Harvey v. Lackawanna R. R. Co., 47 Penn. St. 428; Dalrymple v. Whittinghaus, 26 Vt. 345.

the order of the court or the statute requires an itemized report or verdict, a failure to render such a report or verdict will be a sufficient ground for setting it aside.¹

Where substantial justice has been done, *certiorari* will not lie to quash the proceedings, although technical or formal errors have been committed;² but in a proper case the court will grant this remedy,³

23 Wall. (U. S.) 108. Where the sum of \$600 was awarded as damages, and the inquisition required the railway company to build a certain trestle for the claimant, and also to haul coal over a switch for him at a certain price, and the money was paid and the terms assented to, and the inquisition further provided that in case of failure to comply with these conditions the sum of \$1,500 should be awarded for the breach, it was held that the sum of \$1,500 was liquidated damages, and might be recovered upon a breach of the conditions. *Pennsylvania R. R. Co. v. Reichert*, 58 Md. 261. It is error for the court, on the trial of an appeal, to award execution on the judgment for the amount of damages assessed. *Springfield & Illinois South-eastern R. R. Co. v. Turner*, 68 Ill. 187. On an appeal in the district court, in condemnation proceedings, it is error for the court to render an ordinary personal judgment against the railroad company for the damages assessed to be collected by execution. The judgment for damages in such a case should be in the nature of an award of damages, such as is made by the condemnation commissioners. *St. Louis, Lawrence, & Denver R. R. Co. v. Wilder*, 17 Kansas, 239. Damages for the taking of property by a railway company arise by an act of appropriation under the State power of eminent domain, and do not rest in contract, express or implied, and the railway company is not entitled, therefore, to a stay of execution. *Harrisburg & Potomac R. R. Co. v. Pepper*, 84 Penn. St. 295.

¹ *Greenville R. R. Co. v. Nunnmacher*, 4 Rich. (S. C.) L. 107; *Ohio R. R. Co. v. Wallace*, 14 Penn. St. 245.

² *Boston, &c. R. R. Co. v. Folsom*, 46 N. H. 64.

³ *Fitchburg R. R. Co. v. Boston, &c. R. R. Co.*, 3 Cush. (Mass.) 58; *Farming-ton River Water Power Co. v. County*

Comm'rs, 112 Mass. 206; *Worcester R. R. Co. v. Railroad Comm'rs*, 118 Mass. 561; *Charles River Branch R. R. Co. v. County Comm'rs*, 7 Gray (Mass.), 381; *Bennett v. Camden, &c. R. R. Co.*, 3 N. J. Eq. 145; *Central R. R. Co. v. Pennsylvania R. R. Co.*, 32 N. J. Eq. 475; *New Jersey, &c. Co. v. Suydam*, 17 N. J. L. 25; *State v. Montclair R. R. Co.*, 36 N. J. L. 328; *Allen v. Levee Comm'rs*, 57 Miss. 163; *Delaware, &c. R. R. Co. v. Burson*, 61 Penn. St. 369. *Certiorari* will not lie where the proceedings of the company are void for want of jurisdiction. *Regina v. Bristol & Exeter Ry. Co.*, 11 Ad. & El. 202. Nor to remove an inquisition on the ground that it was taken before two persons (namely, an assessor and a clerk of the under-sheriff by whom the jury and witnesses were sworn), appointed by the sheriff, but not being any of the persons specially named in the act of incorporation. *Regina v. Sheffield Ry. Co.*, 11 Ad. & El. 194. The corporate existence of a company and its right to exercise corporate franchises cannot properly be passed on by the inferior tribunals for assessing damages in condemning lands, and cannot, therefore, be considered on *certiorari* to review their action. *Schroeder v. Detroit, Grand Haven, & Milwaukee R. R. Co.*, 44 Mich. 387. A writ of *certiorari* in cases involving interference with railway construction ought not to be allowed unless applied for as soon as practicable; and if granted after the expiration of the twenty days allowed for an appeal in proceedings to condemn land, will not be sustained, unless the delay in suing it out is satisfactorily explained. *Dunlap v. Toledo, Ann Arbor, & Grand Trunk R. R. Co.*, 46 Mich. 190. The statute provided substantially that when a party failed to prosecute a petition for a revision of the award of the county commissioners at the next regular term after the filing of the

or where the taking is unlawful the proceedings may be restrained by a writ of prohibition.¹

same, it should be dismissed, unless good cause for delay is shown. The determination of the commissioners as to the sufficiency of the excuse offered for delay is not to be reviewed by the Supreme Court by writ of *certiorari*, even though a warrant for a jury had issued before the order of dismissal was entered. *Portland & Ogdensburgh R. R. Co. v. Commissioners*, 64 Me. 505. When the district court makes an order which it has no jurisdiction to make in relation to the use of the property sought to be condemned, and there is no appeal from the order, *certiorari* is the proper remedy, in order to have the order annulled before the damages it purports to authorize have been sustained. And when a trespass is about to be committed, by authority of an order of court which is void, the fact that the trespass may be enjoined in equity does not prevent the order from being reviewed on *certiorari*, for the mere fact that the order is void will not alone authorize an injunction. *California Pacific R. R. Co. v. Central Pacific R. R. Co.*, 47 Cal. 528. The inquisition must be positively sworn to, or a *certiorari* will not be granted to bring up the inquisition of a compensation jury. *Regina v. Manchester & Leeds Ry. Co.*, 8 Ad. & El. 415. An order was made by the Circuit Court sending an appeal from an assessment of land damages by the railroad commissioners and selectmen to a referee for trial; but no action was taken under the order, because of exceptions which were transferred to the Supreme Court. Before the exceptions were reached for decision, the statute was amended by excluding such cases from its operation. It was held that the order of reference should be rescinded. *Gray v. White Mountains R. R. Co.*, 56 N. H. 182. Whenever, in such proceedings, jurisdiction has once attached by due service of the requisite petition and notice upon all parties having or claiming any estate or interest in the property thereby affected,

and an award is regularly made by the commissioners as to each claimant, the rights of the respective parties become definitely fixed, and such award, until modified or changed on appeal, is conclusive and binding, not only upon the parties of record, but upon their privies and grantees. *Trodden v. Winona & St. Peter R. R. Co.*, 22 Minn. 198. The purchaser of real estate while proceedings are pending, and who has not been made a party, cannot appeal. *Connable v. Chicago, Milwaukee, & St. Paul R. R. Co.*, 10 Am. & Eng. R. R. Cas. 520 (Iowa); *Cedar Rapids, &c. R. R. Co. v. Chicago, Milwaukee, & St. Paul R. R. Co.*, 10 id. 52 (Iowa). The provisions of respondent's charter for obtaining the right of way contemplates a decision by commissioners as to the compensation to be paid the land-owner, to be embodied in a report to be filed in the District Court, that either the land-owner or the company may appeal. But neither by express words nor by necessary implication, does the charter prescribe the grounds upon which, or the time or manner in which, the appeal may be taken. It presents in these respects an instance of *casus omissus*. *Peters v. Hastings & Dakota R. R. Co.*, 19 Minn. 260. The owner of lands is not deprived of any rights by the mere deposit, pending appeal, of the sum awarded by the jury; as there is no statute requiring him to take the risk of such a deposit, or depriving him of any rights until he is paid. The owner cannot be compelled to determine at his peril whether a jury will regard the land as necessary for public use; he is not, therefore, in fault for refusing a tender when he can have no assurance that the proposed improvement will be sanctioned. *Toledo, Ann Arbor, & Grand Trunk R. R. Co. v. Dunlap*, 47 Mich. 456. Money deposited by a railway company with a county treasurer for the damages awarded by commissioners in condemnation proceedings remains with the treasurer at the

¹ *Vt. & Mass. R. R. Co. v. County Comm'rs*, 10 Cush. (Mass.) 12; *Conn. River R. R. Co. v. County Comm'rs*, 127 Mass. 50; *Day v. Springfield*, 102 Mass. 310.

Irregularities and defects of any kind in the proceedings may be waived by the land-owner, either expressly or impliedly, as, if he accepts the amount of damages awarded;¹ but this does not operate as a waiver of his remedy for a trespass committed before the damages were assessed.² So a waiver may be implied, from an appearance to contest the amount of damages.³ Indeed, it will be safe to say that

risk of the company pending the proceedings, and if the land-owner appeal from the assessment of the commissioners, and recover a judgment in the District Court, the company is not entitled to have the amount thus deposited credited upon the judgment. *Blackshire v. Atchison, Topeka, & Santa Fe R. R. Co.*, 13 Kans. 514. Where the railway company has deposited the amount of the award and taken possession of the lands condemned, the owner, on giving the requisite bond, may withdraw the amount so deposited, without prejudice to an appeal from the award. *Weyer v. Milwaukee & Lake Winnebago R. R. Co.*, 57 Wis. 329. The amount of an award upon the taking of land belonging to several heirs was paid into court by the corporation. With the assent of the heirs, the administrator of their ancestor gave the bond required by statute, and withdrew the money so deposited. It was held that the administrator was thereafter estopped to deny that he was a party to the proceeding, and the amount of the award having been diminished by the verdict on an appeal by the company, there was no error in rendering judgment against him for the amount of such diminution. In such a case the railroad company is entitled, also, to recover interest upon the amount by which the award is decreased, from the date of the withdrawal of the deposit. *Watson v. Milwaukee & Madison R. R. Co.*, 57 Wis. 332. Under the provisions of the statute the defendant instituted proceedings to condemn plaintiff's land. Both parties appealed from the award of commissioners. At the December term, the appeal was placed upon the calendar for trial, and the parties appeared by their attorneys; but during the term the defendant, with the permission of the court, the plaintiff objecting, dismissed the proceedings for condemnation, and caused the dismissal to be

entered of record. All the proceedings (including the appeals) were duly had as provided by law. It was held that the plaintiff cannot upon this state of facts, maintain an action to recover for his labor, loss of time, and expenses in conducting and attending to the proceedings on his part. *Bergman v. St. Paul, Stillwater, & Taylor's Falls R. R. Co.*, 21 Minn. 533. The respondent appealed from the commissioners' award of damages for right of way. The appeal coming on for trial, the district court on his motion, made an order dismissing the petition and all subsequent proceedings thereunder, and the order was held erroneous and reversed. *Rippe v. Chicago, Dubuque, & Minn. R. R. Co.*, 20 Minn. 187. An appeal by a railway company, from the assessment of damages by commissioners appointed in pursuance of its charter, brings up the whole case into the appellate court where the parties can have every right relating to such damages adjudged and determined. Therefore, a separate action involving the same rights will be dismissed. *Phifer v. Carolina Central R. R. Co.*, 72 N. C. 433; *Wooster v. Sugar River Valley R. R. Co.*, 57 Wis. 311.

¹ *Kile v. Yellowhead*, 80 Ill. 208; *Rees v. Chicago*, 38 id. 322; *Hawley v. Harrall*, 19 Conn. 421; *Dodge v. Burns*, 6 Wis. 514; *Quincy, &c. R. R. Co. v. Kellogg*, 54 Mo. 334; *Troy & Boston R. R. Co. v. Potter*, 42 Vt. 265; *Karber v. Nellis*, 22 Wis. 215.

² *Powers v. Humert*, 51 Mo. 136.

³ In *Dyckman v. New York*, 5 N. Y. 434, the statute required the city to make an effort to agree with the owners for the purchase of the land, but in this case no such attempt was made; and the court held that the land-owner, by appearing and contesting the proceedings without raising the objection, must be treated as having waived the irregularity.

where irregularities in the proceedings exist, if the land-owner appears, but neglects to raise an objection upon that ground, he will be treated as having waived them.¹ When the damages are required

¹ *Mississippi, &c. R. R. Co. v. Byington*, 14 Iowa, 572; *Johnston v. Rankin*, 70 N. C. 550; Delaware, Lackawanna, & Western R. R. Co. v. *Burson*, 61 Penn. St. 369; *Dietrich v. Murdock*, 42 Mo. 279; *Borland v. Mississippi, &c. R. R. Co.*, 8 Iowa, 148; *Chicago v. Wheeler*, 25 Ill. 478; *St. Joseph, &c. R. R. Co. v. Orr*, 8 Kan. 419; *Higgins v. Chicago*, 18 Ill. 276. Where the company took exceptions to a commissioners' report on the ground that, "since the report of the viewers," it had altered the route of its road through the land of some of the property-holders, and the court set aside so much of the report as assessed the damages to them, and then confirmed the rest of the report, it was held that this action of the court was final, and the subject of appeal; and that the location of the line by the company was an appropriation of the land; and after the assessment of the damages, the right thereto was vested in the owners, and could not be divested by a subsequent change of route. *Beale v. Pennsylvania R. R. Co.*, 86 Penn. St. 509. The notice required by the statute to be given on an application for a change of the proposed route of a railway company must be personally served. *People ex rel. v. Lockport & Buffalo R. R. Co.*, 13 Hun (N. Y.), 211. In proceedings of this character all precedent conditions must be fully complied with. *Kansas City, St. Joseph, & Council Bluffs R. R. Co. v. Campbell*, 62 Mo. 585. And evidence of an effort having been made before the commencement of an action, to agree as to the compensation for a right of way, is a prerequisite to establish a cause of suit. *Oregon R. R. & Navigation Co. v. Oregon Real Estate Co.*, 10 Ore. 444. Where the defendant dies during the pendency of the proceeding, or during the pendency of a petition in error to reverse the same, the revivor of the proceeding must be had in the name of the heirs or devisees, and not of the administrator of the deceased. *Valley R. R. Co. v. Böhm*, 29 Ohio St. 633. Where, upon

a hearing before commissioners, the owner makes default, the Supreme Court, on motion to confirm the report of the commissioners, has power, the default being excused, to open it, to set aside the report and order a new hearing. *New York, Lackawanna, & Western R. R. Co., in re*, 93 N. Y. 385. A deposit of the amount of an award of damages for land taken under the law of eminent domain, where a deposit is authorized to be made for the use of the land-owner, is unavailing if a condition is imposed respecting the payment of the money deposited to the owner. It is immaterial whether or not the agent making the deposit was authorized to impose the condition. *Kanne v. Minneapolis & St. Louis R. R. Co.*, 30 Minn. 423. The defendant railway company had commenced the construction of its road over the lands of the defendant B., and had deposited the amount of the land damages awarded B. by the commissioners, in the plaintiff's bank, as provided by statute, for which the bank had issued a certificate of deposit to B. While the work was in progress, and before much of B.'s land had been taken, the company was enjoined, at the instance of other parties, from the further prosecution of work upon its road, whereupon it forbade the orator to pay B. the sum so deposited, because it had taken but a small portion of the lands of B. for which damages were awarded, and had damaged the lands to a much less extent than the amount of the damages awarded. B. claimed the deposit, and demanded it of the orator, and upon its refusal to pay the same to him, brought suit at law therefor. The orator claimed no interest in the fund other than as stakeholder. It was held that the orator could sustain a bill of interpleader against the defendants in respect to the fund. *First National Bank of Brattleboro v. West River R. R. Co.*, 46 Vt. 633; 49 id. 167. The land which a railway company claimed to take for a gravel-pit was described in its petition to the railway commissioners as comprised within a space of

to be assessed by a sheriff's jury, the same rules as to qualification, proceedings, etc., apply as in the case of commissioners, unless spe-

fifteen rods square; the land condemned by the commissioners for that purpose was not comprised within that limit. It was held that they had no power to condemn land not described in the petition; and in so doing they exceeded their jurisdiction. *Spofford v. Bucksport & Bangor R. R. Co.*, 66 Me. 26. In an inquisition of damages the schedule mentioned a dwelling, and it was held that this description included the yard and garden. *Taylor v. Clemson*, 2 Q. B. 978. Where condemnation notices described the land as a certain number of feet on each side of the centre line of the railroad, "as the same is located, staked, and marked," it was held that this description was sufficient, and if any other parts of the description differed therefrom they must yield to the visible designation. *Lower v. Chicago, Burlington, & Quincy R. R. Co.*, 59 Iowa, 563. The petition, under the statute, must contain such a description of the land sought to be condemned as will show its location and the boundaries thereof. A defective description cannot be remedied by a reference in the petition to a deed. *New York Central & Hudson River R. R. Co., in re*, 70 N. Y. 191. On appeal, a railway company may, by a disclaimer, dismiss proceedings instituted by it for condemnation of lands. In such a case the costs must be taxed to the company. *St. Louis, Ft. Scott, & Wichita R. R. Co. v. Martin*, 29 Kans. 750; 10 Am. & Eng. R. R. Cas. 514. The commissioners should hear all legal and relevant testimony offered by either party, bearing upon the question of compensation. *Washington, Cincinnati, & St. Louis R. R. Co. v. Switzer*, 26 Gratt. (Va.) 661. Where a petition is filed to condemn land, and there is no cross-petition to include other land with it, it is improper to permit evidence to be introduced in regard to land adjoining that described in the petition and belonging to the same owner. *Peoria, Atlanta, & Decatur R. R. Co. v. Sawyer*, 71 Ill. 361. If a proceeding may be dismissed, on the motion of the land-owner, because the instrument of appropriation deposited

with the clerk is not signed by any person in behalf of the railway company as required by statute, such objection will be waived if not made until a late stage of the proceeding. *Logansport, &c. R. R. Co. v. Buchanan*, 52 Ind. 163. There is no error in the exclusion of testimony for the purpose of sustaining the commissioners' report, to the effect that they were instructed in their duties by the adverse attorneys. The matters of inquiry for the court are: What did the commissioners do in fact, and upon what principles did they arrive at the conclusions reported? Nothing appearing in the record to show how this inquiry was conducted, the action of the court below, in setting aside the report, will be presumed correct. *Quincy, Missouri, & Pacific R. R. Co. v. Ridge*, 57 Mo. 599. In a proceeding to condemn land under a special statute which passed the fee in the land taken, upon payment of the damages assessed, and which required the court to render judgment upon the report of the commissioners in case no appeal was taken from their assessment, both parties appealed, and a trial was had, and the company procured a reversal for error. The land-owner having died, the cause was re-docketed in the name of his administrator, the company's appeal dismissed for want of prosecution, and thereupon the administrator dismissed the appeal of his intestate, electing to take the damages as found by the commissioners, which had been deposited. It was held that as the fee in the land descended to the intestate's heirs-at-law, they should have been made parties, so as to conclude them by the judgment; and for the error in not making them parties the judgment of the court was reversed. *Peoria & Rock Island R. R. Co. v. Rice*, 75 Ill. 329. Damages resulting to the remainder of the tract not taken, on account of the shape in which it will be left, or of the effect of an embankment built along the track, or from cutting off the front from a county road, so as to injure the sale for building-sites, are not special damages, and may be proved without being set up in the

cific changes are made by statute. If the statute merely provides that the damages shall be assessed by a jury, to be drawn by a sheriff

answer. *North Pacific R. R. Co. v. Reynolds*, 50 Cal. 90. There is no rule of law or practice authorizing the filing of an answer of any kind to a petition for the condemnation of land. If one is filed, the court may properly have the same stricken from the files. *Smith v. Chicago & Western Indiana R. R. Co.*, 105 Ill. 511. An application for a writ to assess damages, must be in writing; and such application constitutes a complaint to which objection may be made as in ordinary proceedings. *Church v. Grand Rapids & Indiana R. R. Co.*, 70 Ind. 161. Proceedings to condemn land for railway uses are special, and unlike ordinary trials at law; the inquest may be conducted by commissioners or a jury without the aid of counsel, so that the practice must be simple, and a large discretion allowed in admitting or rejecting testimony. *Port Huron & Southwestern R. R. Co. v. Voorhees*, 30 Mich. 503; *East Tennessee, &c. R. R. Co. v. Burnett*, 11 Lea (Tenn.), 525; *Camp v. Coal Creek, &c. R. R. Co.*, id. 705. The railway company has the right to open and close. *McReynolds v. Baltimore & Ohio R. R. Co.*, 106 Ill. 152. Upon exceptions filed to the report of commissioners, the court should review by evidence the action of the commissioners, and supervise their finding so as to do substantial justice. The court may approve or reject their report, but cannot alter it. *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491. Where a petition to condemn land for a right of way describes only one tract of land of the defendant's farm, which is cut off from the rest of the farm, and damages are assessed only in respect to that tract, the owner may afterwards cause the damages to be assessed as to the balance of the land. *Galena & Southern Wisconsin R. R. Co. v. Birkbeck*, 70 Ill. 208. A statute authorized a railway company to take a parcel of land after thirty days' notice, and provided that all general statutes relating to the location of railways should govern the taking. It was held that the location over the land might be filed before the expiration of the thirty days.

Eastern R. R. Co. v. Boston & Maine R. R. Co., 111 Mass. 125. An assessment of damages in proceedings to condemn lands is void if the land is not lawfully condemned. *Detroit, Monroe, & Toledo R. R. Co. v. Detroit*, 49 Mich. 47. A report of commissioners, providing that the party defendant shall have the liberty of constructing certain easements over the land taken by the company, is erroneous upon its face, although otherwise in conformity to the statute, and may be set aside on motion of the defendant. *Railroad Co. v. Halstead*, 7 West Va. 301. Where a railway company duly condemned a right of way, which included the plaintiff's lot, and without paying the award entered thereon, but did not actually occupy any portion of plaintiff's property or disturb the fence around it, it was held that the company had not made such an appropriation of the property as to have been guilty of a tort, and that it was not liable to pay the award. *Dimmick v. Council Bluffs & St. Louis R. R. Co.*, 58 Iowa, 637. Proceedings were had to condemn land, which were regular except that the commissioners awarded a gross sum as compensation to all of six lot-owners, who held in severalty, without specifying the sum to which each was entitled. The company paid the money into court, and nothing further was done in the proceeding. It was held that the condemnation proceeding being ended, and not pending so as to permit the award to be corrected at the instance of either party, it was without any effect upon the rights of the parties. Such proceedings were void. *Rusch v. Milwaukee, Lake Shore, & Western R. R. Co.*, 54 Wis. 136. Where commissioners assessed the damages in view of the tract taken altogether, but understated the quantity of the land by a fraction of an acre, it was held that it did not invalidate their action. *Morgan v. Chicago & Northeastern R. R. Co.*, 39 Mich. 675. Under the statute authorizing the Eastern R. R. Co. to take land for a freight-station, and providing that the general statute shall govern the pro-

or constable, a jury of twelve persons are required, and their verdict is required to be unanimous, and they should be drawn according to the method provided by statute for the drawing of juries in ordinary cases.¹ But where the statute makes specific provisions in these respects, it must be strictly followed. The jury should be sworn.² If the statute makes no provision in that respect, the parties are entitled to the same challenges, which must be taken in the same way as in ordinary cases.³ The jury are entitled to the same privileges and subject to the same rules relative to the admission of evidence as commissioners are, and are not subject to the strict rules of law in that respect.⁴ If the jury fail to agree, a new jury must be summoned.⁵ But in New York the verdict of a majority is held sufficient.⁶ The verdict may be itemized,⁷ and according to some of the cases may contain conditions requiring the company to remove buildings, etc.;⁸ but such conditions can only be imposed when the party to be affected thereby assents thereto.⁹ The verdict must be for a certain sum payable in money, and cannot be to the effect that the company shall perform certain acts in compensation for the injury.¹⁰ The same rules as to setting aside the verdict of a jury prevail as exist in reference to setting aside the report of commissioners, etc. Proceedings to condemn land are, while an appeal is pending and

ceedings, except that, instead of the county commissioners, three commissioners shall be appointed by the court to adjudicate the damages, from whose decision "an appeal to the jury shall lie" in behalf of any owner of land taken, "as is provided in cases of lands taken for railroad purposes," the award of commissioners so appointed is to be returned to the court; and the application for a jury, by way of appeal from their decision, is to be made, and the trial by jury had, at the bar of this court. *Wyman v. Eastern R. R. Co.*, 128 Mass. 346.

¹ *Meacham v. Fitchburg R. R. Co.*, 4 Cush. (Mass.) 291. Where the statute makes provision for six jurors, the parties by going to trial with a less number waive the irregularity. *Avery v. Groton*, 36 Conn. 304.

² *Lumsden v. Milwaukee*, 8 Wis. 485; *Rockford R. R. Co. v. McKinley*, 64 Ill. 338; *Owen v. Jordan*, 27 Ala. 608.

³ *Converse v. Grand Rapids R. R. Co.*, 18 Mich. 459; *Mansfield R. R. Co. v.*

Clark, 23 Mich. 519; *Fowler v. Middlesex*, 6 Allen (Mass.), 92; *Molett v. Keenan*, 22 Ala. 484; *Walker v. Boston, &c. R. R. Co.*, 3 Cush. (Mass.) 1.

⁴ *Coster v. New Jersey R. R. Co.*, 24 N. J. L. 780; *Columbia Bridge Co. v. Geisse*, 36 id. 537.

⁵ *Hicks v. Foster*, 32 Ga. 414; *Chicago, &c. R. R. Co. v. Sanford*, 23 Mich. 418.

⁶ *Astor v. New York*, 5 J. & S. (N. Y. Superior Court) 539.

⁷ *Fitchburg R. R. v. Boston, &c. R. R. Co.*, 3 Cush. (Mass.) 58.

⁸ *Omaha R. R. Co. v. Menk*, 4 Neb. 21; *Dwight v. Springfield*, 6 Gray (Mass.), 442.

⁹ *Central R. R. Co. v. Heller*, 7 Ohio St. 220; *Chicago, &c. R. R. Co. v. Melville*, 66 Ill. 820; *Hill v. Mohawk R. R. Co.*, 7 N. Y. 152; *Chesapeake R. R. Co. v. Patton*, 6 W. Va. 147.

¹⁰ *N. O. Pacific R. R. Co. v. Murrell*, 34 La. An. 536.

until the valuation is paid, in the nature of an executory contract to buy land. If in the mean time the corporation becomes insolvent, and a new company is formed, which succeeds to its rights, the last company cannot claim the rights of a *bona fide* purchaser, nor set up adverse possession, or the statute of limitations,¹ as in this respect, it stands in the same position as an individual would in reference to such matters, and being in possession under the original company, it can claim no greater or better title than its grantor had, and, as the original company held as a licensee, both it and its grantees are estopped from denying the title of the licensor. The remedy of the new company would be by a purchase of the land, or its condemnation under the statute. In such cases, the value of the land is to be estimated as it was at the time when the original company went into possession. The rule in such cases is that where a railway company has been permitted by the owner to enter into possession and construct its tracks without first paying the compensation therefor, in subsequent proceedings to condemn the land, the measure of compensation is the value of the land and damages at the time of entry with interest, irrespective of the value of the improvements subsequently put upon it.² The value of the road structure put upon the land is not in such cases to be considered.³ But a different rule prevails where the company entered into a contract for the purchase of the land which it has not performed upon its part, and in such a case, if the company afterwards seeks to condemn the land, its actual value, including the value of the improvements placed thereon, is the true measure of compensation,⁴ and its grantees stand in the same relation to the land as the original company, and are subject to the same rules and liabilities.

The land-owner and the company may agree upon the amount of the damages, or they may agree that the amount of damages shall be ascertained in a different mode from that provided in the statute, and such agreement is valid and binding upon both parties,⁵ and where the company is let into possession under it, before the damages are ascertained, specific performance will be compelled by a court of equity,⁶ if the party seeking such specific performance has

¹ *Cillison v. Savannah, &c. R. R. Co.*, 7 S. C. 173; *Buckner v. Savannah R. R. Co.*, 7 id. 325.

² *North Hudson Co. R. R. Co. v. Boorman*, 28 N. J. Eq. 450.

³ *Emerson v. Western Union R. R. Co.*, 75 Ill. 176.

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⁴ *Aspinwall v. Chicago, &c. R. R. Co.*, 41 Wis. 474.

⁵ *Botkin v. Livingston*, 16 Kan. 39.

⁶ *Chicago, &c. R. R. Co. v. Swinney*, 38 Iowa 182.

performed the agreement upon his part so as to be entitled to invoke the aid of a court of equity.

If the parties do not agree upon the damages, and proceedings for the condemnation of the land are brought, the jury or viewers must be disinterested men ; but a report will not be set aside because one of them had a claim against the company for damages for altering a county road so as to pass through his land. Those persons only are disqualified from acting as viewers whose property immediately adjoins the railroad.¹ Neither does the fact that a viewer has expressed an opinion as to a former and somewhat similar case render him incompetent to serve on the view ; the party waives objection to a viewer by appearing at the hearing.² But one who has given his note to a railway company, to aid in the construction of its road, is disqualified as a juror in proceedings to condemn lands for its right of way. This disqualification cannot be removed by agreement of parties.³ But a subscriber to a railway aid fund, who takes no stock in the road, acquires no legal interest in another projected road from the mere fact that it is to be leased to the road which he has aided, and is not thereby disqualified as a juror in proceedings to condemn lands, for the use of the latter road.⁴

A motion to set aside the verdict of the jury must be addressed to and adjudicated by the court in which the verdict is rendered.⁵ Where a jury is required merely to determine the damages for taking property for a railway, a finding in general terms is sufficient, and it need not specify the amount allowed for each item of injury. The presumption is that all evident facts bearing on the amount of damages were taken into account.⁶ In condemnation proceedings the compensation to be ascertained by the jury for the taking of the land must be, in terms, money ; the jury have no power to prescribe the performance of other acts by the petitioners, such as fencing the road, making crossings, etc.⁷

SEC. 252. Parties to Proceedings. — As to the proper party to initiate the proceedings to condemn, the rule broadly stated is that the company authorized to construct the road for the use of which

¹ *Newbecker v. Susquehanna R. Co.*, 1 Pearson (Pa.), 57.

² *Gingrich v. Harrisburg, &c. R. Co.*, 1 Pearson (Pa.), 74.

³ *Michigan Air Line R. Co. v. Barnes*, 40 Mich. 383.

⁴ *Detroit Western Transit Co. v. Crane*, 50 Mich. 182.

⁵ *Burr v. Bucksport R. Co.*, 61 Me. 130.

⁶ *Michigan Air Line R. Co. v. Barnes*, 44 Mich. 222.

⁷ *Chicago, &c. R. Co. v. Melville*, 66 Ill. 329 ; *Toledo, &c. R. Co. v. Munson*, 57 Mich. 42 ; *Chesapeake, &c. R. Co. v. Patton*, 6 W. Va. 147.

the land is being condemned, is the proper party. If after commencing the construction of the road the original company sells all its interests and franchises to a second company, it is still the proper party to institute condemnation proceedings.¹

It is incumbent on a railroad company petitioning for condemnation of the right of way to ascertain the owners of the land and make them parties to the proceedings; and by selecting the parties against whom it proceeds it admits their ownership.² In the absence of any statutory provision there seems to be no good reason why all persons who sustain damage from the taking of their lands, in a town or county, may not be joined in proceedings brought by the railway company to have the damages assessed; but each owner would be entitled to a separate assessment or verdict for his particular damage.³ When, however, the land-owner is authorized to bring proceedings, only those who are jointly interested in the land in question can join therein;⁴ and in proceedings brought by the company, they may and generally should be joined as defendants;⁵

¹ *Cory v. Chicago, &c. R. Co.*, 100 Mo. 282; 44 Am. & Eng. R. Cas. 183. The fact that proceedings to condemn were commenced and prosecuted by the lessee of the road, but in the name of the lessor, is not a sufficient ground for an injunction to restrain proceedings. *Gottschalk v. Lincoln, &c. R. Co.*, 14 Neb. 389; 10 Am. & Eng. R. Cas. 118. See also *Deitrichs v. Lincoln, &c. R. Co.*, 13 Neb. 361; 13 N. W. Rep. 624.

² *Bentonville R. Co. v. Stroud*, 45 Ark. 278. One who has purchased property after proceedings to condemn part of it have been instituted, but who was not made a party to the proceedings cannot appeal; no one who was not a party to the original proceedings has a right to appeal from the award there rendered. *Connable v. Chicago, &c. R. Co.*, 60 Iowa, 27; 10 Am. & Eng. R. Cas. 520; *Cedar Rapids, &c. R. Co. v. Chicago, &c. R. Co.*, 60 Iowa, 35; 10 Am. & Eng. R. Cas. 522. The word "owner" comprehends any person having an interest in the estate. *Gerrard v. Omaha, &c. R. Co.*, 14 Neb. 270; 20 Am. & Eng. R. Cas. 423. Only the party owning the land at the time of the condemnation is entitled to compensation; a subsequent owner has no right to claim it. *Dixon v. Baltimore, &c. R. Co.*, 1

Mackey (D. C.), 78; 3 Am. & Eng. R. Cas. 201. The lands of a minor cannot be condemned without making his guardian a defendant. If there is no regular guardian, a guardian *ad litem* should be appointed. *Missouri, &c. R. Co. v. Carter*, 85 Mo. 448; 28 Am. & Eng. R. Cas. 249.

³ *McKee v. St. Louis*, 17 Mo. 184. But if the statute makes special provision in this respect, it must be strictly followed. *Quincy R. Co. v. Kellogg*, 54 Mo. 334. In Massachusetts, an estate in which there are different interests is required to be valued as one estate, and the statute provides for the apportionment of the sum awarded among the different interests. *Edmonds v. Boston*, 108 Mass. 535. See also *Spring Valley Water Works v. San Francisco*, 22 Cal. 434; *Chicago, &c. R. Co. v. Chamberlain*, 84 Ill. 333.

⁴ *Merrill v. Berkshire*, 11 Pick. (Mass.) 269; *Tucker v. Campbell*, 36 Me. 346.

⁵ *Whitcher v. Benton*, 48 N. H. 157; *Ashby v. Eastern R. Co.*, 5 Met. (Mass.) 368; *Southern Pac. R. Co. v. Wilson*, 49 Cal. 396; *Grand Rapids, &c. R. Co. v. Alley*, 34 Mich. 10; *East Saginaw, &c. R. Co. v. Benham*, 28 Mich. 459.

and the assessment is made in a gross sum which is to be divided among them according to their respective interests.¹ If an assessment is made to two jointly, one cannot appeal without making the other a party thereto, either by notice or other proper proceeding.²

The appraisal should not contain a separate award of damages to each tenant in common of a single tract of land, of which a part has been taken for the use of a railroad; and where the appraisers, after fixing the value of the land taken and the damages to the remainder of the tract, have apportioned the whole amount among the several tenants, an appeal by the railroad company should be from the gross award. On such appeal the tenants in common and all other parties in interest are plaintiffs, and are not entitled to separate trials. Tenants in common must unite as plaintiffs, even at common law, to recover damages for any injury done to the real estate.³ In some of the States they are allowed to join or sever in the action.⁴

An assessment must be made to each owner in severalty, and a gross sum cannot be awarded to several owners of separate and distinct parcels of a tract;⁵ nor can the damages of owners of separate and distinct parts of a block of buildings be awarded in gross, but the damages of each owner must be assessed separately.⁶ A vendor and vendee of land under a bond for a deed or other written contract of sale,⁷

¹ *East Saginaw R. Co. v. Benham*, 28 Mich. 459. If an assessment is made separately when it should be in gross, — *Lake Superior R. Co. v. Greve*, 17 Minn. 322, — or in gross where it should have been made in several sums, the objection comes too late after verdict. *Knaught v. St. Paul, &c. R. Co.*, 22 Minn. 173.

² *Chicago R. Co. v. Hurst*, 30 Iowa, 73; *Southern Pac. R. Co. v. Wilson*, 49 Cal. 396.

³ *De Puy v. Strong*, 37 N. Y. 372; *Austin v. Hall*, 13 Johns. (N. Y.) 286; *Low v. Mumford*, 14 id. 426; *Decker v. Livingston*, 15 id. 479; *Hill v. Gibbs*, 5 Hill (N. Y.), 56; *May v. Slade*, 24 Tex. 205.

⁴ *Hobbs v. Hatch*, 48 Me. 55; *Webber v. Merrill*, 34 N. H. 202; *Hubbard v. Foster*, 24 Vt. 542; *McGill v. Ash*, 7 Penn. St. 397.

⁵ *Chicago, R. Co. v. Sanford*, 23 Mich. 418.

⁶ *Sharp v. Johnson*, 4 Hill (N. Y.), 92.

⁷ *Colcough v. Nashville, &c. R. Co.*,

2 Head (Tenn.), 171; *Pinkerton v. Boston, &c. R. Co.*, 109 Mass. 527; *Drury v. Midland R. Co.*, 127 Mass. 571. As a rule, the vendee under articles of agreement is entitled to notice and compensation, and where there has been a contract to sell and a suit for specific performance instituted by the vendor, which results in a decree such as is sought, the vendee has sufficient interest pending the suit to file a petition for the assessment of damages. *Pinkerton v. Boston, &c. R. Co.*, 109 Mass. 527. In this case the court say: "The price which he has agreed to pay was made upon the assumption that he was to become the owner of the entire lot, unencumbered by the action of the respondents in appropriating a portion of it to their own use. Under the decree of the court he has been compelled to fulfil his contract and to pay the price of the entire lot. The effect of this decree is that he gets from his grantors less than he contracted for, and that all the damage resulting from the construction of the

a lessor and lessee,¹ tenants in common,² a tenant by dower or curtesy,³ and the heirs,⁴ partners owning land as a firm,⁵ the

respondent's railroad falls upon him, and not upon the parties from whom he derived his title. So far as it is a question between him and his grantors, there can be no doubt that the compensation for the taking equitably belongs to him and not to them." So where a person was in possession of land and held a title-bond conditioned for the execution of a deed to him on payment of the purchase-money, it was held that he was entitled to damages for the taking. *St. Louis, &c. R. Co. v. Wilder*, 17 Kan. 239. See also *Bridgman v. St. Johnsbury, &c. R. Co.*, 58 Vt. 198 (vendor held not a necessary party). And where the vendee joins with the vendor in the petition for damages, the railroad company cannot object that the damages are awarded in a gross sum and not apportioned. *Proprietors v. Nashua, &c. R. Co.*, 10 Cush. (Mass.) 385. The commissioners need, however, take no notice of the vendee's interest in making their award, but the fund awarded by them will be paid into court, and the vendee's rights will there be protected. *McIntyre v. Easton, &c. R. Co.*, 26 N. J. Eq. 425.

¹ *Kohl v. U. S.*, 91 U. S. 367. The lessee of a railway track is not a necessary party in a proceeding to condemn a right of way across such track. *Englewood, &c. R. Co. v. Chicago, &c. R. Co.*, 117 Ill. 611; 25 Am. & Eng. R. Cas. 227. But a lessor of land, a part of which is taken, is entitled to damages for being deprived of recourse to the land for his rent. *Fitzpatrick v. Pennsylvania R. Co.*, 10 Phila. (Penn.) 141. A market company which required lands held by a tenant under a fourteen years' lease suffered the lease to expire, and then turned out the tenant. The lease contained a provision that at the end of the term the tenant should yield up the premises, with all fixtures and improvements. It was held that the tenant was entitled to compensation for good-will and the chance of beneficial renewal, but not for improve-

ments; but that these might be considered by the jury in estimating the chance of beneficial renewal. *Rex v. Hungerford Market Co.*, 4 B. & Ad. 596; and see *Regina v. Hungerford Market Co.*, 9 Ad. & E. 463; *Regina v. London & Southampton Ry. Co.*, 10 Ad. & E. 3.

² *Harrisburgh, &c. R. Co. v. Bucher*, 7 Watts (Penn.), 33.

³ See *Toledo, &c. R. Co. v. Dunlap*, 47 Mich. 456; 5 Am. & Eng. R. Cas. 378.

⁴ *Columbia Bridge Co. v. Geisse*, 35 N. J. L. 268. See also *Church v. Grand Rapids, &c. R. Co.*, 70 Ind. 161; 3 Am. & Eng. R. Cas. 198; *Barlage v. Detroit, &c. R. Co.*, 54 Mich. 564; 17 Am. & Eng. R. Cas. 131. Where there is a life-tenant and a remainderman, both must join or be joined in *ad quod damnum* proceedings, and there will be an apportionment of the damages accordingly. *Colcough v. Nashville, &c. R. Co.*, 2 Head (Tenn.), 171; *Burbridge v. New Albany, &c. R. Co.*, 9 Ind. 546. In such case the value of the life-tenant's interest is to be estimated by multiplying the net annual value of the premises by the years of the life-tenant's expectancy of life, and reducing the same by calculation to a present cash value. *Pittsburgh, &c. R. Co. v. Bentley*, 88 Penn. St. 178. A widow of a decedent in possession of land, together with the heirs, must be made a party in *ad quod damnum* proceedings, and is entitled to damages. *New Orleans, &c. R. Co. v. Frederic*, 46 Miss. 1. So of the owner of a right of way over land taken. *Phila., &c. R. Co. v. Williams*, 54 Penn. St. 103. Or of a right of common. *Bell v. Ohio, &c. R. Co.*, 1 Grant Cas. (Penn.) 105. The owner of a ground-rent is also entitled to an apportionment of the damage. *Voegtly v. Pittsburgh, &c. R. Co.*, 2 Grant Cas. (Penn.) 243. As between trustee and *cestui que trust* it seems that the former must institute *ad quod damnum* proceedings and not the latter. If the latter does so his title may be denied. *Davis v.*

⁵ *Reed v. Hanover Branch R. Co.*, 105 Mass. 303. It seems, however, that where one partner holds land in trust for a firm, the railroad company cannot object to both

parties joining in *ad quod damnum* proceedings and having a joint assessment made in their favor. *Reed v. Hanover, Branch R. Co.*, 105 Mass. 303.

owner of a life-estate and of the reversion,¹ or any parties whose interests are joint, or so connected as not to be fairly severable, are entitled to be made parties and to have their damages assessed. Where the land is the property of a married woman, it is necessary, under most of the statutes now existing, to join her with her husband as parties defendant. The rule in this connection, however, must depend upon the peculiar policy which the several States have adopted in regard to the ownership and conveyance of lands by married women.²

If a party is omitted from the proceedings, they will be valid as to those who are made parties³ but a court of equity will not enjoin the company from the use of the land at the suit of one not made a party, when it does not appear that he has sustained any serious injury therefrom, or where, even though injury has resulted to him, he has rested on his rights until after the construction of the road, when an injunction would be a serious annoyance to the public.⁴

The rule is that proceedings to condemn a single tract must stand or fall as an entirety, and if they are invalid as to any one of the parties in interest, either because of the omission of a proper party or the want of notice, or from any other cause, they are invalid as to

Charles River R. Co., 11 Cush. (Mass.) 506. If the railroad company institutes the proceeding, it is irregular to join the *cestui que trust*. *State v. Easton, &c. R. Co.*, 37 N. J. L. 181.

¹ *Pittsburgh, &c. R. Co. v. Bentley*, 88 Penn. St. 178; *Kansas City, &c. R. Co. v. Weaver*, 86 Mo. 473; 28 Am. & Eng. R. Cas. 247. A tenant for life and remainderman may each recover compensation for the injury he sustains by the construction of a railroad over their land. The remainderman can recover only such damages as affect the reversion. The injury must be of a permanent nature necessarily prejudicial to the reversion, and the measure of the damage is, in general, the amount his estate is thereby diminished in value. *Bentonville R. Co. v. Baker*, 45 Ark. 252.

² Under the Colorado statute both husband and wife should be joined as defendants. *Colorado Central R. Co. v. Allen*, 13 Col. 229; 44 Am. & Eng. R. Cas. 193.

³ *State v. Easton, &c. R. Co.*, 37 N. J. L. 181.

⁴ *Whittlesey v. Hartford, &c. R. Co.*, 23 Conn. 42; *ante*, § 211. In the case of *Columbus, &c. R. Co. v. Witherow*,

82 Ala. 190, the court, in holding that an owner of land abutting on a public street might enjoin a railroad company from occupying such street without proper compensation to him, went on to observe: "The peculiar equities of the case, however, authorize a modification of the injunction, such as will do exact justice to both parties litigant. The proceeding is one in restraint of a public work of great utility, — the construction of a railroad, — thus presenting a case in which injunctions are granted with great caution. Delay in the construction of the work may operate very oppressively against the defendant as well as in great injury to the public." The court therefore dissolved the injunction upon condition that the company should furnish adequate security for the payment of such damages as might be assessed against it in subsequent proceedings. See also *High on Injunctions* (2d ed.), § 598; *East & West R. Co. v. East Tenn., &c. R. Co.*, 75 Ala. 259; *Torrey v. Camden, &c. R. Co.*, 18 N. J. Eq. 293; *Richards v. Des Moines Valley R. Co.*, 18 Iowa, 259; *Irish v. Burlington, &c. R. Co.*, 44 Iowa, 380; *Stretton v. Gt. Western, &c. Ry. Co.*, 40 L. J. Eq. 50.

all.¹ That proceedings are utterly void as to who is a necessary party who was omitted from them is beyond all question.²

The words "owner" or "proprietor" are not legal terms, but words of common parlance. By "owner" is not necessarily meant a tenant in fee simple, but the word is commonly used to express, generally, *a person who receives beneficial returns from the land*; the tenant in fee simple may have scarcely any beneficial interest in the land. The same observations apply to the word "proprietor;" any person who has a beneficial interest in the land was held to be within the words of an act "making satisfaction to the owners or proprietors of all private lands, etc., taken, or for any loss or damage they may sustain thereby."³ In this country it has been held that, under a statute providing for a remedy for damages sustained by the owners of land taken by a corporation, all owners of titles in or growing out of the land whose rights are capable of actual privation by taking, may have compensation.⁴ The term "owner," as used in such a statute, includes every person having any title to or interest in the land, capable of being injured by the construction of the road, and extends to the interest of a lessee or termor.⁵ Lessees of land for years with covenant for renewal have such an interest in the land as will bring them within the jurisdiction of a court authorized to fix the compensation a railroad shall pay to "owners."⁶ Indeed, the interest of a lessee is as potential in the eye of the law as that of the owner of the fee, though practically of less value, and cannot be affected by a subsequent agreement between his lessor and the company, made without his consent. In such case the compensation must be apportioned between the parties; and the lessor and lessee should

¹ *Brush v. City of Detroit*, 32 Mich. 43; *Anderson v. Pemberton*, 89 Mo. 61; 1 S. W. Rep. 216.

² *Columbus, &c. R. Co. v. Witherow*, 82 Ala. 190; *Smith v. Chicago, &c. R. Co.*, 67 Ill. 191; *Garmoe v. Sturgeon*, 65 Iowa, 147; *State v. Easton, &c. R. Co.*, 36 N. J. L. 181; *Hagar v. Brainard*, 44 Vt. 294; *Detroit, &c. R. Co. v. Detroit*, 49 Mich. 47; *Lewis on Em. Dom.*, § 339.

³ *Lister v. Lobley*, 6 N. & M. 343; *Chauntler v. Robinson*, 4 Exch. 163; *Russell v. Shenton*, 3 Q. B. 449. An "owner" is one who has some interest in the land at the time of the injury done. *Phila., &c. R. Co. v. Lawrence*, 10 Phila. (Penn.) 604.

⁴ *Philadelphia, &c. R. Co. v. Williams*, 54 Penn. St. 103.

⁵ *Baltimore, &c. R. Co. v. Thompson*, 10 Md. 76; *Colcough v. Nashville, &c. R. Co.*, 2 Head (Tenn.), 171; *Lister v. Lobley*, 2 H. & W. (N. Y.) 122; *Milley v. South-eastern Ry. Co.*, 1 M. & G. 58. Compare *Ross v. Elizabethtown, &c. R. Co.*, 19 N. J. L. 230; *Canal Bank v. Mayor*, 9 Wend. (N. Y.) 244. That the presumption is, if the jury assess compensation to one person, it is only for his interest in the premises, see *Rex v. Nottingham Waterworks*, 6 Ad. & El. 355. That money paid into court for land taken by a railroad company is to be divided as the land itself should have been, see *Ross v. Adams*, 28 N. J. L. 160.

⁶ *North Pennsylvania R. Co. v. Davis*, 26 Penn. St. 238.

each receive his separate share of the damages.¹ The lessor and lessee are each entitled to recover compensation for the damage sustained by them respectively.² But a lessee, who has expended large sums upon the land demised, under a reasonable expectation of a renewal of his lease, is not entitled to compensation in respect of such expectancy, where the land is taken from him by an incorporated company under a statute directing compensation to be paid to the owners and occupiers of land for the value of such land, and also for the damages sustained by them in making such works.³ The owner of a ground-rent is held not to be affected by proceedings of a railroad company against his tenants, to take and occupy the ground for the purposes of their road, as the landlord and tenant have distinct estates.⁴ A court authorized to fix the compensation to be paid by a railroad for "lands and materials," awarded to lessees, holding with a covenant of renewal, "\$4,000, including the damages arising out of the refusal by the company to renew." It was held that although there was no authority to assess damages for a breach of covenant, yet the decree was good; as this was, in fact, compensation for depriving the lessees of an interest they held in the land.⁵ A widow who is entitled to dower in land taken has an interest which the commissioners should assess, which is the value of her life-estate.⁶ But the wife of the owner of the fee of land taken for public use, is not within the provisions of a statute requiring compensation to be assessed to the persons *interested in or entitled to the land*. Her inchoate right, or possibility of dower, is divested by a regular taking from, and compensation to, the husband in his lifetime. All inchoate rights are defeated by proceedings to condemn the land, at least so far as the company is concerned.⁷ A tenant is not entitled to any allowance for improvements which by the terms of his tenancy he is bound to leave and give up to his landlord.⁸ If a tenant has a valid contract for a renewal of his lease, he is entitled to compensation for the injury resulting from being deprived thereof by the taking.⁹

¹ Baltimore & Ohio R. R. Co. v. Thompson, 10 Md. 76.

² Parks v. City of Boston, 15 Pick. (Mass.) 198.

³ Rex v. Liverpool & Manchester Ry. Co., 4 Ad. & El. 650.

⁴ Voegtly v. Pittsburgh, &c. R. R. Co., 2 Grant Cas. (Penn.) 243.

⁵ North Pennsylvania R. R. Co. v. Davis, 26 Penn. St. 238.

⁶ Matter of William and Anthony Streets, 19 Wend. (N. Y.) 678.

⁷ Moore v. Mayor, &c. of New York, 8 N. Y. 110.

⁸ Reg. v. Hungerford Market Co., 9 Ad. & El. 463.

⁹ Norwich Ry. Co. v. Whitehouse, 11 Beav. 382. In *Ex parte* Farlow, 2 B. & Ad. 341, a tenant from year to year was ejected by the company, but received a

Where the statute makes provision for the payment of damages to the "owners" of land, all persons having a proprietary interest therein capable of being taken, whether in possession, reversion, or remainder, are regarded as being comprehended under the term; and it includes, besides the owner of the fee, owners of franchises issuing out of the land,¹ owners of easements of any kind, over or in the land,² mortgagees,³ and lessees for years⁴ or life.⁵ But neither a

regular half-year's notice to quit. It appeared that she had been many years in possession, and that the tenancy was not likely to have been determined if the act had not passed. She was held entitled to compensation for the whole marketable interest which she had in the premises when the act passed, and that the goodwill, though of premises on so uncertain a tenure, was protected by the act as an interest which would practically have been valuable as between the tenant and a purchaser, though it was not a legal interest as against the landlord. But it was otherwise where the tenancy was from year to year, determinable at three months' notice ending with the year, and with a stipulation against underletting without leave. But see *Doo v. London, &c. Ry. Co.*, 3 Jur. 258, and *Reg. v. London, &c. Ry. Co.*, 10 Ad. & El. 3, where the tenant having received the requisite six months' notice from the company, and held over after notice, having been informed by the company that he might hold until the end of the current year, it was held that he was entitled to no com-

pensation, the situation being the same as though the landlord had given the regular landlord's notice. See also *Ex parte Nodin*, L. J., 1848, ch. 421. A tenant at will is not entitled to compensation for the taking of his estate. *Reg. v. Liver pool, &c. Ry. Co.*, 4 Ad. & El. 650.

¹ *Enfield Toll Bridge Co. v. Hartford, &c. R. R. Co.*, 17 Conn. 454.

² *Philadelphia, &c. R. R. Co. v. Williams*, 54 Penn. St. 108. But a mortgagor may recover the full amount of damages without reference to the mortgagee. *Breed v. Eastern R. R. Co.*, 5 Gray (Mass.), 470, n.

³ *Davis v. LaCrosse, &c. R. R. Co.*, 12 Wis. 16; *Wilson v. European, &c. R. R. Co.*, 67 Me. 358; *Michigan, &c. R. R. Co. v. Barnes*, 40 Mich. 383; *Leverin v. Cole*, 38 Iowa, 463. In *Crane v. Elizabeth*, 36 N. J. Eq. 339, it appeared that the charter of Elizabeth requires that in laying out and opening streets compensation must be made to the owner or owners of lands and real estate taken for the improvement. It was held that this did not require compensation to be made to mort-

⁴ *North Pennsylvania R. R. Co. v. Davis*, 26 Penn. St. 238; *Heise v. Mifflin, &c. R. R. Co.*, 62 id. 67; *Parks v. Boston*, 15 Pick. (Mass.) 198. It is held that a lessee is entitled to notice even though his lease expires before the actual taking. *Edmands v. Boston*, 108 Mass. 535. And a license from the owner to enter is no defence to the lessee's claim for damages. *Baltimore, &c. R. R. Co. v. Thompson*, 10 Md. 76; *Brown v. Powell*, 25 Penn. St. 221. The rule is otherwise, however, where the lease expressly reserves all such damages to the lessor. *Burbridge v. New Albany, &c. R. R. Co.*, 9 Ind. 546. There should be a separate

award to the lessor and to the lessee. *Baltimore, &c. R. R. Co. v. Thompson, ante*. But see *Kohl v. United States*, 91 U. S. 367. The rule for ascertaining the damages to the lessee is to ascertain the difference between the annual use of the premises before and after the taking. *Lawrence v. Boston*, 119 Mass. 126; *Renwick v. D. & N. R. R. Co.*, 49 Iowa, 664; *Cobb v. Boston*, 109 Mass. 438. And benefits accruing to the lease may be offset. *Turnpike Road Co. v. Brossi*, 22 Penn. St. 29.

⁵ *Burbridge v. New Albany, &c. R. R. Co.*, 9 Ind. 546.

trespasser in possession¹ nor a judgment creditor² is held to come under this head. The damages belong to the owner *at the time of the taking*, and do not pass to a grantee of the land under a deed made subsequent to that time, unless expressly conveyed therein.³

gagees specifically; that the compensation should include the value of all the interests burdened by the public easement, and is to be paid to the owner of the land if no other claimant intervenes; and if in any case such owner ought not in equity to receive the whole, timely resort must be had to the Court of Chancery, which will see to the equitable distribution of the fund. See *McIntyre v. Easton & Amboy R. R. Co.*, 26 N. J. Eq. 425; *Wheeler v. Kirkland*, 27 id. 534; *Bright v. Platt*, 32 N. J. Eq. 362; *Astor v. Miller*, 2 Paige (N. Y.), 68; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603. The term "owner" as applied to real estate, is undoubtedly one of variable meaning. Thus, in contracts of insurance it has received much latitude of interpretation, so as to embrace persons entitled to particular estates and equitable interests, where such construction was necessary to preserve the validity of the policy or prevent the forfeiture of rights under it. So in statutes providing compensation to owners for lands taken for public use, where the Constitution required that special interests should be paid for, similar scope has also necessarily been given to the language in order to render the acts consistent with the fundamental law. Thus in *Ellis v. Welch*, 6 Mass. 246, and *Parks v. Boston*, 15 Pick. (Mass.) 198, it was held to include every person having a valuable vested interest in land, capable of being damnified by the laying out of a street, because a narrower construction would have infringed upon the constitution of the commonwealth. But in *Watson v. New York Central R. R. Co.*, 47 N. Y. 157, where upon the same principle it was urged that the phrase "owners of land" should embrace judgment creditors of the legal owner, the court refused to construe it so broadly, because the remedies of such creditors against the land were supposed to be subject to legislative supersedure by the power of eminent domain without compensation. In this case at bar the court applies the pri-

mary rule that in statutes and contracts words are to be received in their common acceptance. According to this acceptance a mortgagee of land is not the owner, as has been frequently adjudged in this State. *Wade v. Miller*, 33 N. J. Eq. 296; *Shields v. Lozeau*, 35 id. 496; *Kircher v. Schalk*, 40 id. 335. If the mortgagor alone is notified, the title of the mortgagee is not divested. *Leverin v. Cole*, 38 Iowa, 463; *Platt v. Bright, ante*; *Michigan Air-Line R. R. Co. v. Barnes*, 40 Mich. 383. And the mortgagee is entitled to notice, whether he is in or out of possession. *Wilson v. European & C. R. R. Co.*, 67 Me. 358. And in the last case it was held that if the company proceeds to take the land without notice to him he may proceed against it in trespass. If he is made a party, but subsequently as to him the proceedings are discontinued, — it is a fatal irregularity. Where he is not made a party it has been held that he may first sell the land, and if that does not yield sufficient to discharge the mortgage debt, he may then sell the right of way, either with or without the land as may be most advantageous. *Leverin v. Cole, ante*. The mortgagor and mortgagee cannot join in proceedings, but must proceed separately. *Farnsworth v. Boston*, 126 Mass. 9. And where the mortgagor proceeds alone, the fund, upon application of the mortgagee, will be ordered to be paid into court, and a proportional part thereof be paid to the mortgagee, and he will be relegated to the remaining estate for the balance. *Platt v. Bright, ante*. In England an equitable mortgagee is entitled to notice. *Martin v. London, & C. Ry. Co.*, 35 L. J. Ch. 795, and so is a mortgagee of a leasehold estate. *Hagar v. Brainerd*, 44 Vt. 294.

¹ *Rasa v. Missouri, & C. R. R. Co.*, 18 Kan. 124.

² *Watson v. N. Y. Central R. R. Co.*, 47 N. Y. 157.

³ *Rand v. Townsend*, 26 Vt. 670;

If the land of a deceased person is taken, the compensation belongs to the heirs,¹ but the compensation for lands taken during the lifetime of the deceased, goes to his executor or administrator precisely the same and upon the same principle as the purchase-money for lands conveyed by him during his lifetime would.² If the statute makes provision for the payment of damages to "parties interested" in the land, a wider field is opened, and the owner of an equitable interest,³ mortgagees,⁴ a party in possession under a written contract for the purchase of the land,⁵ a widow with a right of dower, or a husband who is tenant by curtesy,⁶ a lessor and lessee for years,⁷ are all entitled to damages, as well as any person who has a tangible proprietary interest in the land. Both the lessor and the lessee are entitled to damages, — the lessor for the injury to his estate, and the lessee to the extent of the value of his unexpired term.⁸ If the lease contains a covenant for a renewal, he is entitled also to recover the value of a renewal, and where the damages in such a case were fixed at four thousand dollars, "including the damages arising out of the refusal by the company to renew," it was held that, although there was no authority to assess damages for a breach of covenant, yet the decree was good, as it was in fact compensation allowed the

Trodden v. Winona, &c. R. R. Co., 22 Minn. 198; *Chicago, &c. R. R. Co. v. Loeb*, 8 Ill. App. 627; *Paducah, &c. R. R. Co. v. Stowell*, 12 Heisk. (Tenn.) 1; *Drury v. Midland R. R. Co.*, 127 Mass. 571; *Tenbrook v. Jahke*, 77 Penn. St. 392; *McFadden v. Johnson*, 72 id. 335; *Allyn v. Providence R. R. Co.*, 4 R. I. 457; *Pomroy v. Chicago, &c. R. R. Co.*, 25 Wis. 641. The grantee takes the land *cum onere*. *Hentz v. Long Island R. R. Co.*, 13 Barb. (N. Y.) 646; *Chicago & Alton R. R. Co. v. Maher*, 91 Ill. 312; *Central R. R. Co. v. Merkel*, 32 Tex. 723; *Lewis v. Wilmington, &c. R. R. Co.*, 11 Rich. (S. C.) 91. It is held that a waiver of damages by the owner of the land is binding upon all persons who claim under him. *Central R. R. Co. v. Hetfield*, 29 N. J. L. 206; *Illinois Central R. R. Co. v. Allen*, 39 Ill. 205. In *Toledo, &c. R. R. Co. v. Morgan*, 72 Ill. 155, the court say that "if the grantor does not complain of damage done to his land before he conveyed it, the grantee certainly cannot."

¹ *Ballou v. Ballou*, 78 N. Y. 325;

Boynnton v. Peterboro, &c. R. R. Co., 4 Cush. (Mass.) 467; *Near v. Knox, &c. R. R. Co.*, 61 Me. 298.

² *Moore v. Boston*, 8 Cush. (Mass.) 274.

³ *Drury v. Midland R. R. Co.*, *ante*.

⁴ *Platt v. Bright*, 32 N. J. Eq. 81; *Hagar v. Brainerd*, 44 Vt. 294.

⁵ *Pinkerton v. Boston & Albany R. R. Co.*, 109 Mass. 527. He may prosecute his claim in the name of the vendor.

⁶ *Columbia, &c. Bridge Co. v. Geisse*, 35 N. J. L. 268.

⁷ *Burbridge v. New Albany, &c. R. R. Co.*, 9 Ind. 546; *Parks v. Boston*, 15 Pick. (Mass.) 198; *Lawrence v. Boston*, 119 Mass. 126; *Cobb v. Boston*, 109 Mass. 438; *Kohl v. United States*, 91 U. S. 367.

⁸ *Parks v. Boston*, *ante*; *Turnpike Road v. Brossi*, 22 Penn. St. 29; *Baltimore, &c. R. R. Co. v. Thompson*, 10 Md. 76; *Renwick v. D. & N. R. R. Co.*, 49 Iowa, 664; *Brown v. Powell*, 25 Penn. St. 229; *Heise v. Pennsylvania R. R. Co.*, 62 id. 67; *Colcough v. Nashville, &c. R. R. Co.*, 2 Head (Tenn.), 171.

lessee for his interest in the land.¹ So if a new lease has been already made for a term to begin when the old term ends, he is entitled to the value of such new lease.² The statute of limitations does not apply to this statutory remedy, and unless, as is usually the case, the statute limits the period within which the remedy shall be pursued, it may be done at any time;³ but if any of the common-law remedies apply, the statute runs upon them, and after the lapse of the requisite time after the taking, the remedy is barred.

SEC. 253. Effect of taking an Inchoate Right. — If proper proceedings are brought against the owner of the land for its condemnation, and compensation therefor is made to him, if the statute makes no provision to the contrary, all inchoate rights are thereby, so far as the company is concerned, released,⁴ — as rights of dower, curtesy, and other incipient rights,⁵ including judgment liens, or liens by attachment upon mesne process.⁶ But where the statute makes provision for the acquisition of a lien upon land under a judgment, a payment of the damages to such creditor *pro tanto* would operate as a payment to the owner.⁷

SEC. 254. Title. — When the corporation brings proceedings to condemn land, by making a person a party thereto, it admits his title;⁸ but this is not conclusive upon the owner, and he may show that his title is different from that stated.⁹ But the owner, if he is

¹ North Pennsylvania R. Co. v. Davis, 28 Penn. St. 238. See also Alabama R. Co. v. Kenney, 39 Ala. 301.

² Cobb v. Boston, 109 Mass. 438.

³ Revere v. Boston, 14 Gray (Mass.), 218; Flagg v. Worcester, 13 Gray, 601; Delaware, &c. R. Co. v. Burson, 61 Penn. St. 369; Jefferson, &c. R. Co. v. New Orleans, 31 La. An. 478.

⁴ Lawrence v. Miller, 2 N. Y. 245; McCracken v. Hayward, 2 How. (U. S.) 608; Towne v. Smith, 1 W. & N. (U. S. C. C.) 134; Moore v. New York, 4 Sandf. (N. Y.) 456.

⁵ Moore v. New York, 4 Sandf. (N. Y.) 456; Watson v. N. Y. Cent. R. Co., 47 N. Y. 157.

⁶ Watson v. N. Y. Central R. Co., 47 N. Y. 157.

⁷ Chicago, &c. R. Co. v. Chamberlain, 84 Ill. 333.

⁸ Chicago, &c. R. Co. v. Hopkins, 90 Ill. 316. Unless the statute expressly so provides, the commissioners cannot pass

upon the question of title. Spring Valley Water Works v. San Francisco, 22 Cal. 434.

⁹ Brisbane v. St. Paul, &c. R. Co., 23 Minn. 114. The petition for condemnation should contain a thorough description of the land intended to be taken, so that there may be no question as to its identity. Toledo, &c. R. Co. v. Munson, 57 Mich. 42; 20 Am. & Eng. R. Cas. 410; West v. West, &c. R. Co., 61 Miss. 536; 20 Am. & Eng. R. Cas. 402; Brooklyn City R. Co. v. Hussner, 96 N. Y. 18; 20 Am. & Eng. R. Cas. 265; Ohio River, &c. R. Co. v. Harness, 24 W. Va. 511; 20 Am. & Eng. R. Cas. 405; Indianapolis, &c. R. Co. v. Newsom, 54 Ind. 121. And this description should state the owners of the property and the character of the estate each holds therein; if it does not, any owner may come in and prove his title in the proceedings before the commissioners. Brisbane v. St. Paul, &c. R. Co., 23 Minn. 114.

satisfied with the statement of his title, need not offer any evidence upon that head, as the condemning party cannot dispute it unless it has acquired a paramount title.¹ But this only applies to the land taken; in considering damages to land which is not taken, the owner must establish his title.² So, also, where he brings the proceedings he must establish his title.³ His title may be questioned by the company, but in order to do so it must set up want or failure of title in its answer.⁴ When the corporation institutes proceedings, if it finds the title of the person proceeded against defective its remedy is to dismiss the proceedings, or have the inquest set aside upon that ground.⁵

SEC. 255. *Interference with Water-courses, etc.* — “Property,” within the meaning of the term as employed in the Constitution and in the various statutes conferring the right of eminent domain, not only embraces tangible things, as real estate or personal property, *but also the rights which are incident thereto*; and an invasion of these rights constitutes a taking within the meaning of the term as employed in the Constitution, because it operates as an interference with the owner's right of exclusive use and control.⁶ The right of

¹ Selma R. Co. v. Camp, 45 Ga. 180; St. Paul, &c. R. Co. v. Matthews, 16 Minn. 341; St. Louis R. Co. v. Teters, 68 Ill. 144; Peoria, &c. R. Co. v. Bryant, 57 Ill. 473; Peoria, &c. R. Co. v. Laurie, 63 Ill. 264; Crise v. Auditor, 17 Ark. 572; Norristown Turnpike v. Burkett, 26 Ind. 53; Knauff v. St. Paul, &c. R. Co., 22 Minn. 173; Rippe v. Chicago, &c. R. Co., 23 Minn. 18.

² St. Paul, &c. R. Co. v. Matthews, 16 Minn. 341.

³ Peoria, &c. R. Co. v. Bryant, 57 Ill. 473; Robbins v. Milwaukee, &c. R. Co., 6 Wis. 636; Allyn v. Providence R. Co., 4 R. I., 457; Directors v. Wrightsville, &c. R. Co., 7 W. & S. (Penn.) 236. Possession is evidence of title. Sacramento Valley R. Co. v. Moffat, 7 Cal. 577. In an English case, a railroad company paid for and took a conveyance of land from A. Afterwards B. claimed the land and moved to restrain the company from taking it, their compulsory powers having expired. The evidence of title was conflicting between A. and B. It was held that B. had his remedy by ejectment; and an injunction was there-

fore refused. Webster v. Southeastern Ry. Co. 15 Jur. 73. The land-owner whose property is taken for a company must show what title he has. Ownership of the fee is not to be presumed from the possession. The company pay for what title they get and can maintain, and for no more. Robbins v. Milwaukee, &c. R. Co., 6 Wis. 636; Directors, etc. v. Wrightsville, &c. R. Co., 7 W. & S. (Penn.) 236; East Tennessee, &c. R. Co. v. Love, 3 Head (Tenn.), 63; Winebiddle v. Pennsylvania R. Co., 2 Grant Cas. (Penn.) 32.

⁴ Daley v. St. Paul, 7 Minn. 390.

⁵ Mayor v. Richardson, 1 Stew. & P. (Ala.) 12; Auditor v. Crise, 20 Ark. 540.

⁶ East Pennsylvania, R. Co. v. Schollenberger, 54 Penn. St. 144; Eaton v. Boston, &c. R. Co., 51 N. H. 504; Thompson v. Androscoggin Co., 54 N. H. 545. The word “property” in the tenth article of the Bill of Rights, which provides that “whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor, should have such a liberal construction as to include every valuable in-

exclusive dominion over property is one of its most valuable attributes, and any interference therewith is an infringement of a right which affords ample ground for an action. Among these is the right to have the waters of a natural stream come thereto in its usual manner, with its usual flow, undiminished in quantity and quality;¹ and any interference with this right is, to the extent of such interference, a taking of property for which the owner is entitled to compensation; and in estimating damages to an estate for the taking of the land, all these injuries are to be taken into account and compensated for, whether the injury results from diverting the water, or from precipitating it upon the land in increased volume, so as to flood it, or render it spongy, or otherwise to impair its value or usefulness to the owner.²

terest which can be enjoyed as property and recognized as such." *SHAW, C. J.*, in *Old Colony, &c. R. Co. v. Plymouth County*, 14 Gray (Mass.), 161.

¹ *Luttrell's Case*, 4 Coke, 86; *Parke v. Kilham*, 8 Cal. 77; *Garwood v. New York Central, &c. R. Co.*, 83 N. Y. 400; 38 Am. Rep. 452; *Oliver v. Fenner*, 3 R. I. 215; *Gillett v. Johnson*, 30 Conn. 183; *Davis v. Fuller*, 12 Vt. 178; *Parker v. Griswold*, 17 Conn. 288; *Thompson v. Crocker*, 9 Pick. (Mass.) 59; *Pillsbury v. Moore*, 44 Me. 154; *Clark v. Rockland Water Power Co.*, 52 Me. 68; *Heath v. Williams*, 25 Me. 209. If the public good requires it, all kinds of property are alike subject to the State's right of eminent domain, as well that which is held under it as that which is not. *New York, &c. R. Co. v. Boston, &c. R. Co.*, 36 Conn. 198. In the case of a navigable stream, the bed of the river is a public highway of the State, and within its absolute control, subject only to the rights of commerce. *Green v. Swift*, 47 Cal. 536; *Black River, &c. Co. v. La Crosse, &c. R. Co.*, 54 Wis. 659; *Holden v. Robinson*, 65 Me. 215. See also *Holyoke Water Power Co. v. Connecticut River R. Co.*, 22 Blatchf. (U. S.) 131; s. c. 52 Conn. 570; *Lewis on Em. Domain*, § 71. See also *Grand Rapids, &c. R. Co. v. Jarvis*, 30 Mich. 308, 319. But if the stream is not navigable, it stands on a common footing with other private property, so far as the right of eminent domain is con-

cerned. Thus, in a New Jersey case, *Glover v. Powell*, 10 N. J. Eq. 211, it was held that the legislature had the right to authorize the obstruction of the creek, there being nothing in the case to show that its navigation was demanded by the public interest. Certainly all property is held upon the implied condition that it may be reclaimed by the government, in the manner and upon the terms prescribed by law, whenever the public necessities so demand. *Hazen v. Essex*, 12 Cush. (Mass.) 476, 477; *Trustees v. Dennett*, 5 T. & C. (N. Y.) 207; *Central v. Lowell*, 4 Gray (Mass.), 474. Where lands are taken for public use the owner should pursue the statutory remedy, and an action for tort will not lie against those who make the improvement under a power conferred by statute. *Sprague v. Worcester*, 13 Gray (Mass.), 139; *Bartlett v. Crozier*, 17 Johns. (N. Y.) 447. Such a limited and precarious duty in the reparation of bridges cannot afford a ground for a private action against the overseer from any and every person who may happen to be injured by a bad bridge within his district. *Smith v. Gould*, 59 Wis. 631. The grant of a right of way over land being merely the conveyance of an easement, does not affect the right of the grantor to the use of a stream of water flowing over the land. *Smith v. Holloway*, 124 Ind. 329.

² *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166; *Wabash, &c. Canal*

Says MILLER, J., in a case cited in the last note:¹ "It is not necessary that property should be literally 'taken,' within the strictest sense of that word, in order to bring it within the constitutional provision requiring compensation. While remote and consequential injuries sustained to property by neighboring public improvements are properly excluded from the rule, there may be such serious interruption to the common and necessary use of property as will amount to a taking and entitle the owner to compensation, although it is not absolutely taken from him. The backing of water upon lands, or

v. Spears, 16 Ind. 441; *Evansville, &c. R. R. Co. v. Dick*, 9 Ind. 433; *Hooker v. New Haven, &c. Canal Co.*, 14 Conn. 145; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Ashley v. Port Huron*, 35 id. 296; *Lee v. Pembroke Iron Co.*, 57 Me. 481; *Arimond v. Green Bay, &c. Canal Co.*, 31 Wis. 316; *Glover v. Powell*, 10 N. J. Eq. 211; *Lehigh Valley R. R. Co. v. McFarlan*, 31 N. J. Eq. 706; *Cahill v. Eastman*, 18 Minn. 324; *Kemper v. Louisville*, 14 Bush (Ky.), 87. If there is no difficulty in constructing a culvert under a railroad, to carry off the water from a meadow over which the railroad passes, the railroad company will be liable for flowing the meadow, if they do not make a culvert, with ditches to and from it, sufficiently low to drain off the water. *Johnson v. Atlantic, &c. R. R. Co.*, 35 N. H. 569. But after it has turned a river properly, and has secured the banks in a reasonable manner, they cannot be liable for the future action of the water. *Norris v. Vermont Central R. R. Co.*, 22 Vt. 99. In the absence of special laws, corporations acting within their powers of taking land, and with due care, are not liable for consequential damage. *Hatch v. Vermont Central Railroad*, 28 Vt. 142. If it is authorized to lay rails in the public streets, it will not be liable in damages for accidents resulting therefrom, unless it is guilty of negligence in the laying down. *Mazetti v. New York & Harlem R. R. Co.*, 3 E. D. S. (N. Y.) 98. Such corporations may be vested with the sovereign power to take private property for public use, on making compensation, but are not clothed with the sovereign's immunity from resulting damages. This power leaves their common-law liability for injuries, done in

the exercise of their authority, precisely where it would have stood if the land had been acquired in the ordinary way. Thus a railroad embankment in an eddy and creek's mouth, in which plaintiff has a right of storing lumber, whereby the water is prevented from flowing in its accustomed channel, and the plaintiff is deprived of the full enjoyment of his privilege, is directly injurious to the plaintiff; and the fact that the creek is navigable and within the control of the legislature, is no defence to an action for the injury complained of. *Tinsman v. Belvidere Delaware R. R. Co.*, 26 N. J. L. 148. Where the right of way is granted to a railroad company, and the company are obliged to make a deep cut in order to enjoy the right, they are not bound to build walls to prevent the falling in of the banks. *Hortsmann v. Covington & Lexington R. R. Co.*, 18 B. Mon. (Ky.) 218. Where a street is taken by a railroad company, the remedy of an abutter for an injury thereby is not by statute, but the ordinary one at law to recover for a consequential injury. The lot and street adjoining, as to the owner of the former, constitute but one piece of property, and an injury to the latter is an injury to the former, and to the whole property. *Protzman v. Indianapolis, &c. R. R. Co.*, 9 Ind. 467. Where a railroad company have voluntarily, and for their own profit, so constructed their road as necessarily to injure a person's property, there being no remedy given by their charter, though they constructed their road in a proper manner and place, they are liable in damages for such injury. *Evansville, &c. R. Co. v. Dick*, 9 Ind. 433.

¹ *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166.

casting earth or sand or building a structure upon them, if done under statutes authorizing the acts for the public benefit, may entitle the land-owner to compensation, although his title to the land is not divested."

In a Connecticut case,¹ a corporation was created by the legislature for the purpose of constructing and maintaining a canal within certain *termini*, with all necessary waste-weirs, etc., and providing for the appointment of a board of commissioners, with power to designate the route of the canal, with all the works connected therewith, and to appraise the damages, giving notice to the parties interested. The canal and waste-weirs were constructed under the direction of such commissioners. The water of the canal discharged from one of the waste-weirs, after running through the lands of other persons, flowed upon the land of H. below, and thereby greatly injured it; but it was found that the corporation, in thus discharging the water, acted with proper prudence and care. No part of H.'s land was taken for the purposes of the canal. This injury to the plaintiff's land resulted, not from any act of Providence or unexpected calamity, but from using the waste-weir for the necessary protection of the canal. In an action on the case, brought by H. against the corporation for this injury, it was held, 1. That although it is incident to the sovereignty of every government to take private property for public use, of the necessity or expediency of which the government must judge, the obligation to make compensation is commensurate with the right; 2. That no intent of the legislature to authorize the injury in question was apparent from the charter of incorporation, either by express provision or fair construction; 3. That the approval by the commissioners of this waste-weir, with the other works connected with the canal, did not authorize the defendants to use it, though with prudence and care, to the injury of the plaintiff; 4. That *an injury to land, which deprives the owner of the ordinary use of it, is equivalent to a taking of the land*; 5. That no compensation having been provided for or made to the plaintiff for the injury sustained, he was entitled, by an action at common law, to recover damages for such injury. But where the legislature has provided a mode of redress, — as where it provides for the assessment of damages for "property taken or damaged" by the work authorized, — an action will not lie for the injury, but redress must

¹ Hooker v. New Haven, &c. Canal Co., 14 Conn. 145. Upon a new trial, the doctrine was adhered to. 15 Conn. 312.

be sought in the mode provided by statute. But the class of injuries referred to are held to come within the rule stated in the Connecticut case when no provision is made by statute for their redress.¹

¹ *Stevens v. Middlesex Canal*, 12 Mass. 466. In this case an action was brought against a canal company which had constructed its canal in such a manner that the water oozed through the banks and injured the plaintiff's meadows. No proof was introduced to show that the company had constructed their works in an improper manner or had been guilty of negligence in respect thereto. The court held that as the legislature had provided another mode of redress, an action would not lie, but said: "When the legislature authorizes an act, the necessary and natural consequence of which is damage to the property of another, he who does the act cannot be complained of as a trespasser or wrong-doer. . . . If the legislature should, for public advantage and convenience, authorize any improvement the execution of which would require or produce the destruction or diminution of private property, without affording, at the same time, means of relief and indemnification, the owner of the property destroyed or injured would undoubtedly have his action at common law against those who should cause the injury, for his damages. For although it might be lawful to do what the legislature should authorize, yet to enforce the principles of the Constitution for the security of private property, it might be necessary to consider such a legislative act as inoperative, so far as it trench upon the rights of individuals." In this case the injury is supposed to proceed directly from the act authorized by the legislature, and the rule would not apply in a case where the injury does not proceed directly from the act authorized, *but from a subsequent act of the defendants, intended to protect them in the enjoyment of the privilege granted*. If the act is expressly authorized by their charter, and no provision is made to indemnify them, the person whose lands were injured would, according to the reasoning of the court in the last case, be entitled to redress by a common-law remedy. In the case of *Gardner v. The Village of Newburgh*, 2 Johns. Ch. (N. Y.)

166, the legislature had authorized the village to supply themselves with water from a stream running through the plaintiff's farm, by which the plaintiff claimed he should be much incommoded; and an injunction was granted. KENT, Chancellor, admits the power of the legislature; but to render it valid, he says a fair compensation must, in all cases, be previously made to the individual affected, under some equitable assessment to be provided by law. This is a necessary qualification accompanying the exercise of legislative power, in taking private property for public use. The limitation is admitted, by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice. He cites Grotius and other eminent authorities, to show that where the right of eminent domain exists, unfettered by written constitutions, it is a clear principle of natural equity that when private property is taken for public use, the individual whose property is thus sacrificed must be indemnified. In that case, he insists that the legislature could not have intended to interfere with private rights; and there was no reason why the rights of the plaintiff should not be protected. *Bonaparte v. The Camden & Amboy R. R. Co.*, 1 Bald. (U. S. C. C.) 229. In England, where there are no such checks as we have upon legislative discretion, so great is the regard for private property, that in theory at least, the law will not sanction the least violation of it. All that the legislature will do, is, to compel the owner to alienate his possession for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but legislative authority can perform. 1 Bla. Com. 139. In a more recent case in Massachusetts, on a bill for an injunction, the defendants pleaded that they had constructed the road and bridge precisely in the manner and in the direction prescribed by the act of incorporation, and had done nothing not authorized by that act. The

In Maryland, it has been held that in an action brought against a railway company, by a land-owner a part of whose land has been taken by the company to recover for the diversion of a natural stream from his land, it is competent for the company to show that the attention of the jury of inquest was directed to the diversion of the stream; and that if their attention was so directed thereto, the reasonable presumption is that they estimated in their inquisition the damages likely to result from such diversion.¹ These cases would seem to establish the rule, that evidence is admissible to show that the attention of the jury of inquest *was not* called to a possible injury likely to occur from the use of the land for the construction of the road; because if it is competent to show that it *was* called thereto for the purpose of establishing a right, it is equally competent to show that it was not called thereto, for the purpose of defeating it.

Railway companies are bound to so construct their road as to do as little damage as possible to riparian owners;² and the legislature has no power to authorize the diversion of a natural stream without compensation to all who are damaged thereby;³ or the obstruction of

court say that the corporation, in the absence of positive enactment, are bound to make suitable bridges, culverts, &c., and to keep them in suitable and sufficient repair, so as to carry off the water effectually. This is implied, because it cannot be presumed the legislature would grant authority to enter upon and take private land for public use on other terms. The extent and limits of the duties and powers, in the absence of positive enactment, must be determined by what is reasonable in each case. If, after all, 'there should happen' to be private property so situated that some damage must be done to it, which could not be obviated by reasonable precautions, inasmuch as it is expressly authorized by the legislature, in the exercise of the right of eminent domain, such proprietor must be left to seek his compensation in the mode prescribed by the legislature. *Rowe v. The Granite Bridge Corporation*, 21 Pick. (Mass.) 344. *WILLIAMS, C. J., in Hooker v. New Haven &c. Co.*, 14 Conn. 157-159.

¹ *Beaver v. Western Maryland R. R. Co.*, cited 34 Md. 79; *Baltimore & Potomac R. R. Co. v. Magruder*, 34 Md. 74; 6 Am. Rep. 310. In a Vermont case the defendant was the owner and occupant of

a certain messuage, to which water was conducted for use by an aqueduct, from a spring upon another portion of his land, and the Vermont Central Railroad Company having located its road across the same, the commissioners were called to assess the damages. At the hearing, the defendant stated that he should use the water for the purpose of supplying a new house which he contemplated erecting, and that the commissioners need not take the water into account in assessing the damages. The president and engineer of the company were present and heard this statement, and made no claim to the use of the water; and the water was not considered in assessing the damages. The defendant received the amount of the damages assessed, and executed an absolute deed to the premises, without condition or reservation. It was held that the right to use the water passed by the deed. *Vermont Central R. R. Co. v. Hill*, 23 Vt. 681.

² *Hooker v. New Haven, &c. R. R. Co.*, 14 Conn. 146; *Boughton v. Carter*, 2 Johns. (N. Y.) 405.

³ *Gardner v. Newbergh*, 2 Johns. Ch. (N. Y.) 162.

streams so as to flood the lands of upper riparian owners, when by suitable culverts and sluices the damage can be obviated;¹ and this whether it arises from an ordinary condition, or from great freshets which ought to be foreseen and guarded against.² And where a stream is diverted by a railway company, it is not only bound to restore it as nearly as practicable to its former state, *but also to maintain it there*; because the mere restoration of the stream is not likely to leave it as secure as it was before, *and the company at its peril is bound to keep it secure*.³ In Pennsylvania it is held, and, as we think, with great propriety, that the company is not responsible for injuries resulting from the inability of its works to resist the action of an *extraordinary* flood; and where, during an extraordinary flood, a culvert, which was of sufficient size and strength to carry off the water in ordinary freshets, burst, and let the water down upon the plaintiff's school-house, it was held that the company was not responsible for the injury.⁴ In an earlier case⁵ the rule applicable to such questions was thus stated by AGNEW, J.: "In the present case, if the culvert was so unskillfully and negligently constructed as to be insufficient to vent the ordinary high water of the stream, the railroad company building it would have been liable for the injury thereby caused. The *apparent* facts indicate the duty. The stream, though small, must find a vent, or overflow the adjacent land and undermine the railroad. Its size, the character of the channel, and the declivity of the circumjacent territory which forms the watershed, indicated the probable quantity of water to be passed through. Proper engineering skill should observe these circumstances, and supply the means of avoiding the injury which would result from locking up the natural flow, or obstructing its passage so as to cause a reflux in times of *ordinary* high water. Beyond this, prudent circumspection cannot be expected to look, and there is therefore no liability for extra-

¹ *March v. Concord, &c. R. R. Co.*, 19 N. H. 372; *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 49; *Mellen v. Western R. R. Co.*, 4 Gray (Mass.), 301.

² *Brown v. Cayuga, &c., R. R. Co.*, 12 N. Y. 386; *Lawrence v. Great Northern Ry. Co.*, 16 Q. B. 643. In *Steel v. South Eastern Ry. Co.*, 16 C. B. 550, the plaintiff's garden was overflowed by the contractors of a railway company carelessly cutting off a drain or culvert and flooding the plaintiff's garden. There was no question made but that the defendants would

be liable if the work had been done by it. The doctrine stated in the text applies to municipal and other public corporations as to imperfect and insufficient sewers, etc., *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463.

³ *Colt v. Lewiston R. R. Co.*, 36 N. Y. 214.

⁴ *Baltimore, &c. R. R. Co. v. Sulphur Springs, &c., S. D.*, 96 Penn. St. 65; 42 Am. Rep. 529.

⁵ *Pittsburgh, &c. R. R. Co. v. Gilleland*, 56 Penn. St. 445.

ordinary floods,—those unexpected visitations whose comings are not foreshadowed by the usual course of nature, and must be laid to the account of Providence, whose dealings, though they may afflict, wrong no one.” In this case, it may be observed, according to the proof, if the culverts had been in the most perfect condition, the injury would not have been avoided. There were three culverts, and the testimony showed that one hundred and twenty similar culverts would have been required to carry off the water. Therefore it might be said that the injury came under the head of *vis major*, rather than as the result of any negligence on the part of the company. If the road was originally built by another company, the lessee or purchaser would probably be entitled to notice to remove the nuisance before action could be brought against it for its maintenance, unless there are facts sufficient to excuse notice.¹ The diversion of a stream (not navigable) so far as is *necessary* for the execution of the powers conferred is authorized by the legislature, and, according to the doctrine now generally held, the injury to those whose lands are not within the location of the road resulting from a proper and prudent execution of the power is not *damnum absque injuria*.² But while the damage done to riparian owners whose lands are not taken cannot be recovered by statutory proceedings, yet they have their remedy by a common-law action.

If the injury can be avoided by a proper execution of the works, it is not justified under the charter, even as against those whose lands are taken; as the legislature is presumed to have conferred the power upon the implied condition that it shall be properly exercised, and in such a manner as to avoid, as far as reasonably can be done, all injury and damage from its exercise.³ The duty of avoiding unnecessary damage to others by the construction of their road is not

¹ *Brown v. Cayuga, &c. R. R. Co.*, 12 N. Y. 486; *Hubbard v. Russell*, 24 Barb. (N. Y.) 404; *Norton v. Valentine*, 14 Vt. 239; *Preston v. Norfolk Ry. Co.*, 2 H. & N. 735.

² *Hatch v. Vermont Central R. R. Co.*, 28 Vt. 142.

³ *Whittaker v. Delaware & Hudson Canal Co.*, 87 Penn. St. 34; *Johnson v. Atlantic, &c. R. R. Co.*, 35 N. H. 569. A railroad was constructed across a water-course without making a culvert, thereby setting back the water and injuring land some distance from the railroad. It was

held that the damages could not be recovered by petition, but the party would be left to his remedy at law, because the injury is not the necessary result of a proper construction of the road, but of its negligent and improper construction, damages for which are never assessed. *Proprietors of Locks and Canals v. Nashua & Lowell R. R. Co.*, 10 Cush. (Mass.) 385. So railway companies are liable for diverting a stream of water from its natural course to the injury of a neighboring proprietor. *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 49.

lessened by the circumstance that it would subject them to more expense than some other mode which would be productive of damage to others.¹ If a stream is diverted from its course, or if the water is penned back by the construction of the road, even though the statute makes no provision to that effect, it is bound to restore the stream so far as is practicable, and to build suitable culverts or openings for the water, so as to produce as little damage as possible to the property of riparian owners,² or it will be liable to owners of land, whether upon the stream or not, for an overflow of water thereon caused by its mode of constructing its road.³ The rule is well expressed in a New York case,⁴ that "if a railroad company in constructing its road, necessarily diverts a stream from its natural channel, it is bound to restore and preserve it, in its former state of usefulness, as nearly as practicable in reference to the owners of property thereon, and it cannot burden such proprietor with the expense of preserving it in a condition of usefulness."⁵ If a railway fails to perform its duty in these respects, it is liable to land-owners injured thereby for the damages sustained by them therefrom, whether any portion of their land was taken for the use of the road or not;⁶ as a railway company is exempted from liability for

¹ In *Pugh v. Golden Valley Ry. Co.*, L. R. 12 Ch. Div. 274, it was held that an act which authorized the defendant to divert the course of a river or road "in order the more conveniently to carry the same over, or under, or by the side of the railway, as its officers may think proper," is to be taken as cut down and qualified by the proviso that it be an act necessary for making, maintaining, altering, or repairing, and using the railway. Such a power, therefore, authorizes such a diversion only when the road or river presents an actual obstacle to the construction of the line, and not in a case where the diversion is merely for the purpose of saving the company expense.

² *Walker v. Old Colony R. R. Co.*, 103 Mass. 1; *Valley R. R. Co. v. Bohm*, 34 Ohio St. 114; *March v. Portsmouth, &c. R. R. Co.*, 19 N. H. 372; *Lyon v. Green Bay, &c. R. R. Co.*, 42 Wis. 538. In *Young v. Chicago, &c. R. R. Co.*, 28 Wis. 171, it was held that the fact that after the diversion of a stream upon his land by the construction of the road-bed of a railroad company, the plaintiff did not

bring suit for eighteen years, was not such an acquiescence as deprived him of his right of action, — it appearing that at the time the water was diverted he insisted that a culvert should be built so as to retain it in its natural channel, and had from time to time expressed to agents of the company his objections to the diversion. *Haynes v. Burlington*, 38 Vt. 350; *Pittsburgh, &c. R. R. Co. v. Gilleland*, 56 Penn. St. 445; *Chicago, &c. R. R. Co. v. Moffitt*, 75 Ill. 524; *South Western R. R. Co. v. Lee*, 47 Ga. 38.

³ *Brown v. Cayuga, &c. R. R. Co.*, 12 N. Y. 486.

⁴ *Cott v. Lewiston R. R. Co.*, 36 N. Y. 214.

⁵ Upon the same principle where a railway company, by crossing a highway creates a necessity for a bridge, it must not only construct the bridge, but also keep it in repair, and may be compelled to do so by *mandamus*. *People v. Troy & Boston R. R. Co.*, 37 How. Pr. (N. Y.) 427.

⁶ *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 49. In *Miss. Central R. R. Co. v.*

acts producing injury to adjoining estates only when such injuries necessarily result from the careful and proper execution of its powers, and so can be said to have been within the contemplation of the legislature. Thus, if a railway company in the original construction of its roadway opens up an underground spring, which, after several years inundates its track, it has no authority, by means of an artificial channel, to turn the water upon the lands of another not included in its location, unless such mode of getting rid of the water is reasonably necessary to the maintenance of its road; and whether it is or not, is a question for the jury.¹ So where a railway

Mason, 51 Miss. 234, it was held that if a railroad company, by making imperfect sluices or other passages for streams over which they pass, injure by overflow the land of an adjoining proprietor, the company is bound for the damages sustained by the obstruction of the stream. In *Miss. Central R. R. Co. v. Carruth*, 51 Miss. 77, it was held that where a railroad company, by filling up a trestle under their road, and by making ditches, cattle-guards, and culverts, too small to carry off the water, overflows adjoining lands, and the owner thereof sustains damages by reason thereof, the railroad company is liable to the owner for the amount of the damages actually sustained. *Eaton v. Boston, &c. R. R. Co.*, 51 N. H. 504.

¹ *Curtis v. Eastern R. R. Co.*, 14 Allen (Mass.), 55. In this case it was held that the company was liable for the damages resulting from such an act, although the water reached the plaintiff's land by trickling from the channel through the embankment of the railroad and mingled with the surface drainage. In *Belinger v. N. Y. Central R. R. Co.*, 23 N. Y. 42, the defendant was sued for damages resulting, as was stated in the complaint, for "negligently, wrongfully, and improperly," constructing its railway across a creek and the low-lands forming the valley of the creek, so that the lands of the plaintiff were repeatedly overflowed, and the soil, fences, etc., washed away. The judge charged the jury that the company was not bound to guard against every possible contingency, but that they were bound to see that the openings were sufficient for any freshet

that might reasonably be expected to occur on the stream; and this ruling was sustained by the Court of Appeals. In *Conhocton Stone R. R. Co. v. Buffalo, &c. R. R. Co.*, 3 Hun (N. Y.), 523, affirmed, 51 N. Y. 373, the defendants offered the evidence of experts to show that the bridge (which was the cause of complaint) was built with care and skill, with suitable openings for the discharge of the water; and for the rejection of this evidence the verdict was set aside. See also *Estabrook v. Peterboro, &c. R. R. Co.*, 12 Cush. (Mass.) 224; *Perry v. Worcester*, 6 Gray (Mass.), 544; *Blood v. Nashua, &c. R. R. Co.*, 2 Gray (Mass.), 137; *Mellen v. Western R. R. Co.*, 4 id. 301; *Southside R. R. Co. v. Daniels*, 20 Gratt. (Va.) 344; *Johnson v. Atlantic & St. Lawrence R. R. Co.*, 35 N. H. 569; *Spencer v. Hartford, &c. R. R. Co.*, 10 R. I. 14; *West v. Louisville, &c. R. R. Co.*, 8 Bush (Ky.), 404; *Whittaker v. Del. & Hud. Canal Co.*, 87 Penn. St. 34; *Bagnall v. London, &c. Ry. Co.*, 7 H. & N. 423; *Lawrence v. Great Northern Ry. Co.*, 16 Q. B. 343. But it is held that they are not responsible for injuries resulting from the insufficiency of their culverts to carry off the waters of an extraordinary flood. *Pittsburgh, &c. R. R. Co. v. Gilleland*, 56 Penn. St. 445. Where a railroad crossed the mouth of a ravine, or arroya, partly by a bridge and partly by an embankment composed of materials which would not resist the action of water, and a flood washed out the embankment, it was held that the company was liable for the killing of a passenger by the precipitation of a train into the chasm

company is authorized to construct a bridge across a river, such authority is presumed to be given upon condition that it will so erect the bridge as not unnecessarily to obstruct the flow of the water; and if it erects the bridge in such a manner as to set the water back upon adjoining lands, which by reasonable precautions could have been avoided, unless it shows that it took such precautions it is liable for the damages ensuing from such obstruction of the stream.¹

In some of the States, it is held that a railroad company has no right, by an embankment or other artificial means, to obstruct the natural flow of the surface water, and thereby force it, in an increased quantity, upon the lands of another; and if it does so, it is liable for any injury that the owner of the land may sustain by reason thereof.² And this appears to be the general doctrine, though

at night; but this, in view of all the circumstances, for want of care in the construction of the road, and not for wilful negligence. *Kansas Pacific R. Co. v. Lundin*, 3 Col. 94; *Kansas Pacific R. Co. v. Miller*, 2 Col. 442; *Countess of Rothe v. Kirkaldy Water Works Com'rs*, 6 Sess. Cas. 4th Series (Sc.), 974; *Houston, & C. R. Co. v. Parker*, 50 Tex. 330.

¹ *Mellen v. Western R. Co.*, 4 Gray (Mass.), 301; *Omaha, & C. R. Co. v. Brown*, 29 Neb. 492; 44 Am. & Eng. R. Cas. 475.

² *Toledo, & C. R. Co. v. Morrison*, 71 Ill. 616; *Raleigh, & C. Air Line R. Co. v. Wicker*, 74 N. C. 220; *Wabash, & C. Canal Co. v. Spears*, 16 Ind. 441; *Gillham v. Madison Co. R. Co.*, 49 Ill. 484; *Hundman v. North-Eastern Ry. Co.*, 3 C. P. Div. 168; *Jacksonville, & C. R. Co. v. Cox*, 91 Ill. 500; *Sabine, & C. R. Co. v. Broussard*, 75 Tex. 597; 41 Am. & Eng. R. Cas. 26; *Jordan, v. St. Paul, & C. R. Co.*, 42 Minn. 172; 41 Am. & Eng. R. Cas. 1. See also *Mississippi, & C. R. Co. v. Archibald*, 67 Miss. 38; 41 Am. & Eng. R. Cas. 4; *Bell v. Norfolk, & C. R. Co.*, 101 N. C. 21; 37 Am. & Eng. R. Cas. 270; *Rowe v. St. Paul, & C. R. Co.*, 41 Minn. 384; 39 Am. & Eng. R. Cas. 255. Compare *Wells v. New Haven, & C. Co.*, 151 Mass. 46; 44 Am. & Eng. R. Cas. 491. Thus, where a railroad is so constructed as to cause land to be inundated with surface water, and thereby rendered untillable, the owner may recover for the injury. *Bentonville R. Co. v. Baker*, 45 Ark. 252.

A railway company must so maintain its embankments as to permit the passage of the surface water produced by the climate of the country. *Cornish v. Chicago, & C. R. Co.*, 49 Iowa, 378. Where one sustained damage to his property resulting from the freezing, upon his premises, of water which flowed thereon from the tank of a railroad company, the damage being sustained in consequence of the freezing and detention thereby of the water, but for which the water would have flowed down and off the premises without injury, it was held that the company was liable, as the injury was one which might reasonably and naturally have been expected to result; and that the plaintiff could recover for damages resulting from the melting of the ice in the spring, although this occurred some time after the suit was brought. In a suit for damages caused by water from the tank of a railroad company overflowing the plaintiff's premises, it appeared that some of the water which caused the injury did not come from the tank, but that, to some extent, it was surface water which flowed down from a hillside above; it was held that an instruction that, if the jury could not determine what part of the damages was caused by the water from the tank, they could in no event find for the plaintiff more than nominal damages, was erroneous. *Chicago, & C. R. Co. v. Hoag*, 90 Ill. 339. One who has conveyed to a railroad company a strip of land for a right of way may recover of the company

it has not been followed in Massachusetts. In a case in this State¹ the defendant, the manager of a railroad, claimed the right to collect water in a ditch and discharge it upon the lands of a plaintiff, where it had not been accustomed to flow, on the ground that it was necessary to the proper construction and maintenance of the railroad. It was held that if the right existed it constituted an easement to which plaintiff's land was subject. As between the owners of contiguous estates, it is settled in this Commonwealth that the right of an owner of land to occupy and improve it as he may see fit, either by erecting structures or by changing the surface, is not restricted by the fact that such use of his own land will cause surface water to flow over adjoining lands in greater quantities or in other directions than it was accustomed to flow. If by this use the adjoining land is damaged, it is *damnum absque injuria*.² But the weight of authority is in favor of a different view; the maxim *sic utere tuo ut alienum*

for loss of his crops by the negligent building of its road, so that surface water accumulated and was precipitated on his land, even though he has allowed the company to dig a ditch on his premises, which proved ineffectual. An owner of land has no right so to construct a ditch or embankment as to collect and precipitate surface water in unnatural quantities upon the land of an adjoining owner; and equity will restrain such act. *Hicks v. Siliman*, 93 Ill. 255. Where, in such case the slope of the land is apparent, the opinions of witnesses as to the flow and discharge of surface water upon the servient heritage will not be required; and especially where the latter lies so low as to be barely susceptible of cultivation at ordinary drainage. In such case the complainant will be entitled to the relief sought, although he does not prove threatened injury to the full extent charged; as, for instance, that the defendant was intending to drain "all" the water from the pond upon the complainant's land. *Jacksonville, &c. R. Co. v. Cox*, 91 Ill. 500.

¹ *Rathke v. Gardner*, 134 Mass. 14.

² *Rathke v. Gardner*, 134 Mass. 14; *Cannon v. Hargadon*, 10 Allen (Mass.), 106. The right, it is said, exists in the owner by virtue of his dominion over his own soil, and not by virtue of any easement or servitude over the lower land. That this is so is clear from the fact that

the adjoining owner may himself erect such structures or take such measures as he sees fit on his own land to divert the surface water and prevent its flowing upon his land; and in so doing he does not violate or obstruct any easement of the owner whose land is of a higher level. *Bates v. Smith*, 100 Mass. 181. See *Parks v. Newburyport*, 10 Gray (Mass.), 28. But there is the well-settled distinction, that although a man may make any fit use of his own land which he deems best, and will not be responsible for any damages caused by the natural flow of the surface water incident thereto, yet he has not the right to collect the surface water on his own land into a ditch, culvert, or other artificial channel, and discharge it upon the lower land to its injury. And if he does this, and continues it adversely under a claim of right for more than twenty years, he thereby acquires a right which is in the nature of a servitude or easement upon the lower land. *White v. Chapin*, 12 Allen (Mass.), 516; *Curtis v. Eastern R. Co.*, 14 id. 55, and 98 Mass. 428. As between adjoining land-owners, therefore, if one owner thus discharged water through an artificial channel upon the lower land of the other, and if he claimed the right to do so, either by grant or prescription, the right to an easement would be concerned in the case.

non lædas forbids that any individual or corporation should concentrate the surface water on his own lands and then discharge them upon the lands of another to the material injury of the latter.¹

¹ *McCornick v. Kansas City, &c. R. Co.*, 70 Mo. 359; 35 Am. Rep. 431; *Gillham v. Madison County R. Co.*, 49 Ill. 487; *Templeton v. Voshloe*, 72 Ind. 134; 37 Am. Rep. 150. Nor has a company any right to erect embankments to divert the waters overflowing from a natural stream in time of freshets and turn it upon the lands of others. *Shane v. Kansas City, &c. R. Co.*, 71 Mo. 237; 36 Am. Rep. 480. In *Gormley v. Sanford*, 52 Ill. 160, LAWRENCE, J., said: "This question has already been decided by this court in *Gillham v. Madison Co. R. Co.*, 49 Ill. 487. . . . In the opinion filed in that case we said, although there was a conflict of authorities among the courts of this country, yet the rule forbidding the owner of the servient heritage to obstruct the natural flow of surface water was not only the clear and well-settled rule of the civil law, but had been generally adopted in the common-law courts both of this country and in England. Various cases bearing on each side of the question are cited in that opinion, and it is not necessary to cite them again. This rule was thought by this court, in that case, to rest upon a sound basis of reason and authority, and was adopted. We find nothing in the argument or authorities presented in the present case to shake our confidence in the conclusion at which we then arrived. In our judgment, the reasoning which leads to the rule forbidding the owner of a field to overflow an adjoining field by obstructing a natural water-course fed by remote springs applies with equal force to the obstruction of a natural channel through which the surface waters, derived from the rain or snow falling on such field, are wont to flow. What difference does it make in principle whether the water comes directly upon the field from the clouds above, or has fallen upon remote hills, and comes thence in a running stream upon the surface, or rises in a spring upon the upper field and flows upon the lower? The cases asserting a different rule for surface waters and running streams

furnish no satisfactory reason for the distinction. It is suggested in the argument, if the owner of the superior heritage has a right to have his surface waters drain upon the inferior, it would follow that he must allow them so to drain, and would have no right to use and exhaust them for his own benefit, or to drain them in a different direction. We do not see why this result should follow. The right of the owner of the superior heritage to drainage is based simply on the principle that nature has ordained such drainage; and it is but plain and natural justice that the individual ownership arising from social laws should be held in accordance with pre-existing laws and arrangements of nature. As water must flow, and some rule in regard to it must be established where land is held under the artificial titles created by human law, there can clearly be no other rule, at once so equitable and so easy of application, as that which enforces natural laws. There is no surprise or hardship in this, for each successive owner takes with whatever advantages or inconveniences nature has stamped upon his land."

In *Shane v. Kansas City, &c. R. Co.*, 71 Mo. 237; 36 Am. Rep. 480, NAPTON, J., said: "I confess, for myself, that, like Mr. Justice LAWRENCE, I am unable to perceive the distinction between surface water coming, as he says, from the clouds, and that which rises in a spring, especially in this case, where the surface water comes from the Rocky Mountains, a thousand miles from where the overflow of the Missouri River occurs, occasioned, as it is, not by rains or snows in its vicinity, but by the melting of snows upon the mountains, and by the accession of a thousand tributary streams. But it must be considered as well settled, that this overflow of the Missouri is what is in law termed 'surface water.' In *Kauffman v. Griesemer*, 26 Penn. St. 408, the instructions of the judge who tried the case were, that the water which the defendant obstructed was not a living stream, but came from rains and snows; but that the accustomed,

In a New York case,¹ the question as to the right of parties to deal with surface water arising upon their premises, when its diver-

though not continuous, flowage of such water was, in the eye of the law, a stream, and no more to be obstructed than if it was a channel of a continuous stream that never failed. These instructions were approved by the Supreme Court, and that court observed that : 'The plaintiffs had no right to insist upon his receiving waters which nature never intended to flow there, and against any contrivance to reverse the order of nature he might peaceably take measures of protection.' In *Martin v. Riddle*, 26 Penn. St. 415, Judge LOWRIE says : 'Where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position. . . . Hence, the owner of the lower ground has no right to erect embankments whereby the natural flow of the water from the upper ground shall be stopped, nor has the owner of the upper ground a right to make any excavations or drains by which the flow of water is diverted from its natural channel, and a new channel made on the lower ground ; nor can he collect into one channel waters usually flowing off into his neighbor's field by several channels, and thus increase the wash upon the lower fields.' The Supreme Court of Ohio, in *Butler v. Peck*, 16 Ohio St. 343, unhesitatingly adopted the principle thus decided in Pennsylvania. The question in that case was 'whether an owner of land having upon it a marshy sink or basin of water, which basin, as to a considerable portion of the water collected on it, has no outlet, may lawfully throw such water by artificial drains upon the land of an adjacent proprietor.' The court say : 'We are clear that no such right exists. It would sanction the creation, by artificial means, of a servitude which nature has denied. The natural easement arises out of the relative altitudes of adjacent surfaces as nature made them, and those altitudes may not be artificially changed to the damage of an adjacent proprietor.' In *North Caro-*

lina, the Supreme Court, in *Overton v. Sawyer*, 1 Jones, L. 308, observed : 'The defendant had a right to have the water allowed to pass off his land through the natural drain ; and when the plaintiff, by means of the embankment across this natural drain, obstructed the water and interfered with this right, this latter (the defendant) had a cause of action against the former for causing the obstruction.' What is said by the Court of Errors in New Jersey, in the case of *Earl v. DeHart*, 12 N. J. Eq. 280, seems to conform to Mr. Justice LAWRENCE'S views in the Illinois case we have cited, and to apply to the slough, or swale, or hollow, through which the waters of the river passed when they overflowed its banks, and across which the defendant's road was built. The Chancellor says : 'The facts admitted in the answer show that this is an ancient stream or water-course, and that it is a natural water-course, in the etymological use of the term. A water-course is defined to be a channel or canal for the conveyance of water, particularly in draining lands. It may be natural, as when it is made by the natural flow of the water caused by the general superficies of the surrounding land, from which the water is collected into one channel ; or it may be artificial, as in case of a ditch or other artificial means used to divert the water from its natural channel, or to carry it from low lands, from which it will not flow in consequence of the natural formation of the surface of the surrounding land. It is an ancient water-course if the channel through which it naturally runs has existed from time immemorial. Whether it is entitled to be called an ancient water-course, and as such legal right can be acquired and lost in it, does not depend upon the quantity of water it discharges. Many ancient streams of water, which, if dammed off, would inundate a large region of country, are dry for a great portion of the year. If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and the

¹ *Waffle v. New York Central R. Co.*, 58 Barb. (N. Y.) 421.

sion affected the value of mill-property in part dependent upon such water for its motive power, was very ably discussed in the

melting of large bodies of snow, as to require an outlet to some common reservoir, and if such water is regularly discharged through a well-defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows and has flowed from time immemorial, such channel is an ancient natural water-course.' The court therefore held that where the surface of the ground is such as to collect water at different seasons of the year to an extent which requires an outlet, and if such is always the case in times of heavy rains and melting snow, and if that flow of water produced a natural channel through the lands of different persons where such accumulated surplus water has always been accustomed to run, a court of equity would protect such channel from obstruction to the injury of any one through whose land it runs. This corresponds with the view of the judge in *Kauffman v. Griesemer* (26 Penn. St. 408), *supra*. The judge who tried this case observes: 'The declaration speaks of a stream of water being used to flow. There is no stream, in the usually received sense of that word, as being a continuous flowage of water. The water that flowed down was such as came from springs which do not seem ever to have had a continuous flow that reached defendant's land, and such as came from rains and snows. But the accustomed, though not continuous, flowage of water is a stream in the eye of the law, and its channel is no more to be obstructed than if it was the channel of a stream that never failed. . . . Whatever is the natural direction of the excess of waters in floods and freshets, as in seasons of ordinary water, must be left as nature has made it. No one has a right to divert it from himself and cast it upon his neighbor, to save himself at the expense of another.' Of course the immemorial usage spoken of in the New Jersey case can hardly be claimed here, since there was no witness in the case who spoke of having any knowledge of the river floods beyond thirteen years before the trial; but the question as to this slough being the natural channel

through which the waters of the Missouri River passed in times of floods was put to the jury, in an instruction given by the court, and was found by the jury; and upon the evidence submitted they could not have found otherwise than they did, for upon this point all the witnesses were agreed, though they could not speak of time immemorial, beyond which the memory of man did not reach. The principles which are at the bottom of this case, if taken from the civil law, — a system which, as Judge DILLON remarks in *Livingston v. McDonald* (21 Iowa, 164), 'embodies the accumulated wisdom and experience of the refined and cultivated Roman people for a thousand years, and, though not binding as authority, is of great service to the inquirer after the principles of natural justice and right,' and from which many of the usages of the common-law and equity courts, both in England and this country, are derived, — were recognized by this court as early as the case of *Laumier v. Francis*, 23 Mo. 181, in which the opinion of this court was delivered by Judge LEONARD, when associated with Judges SCOTT and RYLAND, all three of whom are well known in this State, and have been in the front rank of our most eminent jurists. We deem it unnecessary to refer particularly to the decisions in Louisiana, as they are uniformly in conformity with the principles of the cases already cited from Pennsylvania and other States. On the other hand, the cases in Massachusetts and several other of the New England States, following the case of *Gannon v. Hargadon*, 10 Allen (Mass.), 106, adopt the rule of allowing every proprietor to control surface water as he pleases, without regard to contiguous proprietors. Still, as even in these States this right is carefully distinguished from similar rights where a water-course exists by grant or prescription, it is not entirely certain how the courts would apply these doctrines to a case like the present. So, in New York, the general principle asserted in *Gannon v. Hargadon* seems to be maintained in *Goodale v. Tuttle*, 29 N. Y. 459, where Judge DENIO

opinion of the court. In that case the defendant, in the construction of its railroad, at a distance of two miles from the plaintiff's mill, for the protection of the road-bed, dug two ditches, one on either side of its road, to protect the embankment. The plaintiff had a mill and a mill-pond on a stream formed from the surface waters arising from the low boggy lands in the vicinity. The effect of the construction of the road, and the ditches referred to, was to prevent the water from going to the plaintiff's mill in its usual volume in dry seasons, and caused it to be discharged there in such volumes in times of high water, that the plaintiff could not use it for the operation of his mill, but was compelled to throw open his flood-gates and allow it to run to waste. JOHNSON, J., speaking for the court, said: "There is no dispute about the facts in this case. The plaintiff's saw-mill is upon a small stream nearly two miles below the point where the defendant's road crosses such stream. At that point the land is naturally low and marshy, and the defendants, in constructing their road, raised the bed thereof above the natural surface of the land, by excavations on each side, which made ditches, by means of which the surface water, of this low, marshy land was, for a considerable distance, drawn off and passed into this stream on each side of the road-bed, where the stream is crossed by the road. These ditches are wholly upon the defendants' land, and conduct the surface water into this stream upon their own land. The only cause of action stated in the complaint is, in substance, that, by means of these ditches, the water from this low land is drawn off and conveyed into this stream more rapidly than it would be otherwise; and in the wet season, and in times of flood and high water,

says: 'In respect to the running off of surface water, . . . I know of no principle which will prevent the owner of land from filling up the wet and marshy places in his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it.' This is a mere reiteration of the doctrine of *suave qui petit*, or, as popularly translated into our vernacular, 'the devil take the hindmost.' We prefer that asserted by this court in *Laumier v. Francis*, and repeated in *McCormick v. Kansas City, &c. R. Co.*, 70 Mo. 359; 35 Am. Rep. 431. Nor do we think that equitable and just principles, as we understand it, will materially retard agricultural

operations or improvements. The facts in the present case show that the defendant could have built a rock culvert at the crossing of this hollow, at about the same cost with the dirt embankment. The engineer seems to have been misled by the dry and rich soil which extended to the very bottom or lowest part of the swale, portions of which were in cultivation; and although the road was equally strong and safe with a rock culvert or a dirt embankment, the engineer preferred the latter, as 'not so liable to wash out when floods come; and drift-wood and other débris fill the culvert and injure it or the bank adjoining it.' See also *St. Louis, &c. R. Co. v. Harris*, 47 Ark. 340.

filled the stream and the plaintiff's pond so full, and increased the volume of water to such an extent, that he could not use the same, but was compelled to open his gates and let the water flow without using the same; and that, as the dry season came on, the water was, by the same means, drawn off so rapidly from these low, wet grounds, that the stream did not keep up as it did before, and the supply which said stream was accustomed to receive gradually from such wet lands was earlier exhausted, and the plaintiff's mill thereby was compelled to lie idle and unemployed for want of water for a much longer period than formerly, and a much longer period than it would, had these drains not been made. The testimony tended to sustain these allegations in the complaint. It appeared from the evidence that there was no natural outlet or water-course from this low wet land into the creek, but a gentle and gradual inclination of the surface for a long distance toward the stream. The defendant's ditches extended through these lands for a distance of over two miles, and it appears that the owners of the lands along this distance, adjacent to the railway, have availed themselves of the defendant's ditches, and drained the surface water from their lands, by means of ditches through the same, emptying into the defendant's ditches. By these means the surface water is discharged from these wet lands, and the same are rendered tillable and productive, instead of remaining waste lands, and serving as a mere reservoir to hold water for the use of the plaintiff's mill, for a few more days or weeks each summer.

"It is entirely clear that these facts constitute no cause of action. Every person has the unquestionable right to drain the surface water from his own land, to render it more wholesome, useful, or productive, or even to gratify his taste or will; and if another is inconvenienced or incidentally injured thereby, he cannot complain. No one can divert a natural water-course and stream through his land to the injury of another with impunity, nor can he, by means of drains or ditches, throw the surface water from his own land upon the land of another to the injury of such other. But where a person can drain his own land without turning the water upon the land of another, or where it can be done by drains emptying into a natural stream and water-course, there can be no doubt of his right thus to drain, even though the effect may be to increase the volume of water unusually at one season of the year, or to diminish the supply at another.

"No one can be required to suffer his land to be used as a reservoir or water-table for the convenience or advantage of others.¹ In respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil, for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole, above and below the surface."²

¹ *Rawstron v. Taylor*, 11 Exch. 369 ; *Goodale v. Tuttle*, 29 N. Y. 459.

² *Atchison, Topeka, &c. R. R. Co. v. Hammer*, 22 Kan. 763 ; *Munkers v. Kansas City, &c. R. R. Co.*, 60 Mo. 334. The owner of an upper field may not construct drains or excavations so as to form new channels on to a lower field, nor can he collect the water of several channels and discharge it on the lower field so as to increase the wash upon the same. His right to make drains on his own land is restricted to such as are required by good husbandry and the proper improvement of the surface of the ground, and as may be discharged into natural channels, without inflicting palpable and unnecessary injury on the lower field. *Templeton v. Voshloe*, 72 Ind. 134 ; 37 Am. Rep. 150. And the owner of land may, upon the boundaries thereof, not interfering with any natural or prescriptive water-course, erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands ; and for any consequent repulsion, turning aside, or heaping up of these waters to the injury of other lands, he is not responsible ; but such waters as fall in rain and snow upon his lands, or come thereon by surface drainage, from or over contiguous lands, he must keep within his boundaries, or permit them to flow off without artificial interference, unless, within the limits of his land, he can turn them into a natural water-course. *Cairo & Vincennes R. R. Co. v. Stevens*, 73 Ind. 278. In *O'Connor v. Fond Du Lac R. R. Co.*, 52 Wis. 526, it was held that the fact that a railway company in constructing its road-bed has filled up an artificial ditch on the land of a third person by which

the surface water was conducted to the river and thus turned the water back upon the plaintiff's land, constituted no cause of action. See opinion of *COLE, J.*, in which the questions involved are ably reviewed. In *Hoyt v. City of Hudson*, 27 Wis. 656, it was in effect held that under the rule of the common law, an owner has a right to obstruct and hinder the flow of mere surface water upon his lands from the land of other proprietors ; that he may even turn the same back upon the land of his neighbor, without incurring liability for injuries caused by such obstructions. The same doctrine was laid down in *Pettigrew v. Evansville*, 25 Wis. 223, where the question is very fully considered ; also in *Fryer v. Warne*, 29 id. 511. There is a discrepancy in the decisions of the different States upon this subject, because some follow the rule of the civil law, which gives a servitude on the lower in favor of the superior estate. But here the rule of the common law has been already adopted. According to that rule, no natural easement or servitude exists in favor of the owner of the higher ground to the flow of mere surface water over the lower estate, but the owner of the latter may detain or divert the same without rendering himself liable in damages therefor. But this rule does not apply to a water-course, which implies a stream usually flowing in a definite channel, though it may at times be dry. *Enrich v. Richter*, 37 Wis. 226. But a water-course does not include mere surface water which is supplied by rains or melting snow flowing in a hollow or ravine on the land. But see *Palmer v. Waddell*, 22 Kan. 352, and *Gibbs v. Williams*, 25 id. 214, where a contrary rule is adopted in

The company is not liable to an action for interference with subterranean water caused by excavations in its roadway, unless it is

certain cases and under certain conditions. "The obstruction of surface water or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil." BIGELOW, C. J., in *Gannon v. Hargadon*, 10 Allen (Mass.), 106-110. But the owner of the lower land would have no right to obstruct a water-course or divert a stream of water so as to cause damage to another without being responsible therefor. For an injury thus occasioned he would be liable upon general principles as well as by the statute. That liability has often been enforced by the courts. *Young v. C. & N. W. R. R. Co.*, 28 Wis. 171; *Lyon v. G. B. & Minn. R. R. Co.*, 42 id. 538; *Brown v. C. & S. R. R. Co.*, 12 N. Y. 486; *Hatch v. Vt. Central R. R. Co.*, 25 Vt. 49; *Lawrence v. Railway Co.*, 71 Eng. C. L. 643; *Hamden v. N. H. & N. R. R. Co.*, 27 Conn. 158; *Johnson v. A. & St. L. R. R. Co.*, 35 N. H. 569, are a few of the many cases which might be cited in support of that proposition of law. In *Waterman v. Conn. & Pass. Rivers R. R. Co.*, 30 Vt. 610, it was held "that a railroad company may, as a question of prudence and care, as well be required to have regard to the prevention of damage to a land-owner by the accumulation of surface water merely, as of a running stream, when the geographical formation and surrounding circumstances are such as to make it apparent to reasonable men that such precautions are necessary; and that ordinarily what would be a reasonable performance of that duty under a given state of circumstances would be a question of fact, and not a question of law for the court." A purchaser of land over which surface water naturally flows from that of a coterminous proprietor takes it with the burden of receiving such drainage, and cannot impede it to the injury of the superior heritage. Nor can the owner of the superior heritage rightfully collect the water artificially, and thus flow the neighbor's land, without his consent. *Mellor v. Pil-*

grim, 7 Ill. App. 306; *Dickinson v. Worcester*, 7 Allen (Mass.), 19; *Morrison v. Bucksport, &c. R. R. Co.*, 67 Me. 553; *Wakefield v. Newell*, 12 R. I. 75; *Greeley v. Me. Central R. R. Co.*, 52 Me. 200. In *Wagner v. Long Island R. R. Co.*, 2 Hun (N. Y.), 633, TALCOTT, J., said: "This is an action to recover damages against the defendant for constructing the embankment for its road along and across the adjoining land of the plaintiff, whereby the usual flow of the water across and off from the plaintiff's premises, was dammed up and obstructed, and caused to accumulate, whereby the plaintiff sustained damage. It seems to be perfectly well settled, that no action will lie against a party for so using or changing the surface of his own land as to dam up and obstruct the flow of surface water, which had been accustomed to flow over and across the land of his neighbor. The question involved in the case is precisely the same in principle as that which came before the Supreme Court of Massachusetts, in *Parks v. The City of Newburyport*, 10 Gray (Mass.), 28. In that case, the judge on the trial had instructed the jury that if, for twenty years, the water accumulating on the land in the rear of the lots in question had been accustomed to find its outlet over the land of the defendants, and the same had been obstructed by the acts of the defendants, in such a way as to turn it from their own land across land of the plaintiff, and occasion substantial injury to the property of the plaintiff, without his fault, or want of care on his part, then the defendants would be liable. The plaintiff having recovered under this instruction, the verdict was set aside upon the following opinion by the court: 'The declaration is for obstructing a water-course, and the instruction allowed the jury to find for the plaintiff, though there was no water-course. No action will lie for the interruption of mere surface drainage.' See also *Dickinson v. Worcester*, 7 Allen (Mass.), 19; *Swett v. Cutts*, 50 N. H. 439; *Goodale v. Tuttle*, 29 N. Y. 466. These principles, in the abstract, were

running in a defined stream.¹ In all cases, in order to recover for this class of injuries, they must appear to be the result of either unauthorized or negligent acts, and the remedy is open either to one

conceded by the learned justice who tried the cause; but we think the defendant was deprived of the benefit of them by the refusal to nonsuit, and by certain instructions which were given to the jury. It was left to the jury to find, upon the evidence, whether there existed a water-course which the defendant had obstructed. We think this was erroneous in the case, both upon the pleadings and the evidence. First, it is to be observed that the plaintiff did not, in his complaint, claim that there had existed over this land any stream or water-course which the defendant had obstructed. He says that 'prior to the construction of such embankment, during the winter season, large quantities of water flowed some distance above the plaintiff's premises, along and parallel with the aforesaid highway, and passed the plaintiff's premises without collecting there.' This is a statement which seems plainly to mean that such had been the natural flow of the surface water; and such, we think, the evidence on the part of the plaintiff plainly showed it to be in fact. The plaintiff's complaint was plainly founded on the theory that the defendant could not lawfully make any embankment on its own land which would so obstruct the natural flow of surface water during thaws and freshets as to cause it to accumulate on the land of the plaintiff, but was bound by means of sufficient culverts, or otherwise, to provide some means whereby this water should be disposed of. And the gravamen of the plaintiff's action was the alleged negligence of the defendant in constructing its embankment without providing sufficient pipes and culverts to discharge the surface water. A water-course, according to the definitions of the authorities, 'consists of bed, banks, and water; yet, the water need not flow continually; and there are many water-courses which are sometimes dry. There is, however, a distinction to be taken in law between a regular, flowing stream of water, which at certain seasons is dried up, and those occasional

bursts of water which, in times of freshet or melting of ice and snow, descend from the hills and inundate the country. To maintain the right to a water-course or brook, it must be made to appear that the water usually flows in a certain direction and by a regular channel, with banks or sides. It need not be shown to flow continually, as stated above; and it may at times be dry, but it must have a well-defined and substantial existence.' Water flowing through a hollow or ravine, only in times of rain or melting of snow, is not, in contemplation of law, a water-course." Wood on Nuisances, 308, 311. But such an act may be an element of damage to be considered in assessing damages for land taken. *Walker v. Old Colony R. R. Co.*, 103 Mass. 10. And it is liable where the damage results from the proper construction of its works. *Waterman v. Conn. & Pass. River R. R. Co.*, 30 Vt. 610; *Hooker v. Kansas City R. R. Co.*, 60 Mo. 329. In *McCormack v. Kansas City, &c. R. R. Co.*, 70 Mo. 359, 35 Am. Rep. 431, it was held that a railway company has no right to concentrate the surface water on its roadway, and precipitate it on a neighbor's land, although it would naturally flow in that direction; while in other cases it has been held that the mere raising of an embankment by a railroad company, or by an owner on his own land, thereby causing surface water to accumulate to the damage of another land-owner, if not obstructing a natural channel, gives the latter no cause of action against the former.

¹ *Hundman v. North-Eastern Ry. Co.*, L. R. 3 C. P. Div. 168; *Galgay v. Great Southern, &c. Ry. Co.*, 4 Irish C. L. 456; *Swett v. Cutts*, 50 N. H. 439; *Goodale v. Tuttle*, 29 N. Y. 459; *Wheatley v. Baugh*, 25 Penn. St. 528; *Chatfield v. Wilson*, 28 Vt. 49. But the fact that springs, wells, etc., are likely to be drained by the construction of the road is an element to be considered in assessing damages for the taking of the land.

whose land was taken for the purposes of the road, or to one whose land was not taken.¹ Where the State confers upon a railway company authority to build a road between certain *termini*, and there is no provision in either the constitution or the statute to the contrary, the company may take such lands of the State along its route as are necessary for its road, without compensation, unless such lands have already been devoted to some special public use by the State.² But a grant from the State of a right to build a railway does not operate as authority to take lands belonging to the general government without compensation,³ nor the lands of municipal corporations established by the State.

¹ *Estabrook v. Peterborough, &c. R. R. Co.*, 12 Cush. (Mass.) 224; *Foy v. Salem, &c. Co.*, 111 Mass. 27; *Eaton v. Boston, &c. R. R. Co.*, 51 N. H. 504; *Robinson v. N. Y. & Erie R. R. Co.*, 27 Barb. (N. Y.) 512. The damages which commissioners are to appraise in the construction of a railroad are those arising to the land-holder from a proper construction of the road in a prudent manner; these must be deemed to have been taken into account in the assessment of his land damages, and cannot be made the ground of recovery in a subsequent action. But if the company in the construction of their road are negligent in the exercise of the rights conferred upon them, whereby a land-owner is injured, it is not to be presumed in the absence of proof that the damages thus occasioned were taken into consideration by the commissioners; and if it is not shown that such damages were allowed, they should go to a jury for settlement. *Clark v. Vt. & Canada R. R. Co.*, 28 Vt. 103. The rule that the assessment of compensation for land taken for a railway is deemed to cover all damages whether foreseen or not, and whether actually estimated or not, which result from the proper construction of the road, does not prevent holding a railroad company liable to an action for damages resulting from the defective construction of their road, — *e. g.* where the plaintiff's meadows were injured, in consequence of the insufficient culverts in the defendant's road, there being no impediment to the construction of proper ones. Suitable bridges and culverts to convey the water across the railway at or

near the places where it naturally flows, are necessary to the proper construction of the road, except where they cannot be made, or where the expense of making them is greatly disproportionate to the interest to be preserved by them. *Johnson v. Atlantic & St. Lawrence R. R. Co.*, 35 N. H. 569. In the absence of special laws, corporations acting within their powers of taking land, and with due care, are not liable for consequential damage. *Hatch v. Vt. Central R. R. Co.*, 28 Vt. 142; *Monongahela Nav. Co. v. Coon*, 6 W. & S. (Penn.) 101. Where a railroad company in the course of the construction of the road turned a stream of water, which by their charter they might do, restoring it to its former state as near as practicable, and the new channel was properly guarded, so far as could be perceived at the time of turning it, it was held that the company were not obliged thereafter to watch the operation of the water, and take precautions to prevent its encroaching upon the adjoining lands. And the rights and duties of the company in such case are precisely the same as if the land had been condemned by proceedings *in invitum* under the statute. *Norris v. Vermont Central R. R. Co.*, 28 Vt. 99.

² *Indiana Central R. R. Co. v. State*, 3 Ind. 421; *Davis v. East Tennessee, &c. R. R. Co.*, 1 Sneed (Tenn.), 94; *Penn. R. R. Co. v. N. Y. & Long Branch R. R. Co.*, 24 N. J. Eq. 157; *St. Louis, &c. R. R. Co. v. Trustees of Blind Asylum*, 43 Ill. 303.

³ But the laws of the United States

The doctrine as to the rights of land-owners to deal with surface water is unsettled and conflicting, and no general rule, applicable in all the States, can be given. In some of them, it is held that the owner of land may improve or occupy it in such a way and for such purposes as he may see fit, either by changing the surface or by the erection of buildings or other structures thereon, even though by so doing, the water accruing from rains and snows falling thereon is caused to stand upon adjacent lands or flow over them in unusual quantities, or in other directions than they have been accustomed to flow.¹ In these States a railway company is held not to be bound to provide culverts or other means for the escape of surface water from higher adjacent lands.² But in several of the States, what is termed the civil-law rule is adopted, which imposes upon lower estates the burden or servitude of receiving and passing off the surface water from higher estates. This rule is adopted in California,³ Iowa,⁴ Illinois,⁵ Ohio,⁶ Louisiana,⁷ and Pennsylvania;⁸ and in those States it would doubtless be held to be the duty of railway companies to supply suitable means for the escape of surface water through their embankments. In a recent case in Iowa involving this question, this rule was adopted;⁹ and it was also held that it would not—in view of the fact that the means of securing the escape of such surface water, by the company, were easy—be presumed that the damages arising from its obstruction had been considered by the commissioners in appraising the land-owner's damages.

SEC. 256. Injuries to Riparian Rights on Navigable Streams.—Of course, if a riparian owner of land upon a navigable stream has, by virtue of his ownership, any legal rights in the stream itself, or there are any such rights which are incident to his ownership,—if

provide for this contingency. *Rev. Stat.* § 2477, *Flint & Pere Marquette R. Co. v. Gordon*, 41 Mich. 420.

¹ *Gannon v. Hargadon*, 10 Allen (Mass.), 109; *Parks v. Newburyport*, 10 Gray (Mass.), 28; *Cairo, &c. R. Co. v. Stevens*, 73 Ind. 278; 38 Am. Rep. 139; *Taylor v. Tiekas*, 64 Md. 167; 31 Am. Rep. 114; *Grant v. Allen*, 41 Conn. 156; *Barkley v. Wilcox*, 86 N. Y. 140; 40 Am. Rep. 519; *Lynch v. Mayor*, 76 N. Y. 69; 32 Am. Rep. 271; *Gibbs v. Williams*, 25 Kan. 214; *Morrison v. Bucksport R. Co.*, 67 Me. 353; *Sweet v. Cutts*, 50 N. H. 439.

² *O'Connor v. Fond du Lac, &c. R. Co.*, 52 Wis. 562; 38 Am. Rep. 784;

Cairo, &c. R. Co. v. Stevens, 73 Ind. 278; 38 Am. Rep. 139.

³ *Ogburn v. Connor*, 46 Cal. 346; 13 Am. Rep. 213.

⁴ *Cornish v. Chicago, &c. R. Co.*, 49 Iowa, 378; *Van Orsdel v. Burlington, &c. R. Co.*, 56 Iowa, 470.

⁵ *Gilham v. Madison Co. R. Co.*, 49 Ill. 484; *Gormley v. Sanford*, 52 id. 158.

⁶ *Loote v. Clifton*, 22 Ohio St. 247.

⁷ *Hays v. Hays*, 19 La. An. 351; *Delahoussaye v. Judice*, 13 id. 587.

⁸ *Martin v. Riddle*, 26 Penn. St. 415; *Kauffman v. Griesimer*, 26 id. 407.

⁹ *Drake v. Chicago, &c. R. Co.*, 63 Iowa, 302; 17 Am. & Eng. R. Cas. 45; 70 Iowa, 59; 19 N. W. Rep. 215.

he is deprived of them by a railway company in taking land for its uses, he is entitled to compensation therefor.¹ But the question as to whether he has any riparian rights which are incident to his land will depend entirely upon the character of the stream, and the ownership of the *alveus* thereof. In this country there are three classes of navigable streams: 1. Those in which the tide ebbs and flows;² 2. Those which, although non-tidal, are yet navigable in fact for "boats and lighters," and susceptible of valuable use for commercial purposes;³ and 3. Those which are *floatable*, or capable of valuable use in bearing the products of mines and forests, and the tillage of the country it traverses to mills or markets.⁴

The principal distinction between rivers navigable *in law* and those which are navigable *in fact* arises from the difference in the rights of riparian owners. Riparian owners upon *salt-water* streams or arms of the sea, or upon the sea itself, have no title in any portion of the land which is covered or washed by the waters of the stream or of the sea, at ordinary spring-tide. But lands adjoining the sea, or salt-water streams that are usually dry, and are only covered with, or washed by the waters of the sea at extraordinary spring-tide, belong *prima facie* to the owner of the adjacent property,

¹ In *Ashby v. Eastern R. R. Co.*, 5 Met. (Mass.) 393, the owner of a wharf was held entitled to recover of a railway company the damages resulting from constructing their road so as to impair its value. In *Rex v. Comm'rs, &c.*, 5 Ad. & El. 804, the owner of a towing-path, which was obstructed, or from which the navigation was diverted by the action of the commissioners for the improvement of the navigation of the river Thames, was held entitled to compensation therefor. So in *Murray v. Sharp*, 1 Bosw. (N. Y.) the owners of a pier who had an exclusive right to the wharfage, were held entitled to damages for an appropriation by the city of a slip adjoining the pier to the purposes of a public ferry. So a water-power has been held to be such property as a railway company is liable to make compensation for if damaged by the construction of their road, although the stream may have been declared a public highway. *Barclay R. R. Co. v. Ingham*, 36 Penn. St. 194. But where the right to build a dam and maintain it was held under a mere license from the State, the State has

power to revoke it whenever the paramount interests of the public require it; and the owner of the dam cannot recover damages for injuries done to it by a railway company in constructing its railway under its charter. *N. Y. & Erie R. R. Co. v. Young*, 33 Penn. St. 175.

² *The Royal Fishers of the River Banne, Davy*, 143.

³ *Chicago v. McGinn*, 51 Ill. 269; *The Daniel Bell*, 10 Wall. (U. S.) 555; *The Montebello*, 11 id. 411.

⁴ *Rhoades v. Otis*, 33 Ala. 578; *Weisse v. Smith*, 3 Oregon, 445; *Morgan v. King*, 30 Barb. (N. Y.) 9; 35 N. Y. 454; *McManus v. Carmichael*, 3 Iowa, 1; *Veazie v. Dwinell*, 54 Me. 160; *Lorman v. Benson*, 8 Mich. 18; *Scott v. Wilson*, 5 N. H. 321; *Shaw v. Crawford*, 10 Johns. (N. Y.) 236; *Lincoln v. Chadbourne*, 56 Me. 157; *Varick v. Smith*, 5 Paige Ch. (N. Y.) 148; *Folger v. Pearson*, 3 Oregon, 455; *Wadsworth v. Smith*, 11 Me. 278. See Wood on Nuisances, chap. on "Navigable Streams," where the cases are all collected.

although it is covered with beach and sea-weed.¹ Riparian owners upon this class of streams are not only restricted in their title to the high-water mark, which is the outer limit of *terra firma* upon which the waters ordinarily go, but they are also precluded from making any use of the land so embraced between high and low water mark, except for the purpose of approaching the stream or the sea; and it seems that this right is not of such an absolute character that they may not be wholly deprived of it by the State, or those acting under authority conferred by the State, without compensation for the injuries resulting to them.²

¹ Hale's *De Jure Maris*, Chapter IV., p. 12; *Lowe v. Govett*, 3 B & Ad. 869. As to land reclaimed from the sea, see *Atty.-Gen. v. Rees*, 4 De G. & J. 55; *Pollard v. Hagan*, 3 How. (U. S.) 212. The right of eminent domain over the shores and the soil under the waters resides in the State for all municipal purposes; and within the legitimate limitations of this right the power of the State is absolute, and an appropriation of the shores and land is lawful. *Ormerod v. New York, &c. R. Co.*, 13 Fed. Rep. 370. A proprietor of a lake shore who has lawfully intruded into the water for the construction of a breakwater cannot thereby acquire title in fee to land occupied by such breakwater beyond his original boundary; nor can he in a proceeding for compensation for the alleged taking of such land recover for any injury done to the breakwater. The plaintiff having shown title to the land to the water's edge, defendant introduced evidence that the land taken was not above the water's edge, but was made beyond it by means of a breakwater and cribs extending into the water. It was held that there was no error in permitting plaintiff to show that the breakwater and cribs were not built beyond the water's edge, the evidence being properly in rebuttal. *Diedrich v. Northwestern Union R. Co.*, 42 Wis. 248.

² *Gould v. Hudson River R. Co.*, 6 N. Y. 522; *Tomlin v. Dubuque R. Co.*, 32 Iowa, 106; *Stevens v. Paterson, &c. R. Co.*, 34 N. J. L. 532; 20 N. J. Eq. 126; *Thayer v. New Bedford R. Co.*, 125 Mass. 253; *Harvard College v. Stearns*, 15 Gray (Mass.), 1; *Fitchburg R. Co. v. Boston, &c. R. Co.*, 3 Cush. (Mass.) 58; *Davidson*

v. Boston, &c. R. Co., 3 id. 91; *Boston, &c. R. Co. v. Old Colony R. Co.*, 12 id. 605; *Pennsylvania R. Co. v. New York, &c. R. Co.*, 23 N. J. Eq. 157; *Atty.-Gen. v. Hudson Tunnel Co.*, 27 N. J. Eq. 176; *Com. v. Fisher*, 1 P. & W. (Penn.) 462; *Clarke v. Bridge Co.*, 41 Penn. St. 147; *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; *Philadelphia v. Scott*, 81 Penn. St. 80; *McKeen v. Del. Div. Canal Co.*, 49 Penn. St. 424; *Austin v. Rutland R. Co.*, 45 Vt. 215; *Bailey v. Philadelphia, &c. R. Co.*, 4 Harr. (Del.) 389; *Rogers v. Kennebec, &c. R. Co.*, 35 Me. 319. The owner of a tide-mill, who is also the riparian proprietor of flats, from which the tide wholly ebbs, between his mill and navigable water, has no right, either as against contemnerous proprietors or the public, to have his flats kept open and unobstructed for the free flow and reflow of the tide-water for the use of his mill or for navigation purposes. The adjoining proprietors may build solid structures to a certain extent, and thereby obstruct the ebb and flow of the tide, if in so doing they do not wholly obstruct the access of other proprietors to their houses and lands; and if the mill-owner and other proprietors suffer damage therefrom, it is *damnum absque injuria*. Therefore, so far as a railroad erected by the legislature affects the right of the claimants to pass and repass to and from their lands and wharves with vessels, it is a mere regulation of a public right and not a taking of private property for a public use, and gives no claim for damages. *Davidson v. Boston, &c. R. Co.*, 3 Cush. (Mass.) 91. The owner of wharves, in front of which a railroad is located according to law, cannot recover of the railroad

It has been held that there is no private property in the waters of *navigable rivers, or in the strip of shore between high and low water mark, vested in the riparian owners*; that the legislature may authorize the land below high-water mark to be taken for a public use, without providing for a compensation to the riparian owner, even though the use authorized cuts off all communication between his land and the river.¹ But it is not believed that this is the true doctrine. Over the space between high and low water mark the abutting owner has an easement of access to the water and to construct wharves, etc.; and if this easement is impaired by the construction of a railroad on the strip, he is entitled to compensation as for a taking of property.²

The owner of land bounded by a navigable river has property rights therein, embracing the right of access to the navigable part of the stream, and the right to construct a landing or wharf; and where a railroad company, although acting under legislative authority, has constructed its road across the water-front of such owner and thus has deprived him of access to the navigable part of the stream, unless he has granted the right or it has been obtained by eminent domain, he is entitled to recover damages.³ But this rule cannot

company, as damages, the anticipated depreciation of the wharf property because the access thereto is made dangerous and inconvenient. *Boston, &c. R. Co. v. Old Colony R. Co.*, 12 Cush. (Mass.) 605. In the case of compensation claimed for the building of a railroad between a navigable river and coal mines, whereby the river transportation was injured or cut off, to reduce damages, the railroad company may show that the river transportation had lessened in value, by the facilities for transportation furnished by the railroad. *Cleveland, &c. R. Co. v. Ball*, 5 Ohio St., 568.

¹ This was the view expressed in the first edition, the author citing *Gould v. Hudson River R. Co.*, 6 N. Y. 522; *Lansing v. Smith*, 4 Wend. (N. Y.) 9; *Davidson v. Boston, &c. R. Co.*, 3 Cush. (Mass.) 91; *Champlain, &c. R. Co. v. Valentine*, 19 Barb. (N. Y.) 484.

² *St. Paul, &c. R. Co. v. Schurmeier*, 7 Wall. (U. S.) 272, *affirming* 8 Minn. 113, 83 Am. Dec. 770; 10 Minn. 82; 88 Am. Dec. 59; *Organ v. Memphis, &c.*

R. Co., 51 Ark. 235; 39 Am. & Eng. R. Cas. 75; *Rippe v. Chicago, &c. R. Co.*, 23 Minn. 18 (right to construct wharves); *New Jersey, &c. Co. v. Morris, &c. Co.*, 44 N. J. Eq. 398; 36 Am. & Eng. R. Cas. 515. Thus, a riparian owner upon a navigable stream, whether he owns to the thread of the stream or not, has a right to construct in shoal water in front of his land proper wharves or piers, in aid of navigation, through the water far enough to reach actually navigable water. *Dela-plaine v. Chicago, &c. R. Co.*, 42 Wis. 214.

³ *Rumsey v. New York, &c. R. Co.*, 133 N. Y. 79. See also *In re New York, &c. R. Co.*, 101 N. Y. 685.; *Schurmeier v. St. Paul, &c. R. Co.*, 7 Wall. (U. S.) 272. In *Carli v. Railroad Co.*, 28 Minn. 273, the street occupied by a railroad laid by the defendant, and the adjoining lot owned by the plaintiff, were upon made land which had been extended into a lake, through which flowed a navigable stream. It was claimed that the lot-owner's title did not extend to lands covered by the

be extended so as to interfere with the right of the State to improve the navigation of the river, or with the power of Congress to regulate commerce. The proper measure of damages in such case is the diminished rental or usable value of the property for the purpose it was used for before the building of defendant's road, not what it would have been if the land had been put to some other use or other structures had been placed upon it.² Where a ford-way was destroyed by the erection of a dam across a river, in the construction of a canal under legislative grant, the river being a public highway, although not strictly navigable in the common-law sense (which only included such rivers as were affected by

waters of the lake, but stopped at the line of low water. It was held that while such is the law, it is well settled that the owner of land bounded by a navigable stream has certain riparian rights which spring from the ownership of the bank, and are not dependent upon a strict legal title in him to the soil covered by the water. Said CLARK, J.: "These rights were clearly defined in *Brisbane v. St. Paul, & C. R. Co.*, 23 Minn. 114, as follows: 'The right to enjoy free communication between his abutting premises and the navigable channel of the river; to build and maintain for his own and the public use suitable landing-places, wharves, and piers on and in front of his land, and to extend the same therefrom into the river to the point of navigability, even though beyond low-water mark; and to this extent exclusively to occupy for such and like purposes the bed of the stream, subordinate and subject only to the navigable rights of the public, and such needful rules and regulations for their protection as may be prescribed by competent legislative authority.' In addition to the authorities cited in the opinion in this case, the doctrine has the authority of a recent English case in the House of Lords, and we are satisfied that it rests upon solid grounds of justice and utility. *Long v. Fishmongers*, L. R. 1 App. Cas. 662. It does not appear that the use made of the shore in this case has caused the least impediment to the free and unobstructed navigation of the river, or has been prejudicial in any way to the public interests. These riparian rights are property, and cannot lawfully be taken for

public use without compensation. *Yates v. Milwaukee*, 10 Wall. (U. S.) 197. The acts done by the defendant are an invasion of the riparian rights of the plaintiff."

¹ *Rumsey v. New York, & C. R. Co.*, 133 N. Y. 79. Thus, in an action by plaintiffs, who were the owners of certain uplands on the Hudson River, to recover damages sustained by the construction by the defendant in 1880 of a railroad across their water-front, which cut off their access to the water, it appeared that the lands under water in front of the plaintiffs' premises were not granted to them until in March, 1885. It was held that the plaintiffs' right to recover was not confined to the period since such grant, but that they were entitled to damages for interference with their prior property rights in the stream as riparian owners. The case of *Gould v. Hudson River R. Co.* (6 N. Y. 522) was held to have been overruled. *Lansing v. Smith*, 8 Cow. (N. Y.) 146; 4 Wend. (N. Y.) 9; *Stevens v. P. & N. R. Co.*, 34 N. J. L. 532; *Bucclench v. Met. Bd. of Works*, L. R. 5 Exch. 221, were distinguished. The plaintiffs' premises had formerly been used as a brick-yard, and the river-front for shipping brick and other purposes connected with brick-making. Some years before the construction of the defendant's road and the embankment along the plaintiff's front, such use of their premises had been abandoned, and it was held that plaintiffs' damages could not properly be based upon the rental or usable value of their property as a brick-yard. *Rumsey v. New York, & C. R. Co.*, 133 N. Y. 79.

tide-water), it was held that the owner of the ford-way could recover no compensation from the State or its grantees, the act being but a reasonable exercise of the right to improve the navigation of the stream as a public highway.¹ So the owner of a dam erected by legislative grant upon a navigable river, with a proviso that the navigation of the same should not be thereby obstructed, and which is afterwards cut off by a canal, granted by the same authority, is not entitled to recover damages. The State is never deemed to have parted with one of its franchises, in the absence of conclusive proof of such intention.²

In reference to streams not navigable in law, — that is, streams which whether large or small are nevertheless *floatable* and come within the third class named, — it may be said that the riparian owner is usually held to own the *alveus* in the stream, and therefore has a property interest therein of which he cannot be deprived without compensation; and such also is the case in reference to other navigable streams, where, under the law of the State, he is treated as the owner of the bed of the stream.³

¹ Zimmerman v. Union Canal Co., 1 W. & S. (Penn.) 346.

² Susquehanna Canal Co. v. Wright, 9 W. & S. (Penn.) 9. In Abraham v. Great Northern Ry. Co., 16 Q. B. 586, it is held the owner of land *adjoining* a navigable stream has no property in the bed of the stream, and the legislature may give permission to a railway company to so construct their road as to interfere with and alter the bed of the stream, to the damage of any owner of adjoining land, in regard to flowage or otherwise, *even to the hindrance of accustomed navigation*, without compensation; and the railway company, in constructing their road within the provisions of the act of incorporation, do not become liable to an action for damages to any such proprietor of adjoining land.

³ Lehigh Valley R. Co. v. Trowe, 28 Penn. St. 206. A riparian owner may by grant from the State be clothed with a special interest or property in the sea or stream, which endows him with rights such as are not possessed by the public generally, and which estop the State from a special or any use of the stream or the *alveus* thereof to his injury or prejudice

without proper compensation therefor. If a *special* right exists in the shore owner by virtue of a grant from the State, and which is made *appendant* to his land, this special right cannot be destroyed without proper recompense, for its destruction or injury is the taking of private property within the meaning of the Constitution. Thus, the State may by patent convey the land on the shore of the stream to low-water mark. Del. & Hud. Canal Co. v. Lawrence, 2 Hun (N. Y.), 60, Attorney-General v. Boston Wharf Co., 12 Gray (Mass.), 553; Winnisimmet Co. v. Wyman, 11 Allen (Mass.), 432; Nichols v. Boston, 98 Mass 39; Morgan v. King, 35 N. Y. 454. Or it may authorize the construction of wharves, piers, quays, or docks. Hale's De Jure Maris, Chapter VI., p. 73. Or it may grant the right of ferryage between opposite shores, or the right of fishing opposite the banks, and other uses which it is not necessary to enumerate; and when such rights have been legally conferred upon the riparian owner, he is entitled to compensation if they are taken. The right to set up a ferry is a *franchise* which can be exercised only under a license from the State, — Blissett v. Hart, Willes,

Upon streams which are only navigable in fact, the riparian owner may apply the water to use for the propulsion of machinery, and for that purpose may erect a dam across the stream where the stream is simply *floatable*, leaving suitable ways for the passage of logs and other products.¹ The right of the public for passage with logs, etc., is superior to the right of the riparian owner; and if he erects obstructions in the stream which prevent, endanger, or materially hinder the passage of rafts or logs, whether such obstruction is in the form of a dam or otherwise, such obstruction is a nuisance and subjects the person making it, not only to an action for the damages sustained by the owners of rafts or logs obstructed by it, but also to indictment as for a public nuisance;² and the person so injured by the obstruction may abate so much of the same as is necessary to secure the proper exercise of his right.³ But while the right of

512, *n.*—or by prescription. 2 Rolle's Abr. 140; *Lansing v. Smith*, 4 Wend. (N. Y.) 21; *Benson v. Mayor*, 10 Barb. (N. Y.) 223; *Young v. Harrison*, 6 Ga. 139; *Dyer v. Bridge Co.*, 2 Port. (Ala.) 303; *Stark v. McGowen*, 1 N. & McC. (S. C.) 387; *Nashville B. Co. v. Shelby*, 10 Yerg. (Tenn.) 280; *Somerville v. Wimbish*, 7 Gratt. (Va.) 205. A riparian owner may set up a ferry for his own use, but not for the use of others. *Young v. Harrison*, 6 Ga. 139; *People v. Mayor, etc.*, 32 Barb. (N. Y.) 102; *Norris v. Farmers' Co.*, 6 Cal. 590; *Johnson v. Erskine*, 9 Tex. 1; *Sparks v. White*, 7 Humph. (Tenn.) 86; *De Jure Maris*, 73; *Milton v. Haden*, 32 Ala. 30; *Taylor v. Railroad Co.*, 4 Jones (N. C.) 277; *Mills v. St. Clair Co.*, 7 Ill. 197; *Cooper v. Smith*, 9 S. & R. (Penn.) 26; *Trustees v. Talmian*, 13 Ill. 27; *Murray v. Menefee*, 20 Ark. 561. A ferry franchise is not an incident of riparian ownership. *Patrick v. Ruffners*, 2 Rob. (Va.) 209; *Young v. Harrison*, 6 Ga. 130; *Stanford v. Mangin*, 30 Ga. 355. All unlicensed ferries are nuisances. 3 Kent's Com. 458, 459; 3 Blackstone's Com. 219. But the State may license as many ferries to and from the same point as it chooses, and may license a railway company to maintain a ferry, either expressly or by inference. *State v. Wilmington, &c. R. Co.*, *Busbee* (N. C.) 234; *Fisher v. New Haven, &c. R. Co.*, 30 Conn. 38; *Aiken v. Western R. Co.*, 20 N. Y. 370;

Dyer v. Tuscaloosa Bridge Co., 2 Port. (Ala.) 303; *Railroad Co. v. Douglass*, 9 N. Y. 444; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Bridge Co. v. Railroad Co.*, 17 Conn. 454; *Thompson v. Railroad Co.*, 2 Sandf. Ch. (N. Y.) 625; *Bridge Co. v. Fish*, 1 Barb. Ch. (N. Y.) 547; *Toledo Bank v. Bond*, 1 Ohio St. 622; *Canal Co. v. Railroad Co.*, 11 Leigh (Va.), 42; *Benson v. Mayor, &c.*, 10 Barb. (N. Y.) 223; *East Hartford v. Bridge Co.*, 13 How. (U. S.) 71; *Shorter v. Smith*, 9 Ga. 517.

¹ *Lorman v. Benson*, 8 Mich. 18; *Lancey v. Clifford*, 54 Me. 491; *Morgan v. King*, 18 Barb. (N. Y.) 277; *Scofield v. Lansing*, 17 Mich. 437. See note in *Washington on Easements*, p. 507; *Avery v. Fox*, 1 Abb. (U. S.) 246; *Yates v. Milwaukee*, 10 Wall. (U. S.) 497.

² *Scofield v. Lansing*, 17 Mich. 437; *Thurman v. Morrison*, 14 B. Mon. (Ky.) 397; *Douglass v. State*, 4 Wis. 387.

³ *Renwick v. Morris*, 7 Hill (N. Y.), 575; *Memphis R. Co. v. Hicks*, 5 Sneed (Tenn.), 427; *Barnes v. Racine*, 4 Wis. 454; *Burrows v. Pixley*, 1 Root (Conn.), 363; *Brown v. Watson*, 47 Me. 161; *Gerrish v. Brown*, 51 Me. 256; *Veazie v. Dwinel*, 50 Me. 479; *Knox v. Chaloner*, 42 Me. 156; *State v. Freeport*, 43 Me. 198; *Powers v. Irish*, 23 Mich. 429; *Rippe v. Chicago, &c. R. Co.*, 22 Minn. 18; *Steamboat Magnolia v. Marshall*, 39 Miss. 109; *Brisbane v. St. Paul, &c. R.*

passage for the public must on the one hand be respected by the riparian owner, so on the other hand must the rights of the riparian owner be respected by the public; and where a river is merely *floatable* the public have no right to so use it as to destroy its beneficial use for manufacturing purposes.¹ Thus it has been held that persons using a *floatable* stream have no right to erect dams thereon, and thereby detain and hold the water to be let off in such a manner as to aid in the floating of logs, when, by such dam, the water is withheld from mill-owners below to their injury, — even though except for such dams the stream could not be used for floatage at certain seasons of the year.² In a New York case,³ a railroad company, which was a riparian owner, diverted the water of a creek for its use in furnishing water to its locomotives, so as perceptibly to reduce the volume of water flowing therein, and materially to reduce the grinding power of the mill of plaintiff, a riparian owner below the railroad company, and in consequence thereof he sustained damage to a substantial amount. It was held that the petitioner was entitled to an injunction restraining the railroad company from diverting the water to his injury.⁴

SEC. 257. What constitutes Damage. — Under a statutory provision that railroad corporations shall be liable to pay all damages occasioned by laying out and making and maintaining their roads,

Co., 23 Minn. 114; Chicago, &c. R. Co. v. Stein, 75 Ill. 41.

¹ Scofield v. Lansing, 17 Mich. 437.

² Middleton v. Flat River Booming Co., 27 Mich. 533.

³ Garwood v. New York Central R. Co., 83 N. Y. 400; 38 Am. Rep. 452.

⁴ The court speaking by DANFORTH, J., after distinguishing the cases of Elliott v. Fitchburg R. Co., 10 Cush. (Mass.) 191; Earl of Sandwich v. Great Northern Ry. Co., L. R. 10 Ch. Div. 707, went on to say: "Each riparian owner has the use of the water *ad lavandum et portandum* for domestic purposes and his cattle, though some portion be exhausted, and this without regard to the effect upon the lower owner. He may use for irrigation or manufacturing; but his privilege is connected with the land through which the stream runs, and cannot be exercised if thereby the lawful use of the water by a lower proprietor is interfered with to his injury. Miner v. Gilmour, 12 Moore's

P. C. 156; Tyler v. Wilkinson, 4 Mason, 397. The railroad company did not merely use the water, returning it to the stream, but diverted it from the land. The fact that plaintiff, as well as the railroad company, used the water for artificial purposes, would not affect plaintiff's rights. The case presents no exception to the rule, that a riparian proprietor has no right to divert any part of the water of the stream into a course different from that in which it has been accustomed to flow, for any purpose to the prejudice of any other riparian proprietor. This is the doctrine of the civil and the common law, and it stands upon the familiar maxim, *sic utere tuo ut alienum non lœdas*."

The authorities all sustain the propriety of preventive relief in such a case. See 2 Story's Eq. Juris, § 927; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162; Swinton Water Works Co. v. W. & B. Canal Co., L. R. 7 Eng. & Ir. Ap. Cas. 697; Campbell v. Seaman, 63 N. Y. 568.

or by taking any land or materials, a party who sustains an actual and real damage, capable of being pointed out, described, and appreciated, may recover compensation therefor. Thus, where the water of a well on an estate adjoining, but not crossed by, a railroad was drawn off in consequence of the excavation made for the road, and the well thereby rendered dry and useless, it was held that the owner of the estate could recover damages therefor in the same manner as for land, etc., taken for the purposes of the road.¹ The rule in regard to what damage is to be included under the terms "lands injuriously affected," or equivalent terms, includes all direct damage to real estate by passing over it or part of it, or which affects the estate directly, although it does not pass over it, as by a deep cut or high embankment so near lands or buildings as to prevent or diminish the use of them, by endangering the fall of buildings, the caving of earth, the draining of wells, the diversion of water-courses by the proper erection and maintenance of the company's works, the blasting of a ledge of rocks so near houses or buildings as to cause damage, running a track so near as to cause imminent and appreciable danger by fire, obliterating or obstructing private ways leading to houses or buildings, — all these and some others, doubtless, are included. But damage cannot be assessed for losses arising directly or indirectly from the diversion of travel, the loss of custom to turnpikes, canals, bridges, taverns, coach companies, stores, and the like; nor for the inconveniences which the community may suffer in common from a somewhat less convenient and beneficial use of public and private ways, from the rapid and dangerous crossings of the public highways arising from the usual and ordinary action of railroads and railroad trains, and their natural incidents.²

¹ *Parker v. Boston, &c. R. Co.*, 3 Cush. (Mass.) 107.

² *Proprietors of Locks v. Nashua, &c. R. Co.*, 10 Cush. (Mass.) 285; *Uline v. New York, &c. R. Co.*, 101 N. Y. 98; 23 Am. & Eng. R. Cas. 3; *Dimmick v. Council Bluffs R. Co.*, 58 Iowa, 637; 10 Am. & Eng. R. Cas. 105; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316; 26 Am. & Eng. R. Cas. 559. In some jurisdictions provision is expressly made for compensation for consequential injuries. Thus, the constitution of Illinois provides that compensation shall be made for property "taken or damaged" for public use. *Chicago, &c. R. Co. v. Ayers*, 106 Ill. 511; 14 Am.

& Eng. R. Cas. 152. So also as to a similar provision in Nebraska for injury to land not taken. *Republican Valley R. Co. v. Fellers*, 16 Neb. 169; 20 Am. & Eng. R. Cas. 256; *Omaha, &c. R. Co. v. Standen*, 22 Neb. 343; 34 Am. & Eng. R. Cas. 179. See also *Ford v. Metropolitan Dist. Ry. Co.*, 17 Q. B. Div. 12; 25 Am. & Eng. R. Cas. 182; *Gilbert v. Greely, &c. R. Co.*, 13 Col. 501; 40 Am. & Eng. R. Cas. 300. In the case of *Proprietors, &c. v. Nashua, &c. R. Co.*, 10 Cush. (Mass.) 285, it is also held that no damages can be assessed under the statute for cutting through a water-course in making an embankment, without making a cul-

A constitutional provision requiring just compensation to be made, or adequate security to be given therefor, before private property can be taken for public use, contemplates only an actual appropriation. Matters of annoyance, indirect and consequential injuries to property, and acts tending to depreciate the value but which do not amount to a real appropriation, are outside of this provision. Therefore a railroad company, when empowered to take land for its use, is not responsible for indirect or consequential injuries, unless such liability is imposed by charter.¹ In England, and in some of the

vert, whereby the water is made to flow back and injure the plaintiff's land at a distance from the railway, no part of which is taken, — the remedy being by action at common law. See *Parker v. Boston, &c. R. Co.*, 3 Cush. (Mass.) 107. And where the company, by consent of the land-owner, enters upon the land and makes the requisite erections, which are subsequently conveyed to it with the land by, the land-owners, it was held such grantor is not estopped from claiming damages resulting from want of proper care and skill in constructing the works, or from neglect to keep them in repair. *Morris Canal & Banking Co. v. Ryerson*, 27 N. J. L. 457; *Waterman v. Connecticut, &c. R. Co.*, 30 Vt. 610; *Lafayette Plank-Road Co. v. New Albany, &c. R. Co.*, 13 Ind. 90. In England the rule that damages can only be recovered for injuriously affecting land, where but for the statute the act complained of would be just ground of action at common law, does not apply where part of the land is taken and damages are sought, not only for the part taken, but for the rest of the land being injuriously affected, either by severance or otherwise. And it was here held that the owner of a mill was entitled to have damages assessed to him for the increased exposure of the same to fire by the passage of the company's trains. But loss of trade caused by the operations of the company during the construction of their works is not damages for which the party is entitled to compensation. *Senior v. Met. Ry. Co.*, 2 H. & C. 258; *Ricket v. Metropolitan Ry. Co.*, 5 B. & S. 149. But a person may claim damages on the ground of being injuriously affected on account of the obstruction or diversion of

a public way by the construction of the works of a railway. *Wood v. Stourbridge Ry. Co.*, 16 C. B. N. s. 222; *Boothbay v. Androscoggin, &c. R. Co.*, 51 Me. 318.

¹ *Watson v. Pittsburgh, &c. R. Co.*, 37 Penn. St. 469; *Pennsylvania R. Co. v. Marchant*, 119 Penn. St. 541; 33 Am. & Eng. R. Cas. 116; *Beseman v. Pennsylvania R. Co.*, 50 N. J. L. 235; 33 Am. & Eng. R. Cas. 107. In the New York, &c. R. Co. v. Young, 33 Penn. St. 180, the court say: "It has been held by this court, in the *Monongahela Navigation Co. v. Coons*, 6 W. & S. (Penn.) 101; *Susquehanna Canal Co. v. Wright*, 9 W. & S. (Penn.) 9; *McKinney v. Monongahela Navigation Co.*, 18 Penn. St. 65; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. (Penn.) 71; *The Philadelphia, &c. R. Co.*, 6 Whart. (Penn.) 45; and *Rundle v. Del. & Rar. Canal Co.*, 14 How. (U. S.) 80, that the grantees of such a franchise have the same power that existed in the State, and may exercise it, subject only to such restrictions as are imposed in the grant, and that they are subject only to the same liability, unless otherwise declared. Such grants are always supposed to be for the public benefit, and to be exercised with that view by the corporation rather than by the State itself. In the cases cited, the doctrine has been distinctly held, and is the settled law of the land, if anything can be settled, that, unless the act of incorporation provides for it, consequential damages are not recoverable from a railway, or other improvement company, in constructing or maintaining their works, — thus applying the same rule to them as was held applicable to the Commonwealth itself. *Com. v. Fisher*, 1 Penn. 467. That the legislature may direct otherwise, no-

States of this country, railway companies are by statute made liable to the owners of all lands "injuriously affected" "or damaged" by their railways; and under such statutes it is held that if the company does any act which would be an actionable injury, without the protection of the special act of the legislature, they are liable under the statute.¹ So that there any act of a railway company amounting to a nuisance in a private person, and causing special damage to any particular land-owner, is a good ground for claiming damages under the statute.² These statutes indicate the policy of the State in regard to compensation for the appropriation of land, and serve to command a liberal interpretation of the constitutional right in favor of the land-owner.³ It has never been the doctrine that the State or its representative might injuriously affect private property to any extent short of an actual conversion, and escape liability for compensation to the owner of such property. Such a

body doubts; but the liability does not exist unless it is expressed." See also *Hortsman v. Lexington, &c. R. Co.*, 18 B. Mon. (Ky.) 218; *post*, chapter on "LOCATION AND CONSTRUCTION." In the case of Governor of Plate Manufacturers *v. Meredith*, 4 T. R. 794, Lord KENYON says: "If the legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to the individuals who happen to suffer. But if there be no such power given the commissioners, the parties are without remedy, provided the commissioners do not exceed their jurisdiction." This was a case where the plaintiffs had been hindered in the free access to their business premises by the raising of the street opposite them by the defendants, who were commissioners for paving the street. And see *Sutton v. Clarke*, 1 E. C. L. 298; *Boulton v. Crowther*, 9 E. C. L. 227; *King v. Pagham*, 15 E. C. L. 237.

¹ *Denver v. Bayer*, 7 Col. 113; 2 Am. & Eng. Corp. Cas. 465; *Indianapolis, &c. R. Co. v. Hartley*, 67 Ill. 439; *Glover v. North Staffordshire Ry. Co.*, 16 Q. B. 912.

² *Glover v. North Staffordshire Ry. Co.*, 16 Q. B. 912; *Hatch v. Vermont Cent. R. Co.*, 25 Vt. 49.

³ See also City Council *v. Townsend*, 80 Ala. 489; *Transportation Co. v. Chicago*, 99 U. S. 642; *Gottschalk v. Burlington, &c. R. Co.*, 14 Neb. 550. The Texas

court, referring to a similar provision in the constitution of that State, observes: "This language is broader than that used in the former constitutions of this State, and was doubtless intended to meet all cases in which, even in the proper prosecution of a public work or purpose, the right or property in a pecuniary way may be injuriously affected by reason of its being thereby made less valuable, or its use by the owner restricted by the public use to which it is wholly or partially applied without compensation having been first made to the owner. It is also not improbable that it was intended by the language found in the present constitution, to meet and correct evils which had sometimes been thought to result to the property-owner from a narrow and technical meaning sometimes put by the courts upon the word 'taken' as used in former constitutions. . . . If by the construction of a railway or other public work an injury peculiar to a given property be inflicted upon it, or its owner be deprived of its legal and proper use, or of any right therein or thereto, — that is, if an injury, not suffered by that particular property or right only in common with other property or rights in the same community or section, by reason of the general fact that the public work exists, be inflicted, then such property may be said to be 'damaged.'" *Galveston, &c. R. Co. v. Fuller*, 63 Tex. 467.

contention is repudiated by Mr. Justice MILLER¹ in language which has been often quoted: — "It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law always understood to have been adopted for the protection and security of the rights of the individual as against the government, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not *taken* for a public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at common law, instead of upon the government, and make it an authority for the invasion of private right under the pretext of the public good which had no warrant in the laws or practices of our ancestors."

But in the absence of special statutory provision for compensation to the land-owner in such cases, railway companies are not liable for *necessary consequential damages to land-owners, no portion of whose land is taken, where they construct and operate their roads in a skilful and prudent manner.*² Thus, one whose lands, fronting on

¹ *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 177-178. See also *Sinnickson v. Johnson*, 17 N. J. L. (2 Harr.) 129; *Gardner v. Newburg*, 2 Johns. Ch. (N. Y.) 162.

² *Monongahela Nav. Co. v. Coons*, 6 W. & S. (Penn.) 101; *Radeliff v. Brooklyn*, 4 N. Y. 195; *In re Phila. & Trenton R. Co.*, 6 Whart. (Penn.) 25; *Seneca Road Co. v. Auburn, &c. R. Co.*, 5 Hill (N. Y.), 170; *Hatch v. Vt. Central R. Co.*, 25 Vt. 49; *Richardson v. Vt. Central R. Co.*, 25 Vt. 465; *Sunbury, &c. R. Co. v. Hummell*, 27 Penn. St. 99; *Clarke v. Birmingham, &c. R. Co.*, 41 Penn. St. 147; *Struthers v. Dunkirk, &c. R. Co.*, 87 Penn. St. 282; *Thompson v. Androscoggin R. Co.*, 58 N. H. 108; *Stetson v. Chicago, &c. R. Co.*, 75 Ill. 74; *Freeland v. Penn. R. Co.*, 66 Penn. St. 91; *Bellinger v. N. Y. Central R. Co.*, 23 N. Y. 42; *Corey v. Buffalo, &c. R. Co.*, 23 Barb. (N. Y.) 482; *Spanger's App.* 94 Penn. St. 387. There are many cases confirming the same general view. *Henry v. Pittsburgh, &c. Bridge Co.*, 8 W. & S. (Penn.)

85; *Canandaigua, &c. R. Co. v. Payne*, 16 Barb. (N. Y.) 273, where it is held that injury to a mill upon another lot of the same land-owner, in consequence of the construction and operation of the railway, is a matter with which the commissioners have nothing to do in estimating damages for land. See also *Troy, &c. R. Co. v. Northern T. Co.*, 16 Barb. 100. Nor is a person entitled to damage in consequence of a highway being laid upon his line, thus compelling him to maintain the whole fence. *Kennett's Petition*, 24 N. H. 139. In *Albany Northern R. Co. v. Lansing*, 16 Barb. (N. Y.) 68, it is said: "The commissioners in estimating the damages should not allow consequential and prospective damages." In *Plant v. Long Island R. Co.*, 10 Barb. (N. Y.) 28, it is held not to be an illegal use of a street to allow a railway track to be laid upon it, and that the temporary inconvenience to which the adjoining proprietors are subject while the work of excavation and tunnelling is going on is *damnum absque in-*

a public navigable river, are taken for the construction of an aqueduct, cannot claim damages beyond the value of the land taken, on

juris. So also in regard to the grade of a street having been altered by a railway by consent of the common council of the city of Albany, who by statute were required to assess damages to any freeholder injured thereby, and who had done so in this case, it was held that no action could be maintained against the railway company. *Chapman v. Albany, &c. R. R. Co.*, 10 Barb. (N. Y.) 360; *Adams v. Saratoga, &c. R. R. Co.*, 11 Barb. (N. Y.) 414. In Kentucky, — *Wolfe v. Covington, &c. R. R. Co.*, 15 B. Mon. (Ky.) 404, — it was held that the municipal authority of a city might lawfully alter the grade of a street for any public purpose without incurring any responsibility to the adjacent landholders, and might authorize the passage of a railway through the city along the streets, and give them the power to so alter the grade of the streets as should be requisite for that purpose, this being done at the expense of the company, and by paying damages to such adjacent proprietors as should be entitled to them. But one who urged the laying of the road in that place on the ground that it would benefit him, and who was thereby benefited, cannot recover damages of the company, — upon the maxim *volenti non fit injuria*. A railway when so authorized "is not a *purpresture* or encroachment upon the public property or rights." So where a railway company erect a fence upon land which they own in fee for the purpose of keeping the snow off their road, they are not liable for damages sustained by the owner of land upon the opposite side of the fence by the accumulation of snow occasioned by the fence. *Carson v. Western R. R. Co.*, 8 Gray (Mass.), 423. See also *Morris & Essex R. R. Co. v. Newark*, 2 Stock. Ch. 352. Where the act complained of was the construction of an embankment by a railway company at the mouth of a navigable creek, in which the plaintiff had a prescriptive right of storing, landing, and rafting lumber for the use of his saw-mill, whereby the free flow of the water was obstructed, and the plaintiff thereby deprived of the full enjoyment of his privilege, the injury was regarded as

the direct and immediate consequence of the act of the company, and the company was held liable for the damages thereby sustained. *Tinsman v. the Belvidere Delaware R. R. Co.*, 26 N. J. L. 148. *Rogers v. Kennebec, &c. R. R. Co.*, 35 Me. 319; *Burton v. Philadelphia, W. & B. R. R. Co.*, 4 Harr. (Del.) 252; *Hollister v. Union Co.*, 9 Conn. 436; *Whittier v. Portland, &c. R. R. Co.*, 38 Me. 26. But for a want of skill or prudence in the construction or operation of its road, it is liable to any one suffering special damage thereby, as in needlessly diverting water-courses and streams, and not properly restoring them, whereby lands are overflowed or injured. *Whitcomb v. Vt. Central R. R. Co.*, 25 Vt. 69; *Hooker v. N. H. & N. Y. R. R. Co.*, 14 Conn. 146. And there is the same liability although the lands are not situate upon the stream. *Brown v. Cayuga, &c. R. R. Co.*, 12 N. Y. 486. A party is liable to an action for diverting the water from a spring, which ran in a well-defined channel into a stream supplying a mill, at the suit of the mill-owner, notwithstanding he had permission from the owner of the land where the spring arose. But not if the spring spreads out upon the land, having no channel. As the land-owner might drain his land, so he may give permission to others to do so. *Duddon v. Guardians of Herndon Union*, 1 H. & N. 627; *Brown v. Illius*, 27 Conn. 84; *Robinson v. New York & Erie R. R. Co.*, 27 Barb. (N. Y.) 512; *Waterman v. Conn. & Pass. Riv. R. R. Co.*, 30 Vt. 610; *Henry v. Vt. Central R. R. Co.*, 30 id. 638. But in the last case it was decided that the effect of erecting a bridge in a stream upon the course of the current below was so far incapable of being known or guarded against that there was no duty imposed upon railway companies to guard against an injury to land-owners below by a change of the current. *New Albany & C. R. R. Co. v. Higman*, 18 Ind. 77; *New Albany, &c. R. R. Co. v. Huff*, 19 id. 315; *Colcough v. Nashville & N. W. R. R. Co.*, 2 Head (Tenn.), 171; *Regina v. Eastern Counties Ry. Co.*, 2

the ground that the contemplated aqueduct will obstruct the navigation of the river,¹ because his right of access thereto is a natural and not a legal right. The verdict of a jury appointed to estimate damages for land taken by a company can only embrace injuries caused by acts of the company which are authorized by their charter, and cannot include wrongful acts done by the company. For this class of injuries he has his remedy at the common law.² Under a statute directing the appointment of commissioners "to ascertain and appraise the compensation to be made to the owners or persons in-

Q. B. 347. But in this case the act expressly provided that the verdict and judgment should be conclusive and binding, which most railway acts do not; but it seems questionable if this will make any difference. *E. & W. I. Docks, &c. v. Gattke*, 3 M. & G. 155. In *Bradley v. New York & New H. R. R. Co.*, 21 Conn. 294, where the defendants' charter gave them power to take land, and made them liable for all damages to any person or persons, and they excavated an adjoining lot to plaintiffs, so as to weaken the foundations of his house, and erected an embankment in the highway opposite his house, so as to obscure the light and render it otherwise unfit for use, it was held that this did not constitute a taking of plaintiffs' land, but that defendants were liable to consequential damage under their charter. But in the early case of *the Wyrley Nav. v. Bradley*, 7 East, 368, it is considered that where the act of Parliament reserved the right to dig coal to the proprietor of mines, unless the company on notice elected to purchase and make compensation where the canal was damaged by the near approach of the mine after such notice, and no compensation made, the coal-owner was not liable, although it is there said to be otherwise in case of a house, undermined by digging on the soil of the grantor. But this case seems to turn upon the reservation in the grant. The reservation in a deed of land to a railway company of the right to make a crossing over the land, creates an easement in the land, but does not extend such easement across the other lands of the company. *Boston & Maine R. R. Co. v. Middlesex*, 1 Allen (Mass.), 324. Where the company take land but decline to purchase the minerals, after notice from

the owner of his intention to work them pursuant to the English statute, the company is not entitled to the subjacent or adjacent support of the minerals. And where the company gave notice under the statute that the working of the mines was likely to injure the railway, the owner was held entitled to recover compensation which had been assessed under the statute. *Fletcher v. Great-Western Ry. Co.*, 4 H. & N. 242. And in *North-Eastern Ry. Co. v. Elliott, J. & H.* 145, it was held that the general principle that a vendor of land sold for a particular use cannot derogate from his own grant by doing anything to prevent the land sold from being put to that use, applies to sales to railways under compulsory powers. But it was here said that this principle will not compel the vendor of land to perpetuate anything upon the portion of the land retained by him which is merely accidental, though existing and of long standing at the date of the sale. Therefore, where a railway company took land for a bridge in a mining district, where a shaft had been sunk many years before, but the working of the mines abandoned and the shaft filled with water for a long time before the taking of the land, it was held that the land-owner was not precluded from draining the water and working the mine, although the effect must be to lessen the support of the bridge to some extent, by withdrawing the hydrostatic pressure upon the roof of the mine, and the consequent support of the superincumbent strata of earth.

¹ Matter of the Water Commissioners, 3 Edw. Ch. (N. Y.) 290.

² *Whitehouse v. Androscoggin R. R. Co.*, 52 Me. 208.

terested in the real estate proposed to be taken for the purposes of the company," and "to ascertain and determine the compensation which ought justly to be made by the company to the party or parties owning or interested in the real estate appraised by them," it was held in some early cases in New York that the office of the commissioners is to determine the compensation to be made to the owner for the land "proposed to be taken," and to be "appraised by them," and not *the damages that will be occasioned* by the construction of the proposed works upon his premises; that it is error to consider in such a case the damage which would result to a mill on other land of the owner;¹ and that under such a statute, the commissioners should award damages for the value of land taken, and the damages to the owner's adjoining land produced *by the taking*. They are to consider how the *taking* of the land, but not the *use* of it in any particular mode, will affect the value.² But this is an exceedingly narrow and unwarranted construction to place upon the statute, and is not the rule generally adopted; and the *use* for which the land is taken is of the greatest importance in determining the amount of compensation which should be awarded the land-owner.³ In no other way could the "just compensation" to which the owner is entitled be ascertained; and it is hardly to be presumed that the framers of the Constitution, or of these statutes, intended that any such narrow and unreasonable construction would be placed thereon. A company which, being engaged in the construction of a public work, is authorized by charter to enter upon the lands adjoining the work, and take materials therefrom, is liable to land-owners for materials taken by contractors in the employ of the company, under the provisions of the charter, and applied to the works to be constructed.⁴

SEC. 258. **Presumption that Commissioners Estimated all Injuries.**

—Any contingent and consequential depreciation of the value of the portion of the land not taken, in consequence of the construction of a railroad in a proper manner and according to its charter, whether reference be had to its market value or its desirableness as a residence, or for general or any particular use, cannot be made the basis of an action to recover damages beyond, or in addition to, the

¹ *Canandaigua & N. F. R. Co. v. Payne*, 16 Barb. (N. Y.) 273; *Matter of Hamilton Avenue*, 14 Barb. (N. Y.) 405.

² *Albany Northern R. R. Co. v. Lansing*, 16 Barb. (N. Y.) 68.

³ *Bangor, &c. R. R. Co. v. McComb*, 60 Me. 290; *Pacific R. R. Co. v. Chrystal*, 25 Mo. 544.

⁴ *Hinde v. Wabash Navigation Co.*, 15 Ill. 72.

compensation awarded for taking so much of the land as was properly taken. The presumption is that every injury which, in judgment of law, would result to the other adjacent property of the owner from taking a part of his land for the construction of the road, and from the use of it in a proper manner when constructed, was foreseen by the appraisers, and included in their first estimate.¹

¹ *Furniss v. Hudson River R. R. Co.*, 5 Sandf. (N. Y.) 551. In ascertaining what compensation ought to be made to a turnpike company for granting to a railroad company an easement or right of way across their road, it should be assumed that the railroad company would, as required by law, restore the turnpike to such state as not unnecessarily to impair its usefulness. The consideration that the business of the turnpike would be diminished by the construction of a railroad along the same general line of travel, should be disregarded. Every public improvement, from the necessity of the case, must affect some property favorably and some unfavorably. When this effect is merely consequential, the injury is *damnum absque injuria*. If no vested rights have been violated, and the turnpike company still enjoy all the rights and privileges secured to them by their charter, the depreciation of their property does not furnish a legal ground of remuneration. *Troy & Boston R. R. Co. v. Northern Turnpike Co.*, 16 Barb. (N. Y.) 100; *Matter of Hamilton Avenue*, 14 id. 405; *Matter of Flatbush Avenue*, 1 Barb. (N. Y.) 236. An inquest of damages precludes the owner of the land from claiming additional damages for the same original location, upon the occasion of a change in the location. *But he can recover damages for the alteration, notwithstanding the legislature authorized the alteration, if any actual damage or injury has been sustained thereby, to the extent of such additional injury and no more.* *Baltimore & Susquehanna R. R. Co. v. Compton*, 2 Gill (Md.), 20. Where a railroad company, upon an award of commissioners, have recorded the order and deposited the money as required by statute, the title becomes wholly vested in the company, and no longer remains in the former owner. Hence the company cannot, by changing the route of their

road, avoid paying such compensation, on the ground that the premises are not necessary for them: *Crowner v. Watertown & Rome R. R. Co.*, 9 How. Pr. (N. Y.) 457. The right of passage which a railroad corporation acquires across the land of private individuals is an interest in the land, and must be derived either by a private purchase or by the exercise of the power of eminent domain vested in them by the State. In the former mode of acquisition, the price agreed upon must be paid; in the latter, the damages must be assessed according to the provisions of law. But if the company allege that the damages have been released, and the right of way surrendered as a gratuity, the evidence relied on to such end should be clear, definite, and uncontradicted. *East Pennsylvania R. R. Co. v. Schollenberger*, 54 Penn. St. 144. After a railroad has lawfully taken lands under their charter, and the damages have been duly assessed by the commissioners, and, upon appeal the assessment has been confirmed, and the amount received by the owner, he is estopped from setting up any claim against the company's possession, while the lands are used for any of the purposes authorized by the charter. *Dodge v. Burns*, 6 Wis. 514. Where damages sustained by persons from the construction of a railroad over their land are to be assessed by a jury, the plans and estimates of the company for that portion of the road are admissible in evidence. *Jacksonville & Savanna R. R. Co. v. Kidder*, 21 Ill. 131. And although a railroad company, in proceedings before a jury summoned to assess damages for land taken by their road, will not be bound by the verbal representations and promises of the engineers and others, such officers may be examined for the purpose of explaining the plans and estimates. *Jacksonville & Savanna R. R. Co. v. Kidder*, 21 Ill. 131. A duly attested

The award made by the statutory tribunal is exhaustive; and the land-owner cannot maintain an action for damages which should have been but were not assessed and allowed in that proceeding; even though he claimed them there, and they were erroneously disallowed. His remedy for such error is by steps to review the award.¹ Where the appraisal of land damages was reduced below what it otherwise would have been, by the representations of the agents of the company that the road would be constructed in a particular manner, made at the time of the appraisal to the commissioners, and such representations were not fulfilled in the actual construction of the road, whereby the plaintiff sustained serious loss and injury, it was held that the adjudication of the commissioners was a merger of all previous negotiations upon the subject, and that no action could be maintained for constructing the railway contrary to such representations, provided it was done in a prudent and proper manner.² So where a land-owner's buildings were supplied with water from a permanent spring, and after an excavation had been made in his land for the purpose of a railroad, water appeared in the excavation about fifteen feet below the surface of the ground, and the spring disappeared, it was held that, damages having been assessed to him before the excavation was made, an action to recover damages could not be sustained. *Unforeseen injuries will be presumed, to have been considered by the commissioners.*³

Where the water of a river was obstructed in its passage to the plaintiff's factory, and diverted therefrom so as to produce a substantial injury to him, by the works of a canal company, of which no survey or appraisal under the charter had been had, and for which

copy of the report and estimate of county commissioners, on an application for damages occasioned by taking the petitioner's land for a railroad, is admissible in evidence for the respondents, on a hearing before a sheriff's jury, to estimate the petitioner's damages. In such case, it is no objection to a witness that he had been a viewer to appraise damages. *White v. Boston & Providence Railroad Corporation*, 6 Cush. (Mass.) 420. On a hearing before a sheriff's jury, to estimate the damages of an owner's land taken for a railroad, the order of the county commissioners, estimating the damages, and directing the making of a passage-way for draining the petitioner's premises, the wetting of

which was one principal ground of his claim for damages, may properly go to the jury with other papers in the case. *Chapin v. Boston & Providence R. R. Co.*, 6 Cush. (Mass.) 422. And the respondents may prove that, since the hearing began, they have located a passenger station near his land, over which the railroad crossed. *Shattuck v. Stoneham Branch, &c. Railroad*, 6 Allen (Mass.), 115.

¹ *Van Schoick v. Delaware & Raritan Canal Co.*, 20 N. J. L. 249.

² *Butman v. Vt. Central R. R. Co.*, 27 Vt. 500.

³ *Aldrich v. Cheshire R. R. Co.*, 20 N. H. 359.

no damages had been assessed, and no compensation made, it was held that the plaintiff was entitled to redress in an action on the case, although the dams producing such injury were erected with the approbation of the commissioners appointed by the charter, before the plaintiff had any interest in the property to which the injury was done, and had not since been raised. The duty of the commissioners is, to ascertain the injury sustained by individuals by the works of the company, and to assess damages for such injury; but they have no authority to assess damages for injuries arising from time to time.¹

In the construction of their road, a railroad company are bound to exercise the rights conferred upon them with a prudent regard to the rights of others; and if they are guilty of negligence in this respect, whereby a land-owner is injured, it is not to be presumed, in the absence of proof, that the damages thus occasioned were taken into consideration by the commissioners in their appraisal. Commissioners are to assess such damages "as are likely to arise" from a proper construction of the road, with a due regard to the rights of others, and such only will be deemed to have been taken into consideration in the assessment.² Where no remedy is given by their charter, a railroad company is liable for an injury resulting from the construction of their works, as at common law.³ The remedy provided by statute must be followed so far as it extends; but where a statute authorizes a corporation to do certain acts, and provides a remedy for only a part of the injury arising therefrom, the injured party may have his action at common law for the residue.⁴ Where no steps are taken by the company to present a case to commissioners appointed by the charter of a corporation to assess the damages done to individuals by the works of the company, in the manner directed by the charter, the parties are left in the same situation as if no such authority was given; and the rights of one party, and the liability of the other, are the same as at common law if only the company can bring proceedings.⁵

SEC. 259. *Measure of Damages: General rule.* — When the whole of a person's land is taken by proceedings *in invitum*, the market

¹ Denslow v. New Haven & Northampton Co., 16 Conn. 98.

² Clark v. Vt. & Canada R. R. Co., 28 Vt. 103.

³ Tate v. Ohio & Mississippi R. R. Co., 7 Ind. 479; Evansville & Crawfordsville R. R. Co. v. Dick, 9 Ind. 433; Indiana

Central R. R. Co. v. Boden, 10 Ind. 96; New Albany & Salem R. R. Co. v. O'Daily, 12 Ind. 551.

⁴ Town of Troy v. Cheshire R. R. Co., 3 Fost. 83.

⁵ Denslow v. New Haven & Northampton Co., 16 Conn. 98.

*value of the land at the time of the taking is the true measure of compensation; but when only a part of the land is taken, the compensation to be given should be assessed, not only with reference to the market value of the land taken, but also with reference to the injurious effects upon the part not taken, and the deterioration in the value of the whole lot.*¹ The real inquiry is, what was the fair market value

¹ *Wilmes v. Minneapolis, &c. R. R. Co.*, 29 Minn. 242; *Sheldon v. Minneapolis, &c. R. R. Co.*, 29 id. 318; *Bowen v. Atlantic, &c. R. R. Co.*, 17 S. C. 574; *Atchison & Nebraska R. R. Co. v. Gough*, 29 Kan. 94; *St. Louis, Arkansas, &c. R. R. Co. v. Anderson*, 39 Ark. 167; *St. Louis, Jerseyville, &c. R. R. Co. v. Kirby*, 104 Ill. 345; *Lehar v. Minneapolis, &c. R. R. Co.*, 29 Minn. 256; *Burlington, &c. R. R. Co. v. Schluntz*, 14 Neb. 421; *Dreher v. Iowa Southwestern R. R. Co.*, 59 Iowa, 599; *Hot Springs R. R. Co. v. Tyler*, 36 Ark. 205; *Central Branch Union Pacific R. R. Co. v. Andrews*, 26 Kan. 702; *In re Boston, Hoosac Tunnel, &c. R. R. Co.*, 22 Hun (N. Y.), 176; *Nottingham v. Baltimore & Potomac R. R. Co.*, 3 MacArthur (D. C.); *In re Morgan R. R. Co.*, 32 La. An. 371; *St. Louis, &c. R. R. Co. v. Morris*, 35 Ark. 622; *Kansas City, Emporia, &c. R. R. Co. v. Merrill*, 25 Kan. 421; *Freemont, Elkhorn, &c. R. R. Co. v. Whalen*, 11 Neb. 585; *Blesch v. Chicago, &c. R. R. Co.*, 48 Wis. 168; *Lafayette, Muncie, &c. R. R. Co. v. Murdock*, 68 Ind. 137; *Chicago, Rock Island, &c. R. R. Co. v. Carey*, 90 Ill. 514; *Harts-horn, v. B. C. R. & N. R. R. Co.*, 52 Iowa, 613; *Renwick v. D. & N. R. R. Co.*, 49 Iowa, 664; *Illinois Western Extension R. R. Co. v. Maynard*, 93 Ill. 591; *Chicago & Iowa R. R. Co. v. Hopkins*, 90 Ill. 316; *Henderson v. N. Y. Central R. R. Co.*, 78 N. Y. 423; *Cincinnati, &c. R. R. Co. v. Longworth*, 30 Ohio St. 108; *Jeffersonville, &c. R. R. Co. v. Osterle*, 13 Bush (Ky.), 667; *Swinney v. Fort Wayne, &c. R. R. Co.*, 59 Ind. 205. The depreciation of the value of property arising from the construction of a railroad across or near it, is a proper subject for compensation; as, where a railroad was located so near a barn that the risk of fire from passing engines depreciated the value of the barn. *Wilmington, &c. R. R. Co.*

v. Stauffer, 60 Penn. St. 374. Where land is taken for the purposes of a railroad, the compensation to be paid therefor is not limited to the actual value of the land taken, or to the depreciation of the remainder of the lot from which it is taken. Besides these elements, many others are to be considered, — such as the market value of the lot and the owner's other and adjoining property before and after the railroad is built, the difficulty of access, the risk of fire, the inconveniences of noise, smoke, or increased danger, &c. *Matter of Utica, &c. R. R. Co.*, 56 Barb. (N. Y.) 456; *In re Prospect Park & Coney Island R. R. Co.*, 13 Hun (N. Y.), 345. *In Black River, &c. R. R. Co. v. Barnard*, 9 Hun (N. Y.), 104, BOARDMAN, J. said: "The proper inquiry for the commissioners is, what is the fair market value of the whole property? and then, what will be the fair market value of the property not taken? The difference will be the true amount of compensation to be awarded." *Troy & Boston R. R. Co. v. Lee*, 13 Barb. (N. Y.) 169; *Matter of Furman St.*, 17 Wend. (N. Y.) 649; *Canandaigua, &c. R. R. Co. v. Payne*, 16 Barb. (N. Y.) 273; *Rochester & Syracuse R. R. Co. v. Bud-long*, 6 How. Pr. (N. Y.) 467; *Albany Northern R. R. Co. v. Lansing*, 16 Barb. (N. Y.) 68; *In re Poughkeepsie, &c. R. R. Co.*, 63 id. 151; *In re Utica, &c. R. R. Co.*, 56 id. 456; *Bloomfield, &c. Gas L. Co.*, 1 T. & C. (N. Y.) 549; *Quincy, &c. R. R. Co. v. Ridge*, 57 Mo. 599; *Drury v. Midland R. R. Co.*, 127 Mass. 571; *Edmonds v. Boston*, 108 id. 535; *Pres-brey v. Old Colony R. R. Co.*, 103 id. 1; *Parks v. Boston*, 15 Pick. (Mass.) 198; *Dickenson v. Fitchburg*, 11 Cush. (Mass.) 201; *Meacham v. Fitchburg R. R. Co.*, 4 id. 291; *Walker v. Old Colony R. R. Co.*, 103 Mass. 10; *Robb v. Maysville, &c. R. R. Co.*, 3 Met. (Ky.) 117; *Henderson, &c. R. R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 173; *Richmond, &c. T. Co. v.*

of the land *before* the taking, and what is its fair market value since the taking,¹ in view of the uses to which the land is or might be

Rogers, 1 Duv. (Ky.) 135; White Water Valley R. R. Co. v. McClure, 29 Ind. 536; Baltimore, &c. R. R. Co., 52 Ind. 229; Grand Rapids, &c. R. R. Co. v. Horn, 41 id. 479; Montmorency Grand Road Co. v. Stockton, 43 id. 328; Pacific R. R. Co. v. Crystal, 25 Mo. 544. Where the land was used as a stock ranch, and comprised a large tract, it was held that

the owner was entitled to recover for the injury to the whole property, and was not confined to the injury done to the quarter-section over which the road was built. In this case the railway ran diagonally through one quarter-section so as to cut off the water, timber, house, and corrals, from the main body of the land. Kansas City, Emporia, &c. R. R. Co. v. Merrill,

¹ Matter of Rensselaer v. Saratoga R. R. Co., 4 Paige Ch. (N. Y.) 553; Rood v. N. Y. & Erie R. R. Co., 18 Barb. (N. Y.) 80; Furniss v. Hudson River R. R. Co., 5 Sandf. (N. Y.) 551; Troy & Boston R. R. Co. v. Lee, 13 Barb. (N. Y.) 169; Veagh v. Auburn, &c. R. R. Co., 2 Barb. Ch. (N. Y.) 489; Raman v. Portland, 8 B. Mon. (Ky.) 282; Haynes v. Thomas, 7 Ind. 88; Tate v. Ohio, &c. R. R. Co., 7 id. 479; Bosman v. I & C. R. R. Co., 9 id. 467; Lackland v. No. Missouri R. R. Co., 31 Mo. 380; Cummins v. Cincinnati R. R. Co., 14 Ohio St. 424; Crawford v. Delaware, 7 Ohio St. 459; Brand v. Hammersmith, L. R. 2 Q. B. 225; Chamberlain v. West End Ry. Co., 2 B. & S. 605; Beckett v. Midland Ry. Co., L. R. 3 C. B. 83; Mahon v. Utica, &c. R. R. Co., 24 N. Y. 658; Drake v. Hudson River R. R. Co., 7 Barb. (N. Y.) 508; Fletcher v. Auburn, &c. R. R. Co., 25 Wend. (N. Y.) 462; Baltimore, &c. R. R. Co. v. Lansing, 52 Ind. 229; Buchanan v. C. C. & D. R. R. Co., 46 Iowa, 366; Parks v. Wisconsin Central R. R. Co., 33 Wis. 413; Simmons v. St. Paul, &c. R. R. Co., 18 Minn. 184; Tonica & Petersburg R. R. Co. v. Unsicker, 22 Ill. 221; White v. Charlotte, &c. R. R. Co., 6 Rich. (S. C.) 47. W. laid out a street, dedicated it to the public use as a highway, and laid out the adjoining premises into village lots. The N. railroad company, without making him compensation, proceeded to cut down the street nearly three feet and lay tracks thereon. In an equitable action by W. against the N., wherein, upon his death, his executors and devisees were made plaintiffs, it was held that, as one item of damages, the amount of the depreciation in value of the

lots by reason of the N.'s acts might properly be allowed; also, that the judgment might properly provide that if the plaintiffs tender to the N. a conveyance of the interest which W. had, at the time of his death, in the land occupied by the tracks, and release the N. from all claim for damages except said item, the N. should pay a further sum, or in default, be enjoined from so using the land. Henderson v. N. Y. Central R. R. Co., 78 N. Y. 423. An award of \$2,500 damages for the taking by a railroad company of a strip of land, about 1½ acres, cutting an old race-track into two nearly equal parts was held not to be excessive,—the whole land being worth, as a public race-course, about \$25,000; as a training track, \$7,000; and the strip, for agricultural purposes, about \$500. *Re* New York, Woodhaven, &c. R. R. Co., 21 Hun (N. Y.), 250. The court may lay down a rule as to the value of a life estate, as an independent estate entitled to damages. The true rule for estimating the damages as a whole is the difference between the value of the property before the making of the road, and its value after the road is made, as affected by it, and of this difference the life-tenant is entitled to the proportion of the whole which the value of the life estate bears to the whole difference. The net annual value of the premises, multiplied by the years of the life-tenant's expectancy of life, and reduced by calculation to a present cash value, is not an incorrect mode of determining the value that the life estate bears to the whole difference. Pittsburgh, Virginia, &c. R. R. Co. v. Bentley, 88 Penn. St. 178.

devoted, and the uses to which it is to be put under the taking, and the probable effect of such use upon the value of the land remaining?

25 Kan. 421; *Woodfolk v. Nashville*, &c. R. R. Co., 2 Swan (Tenn.), 422; *Rockford*, &c. R. R. Co. v. *McKinley*, 64 Ill. 338; *Wyandotte*, &c. R. R. Co. v. *Waldo*, 70 Mo. 629; *Raleigh*, &c. R. R. Co. v. *Wicker*, 74 N. C. 220; *Winona*, &c. R. R. Co. v. *Waldron*, 11 Minn. 515; *Lake Superior* &c. R. R. Co. v. *Greve*, 17 Minn. 322; *Chapman v. Oshkosh*, &c. R. R. Co., 33 Wis. 629; *Dearborn v. Boston*, &c. R. R. Co., 24 N. H. 179; *Carpenter v. Landaff*, 42 N. H. 218; *Mount Washington Road*, *in re*, 35 N. H. 134; *Virginia*, &c. R. R. Co. v. *Henry*, 8 Nev. 165; *Robbins v. Milwaukee*, &c. R. R. Co., 6 Wis. 636; *Selma*, &c. R. R. Co. v. *Redwine*, 51 Ga. 470; *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249; *Winona*, &c. R. R. Co. v. *Denman*, 10 Minn. 267; *San Francisco*, &c. R. R. Co. v. *Caldwell*, 31 Cal. 367; *Brooks v. Davenport*, &c. R. R. Co., 37 Iowa, 99; *Sater v. Burlington*, &c. Plank-Road Co., 1 Iowa, 386; *Harrison v. Iowa Midland R. R. Co.*, 36 Iowa, 323; *Fleming v. Chicago*, &c. R. R. Co., 34 id. 353; *Henry v. Dubuque*, &c. R. R. Co., 2 id. 288; *Harrison v. Young*, 9 Ga. 359; *Wilson v. Rockford*, &c. R. R. Co. 59 Ill. 273. A company obtained a legislative license to lay tracks in a public avenue; but it was adjudged invalid, because it did not provide for compensation to the owners of the fee. The company then instituted proceedings to condemn the lands required. It was held that the commissioners to appraise damages should regard the land in the avenue as still forming a part of the parcels to which it had belonged, but subject to the easement of a highway, and should award as damages the difference between the market value of the whole property from which the railroad was to be severed, before the taking, and its value after the taking, with the railroad upon the land taken. *Matter of Prospect Park*, &c. R. R. Co., 13 Hun (N. Y.), 345. In a proceeding to assess damages for taking land for a railroad, the owner may show that, before he knew the land would be sought therefor, he laid it out for sale as town-lots; and he may adduce his unrecorded diagram to show how the subdivi-

sion is affected by the appropriation. The jury may take such subdivision into account, though there has been no legal dedication as a town-plat. *Cincinnati*, &c. R. R. Co. v. *Longworth*, 30 Ohio St. 108. Plaintiffs owned lots abutting upon a navigable lake; and defendant, without their consent, constructed its railway within the water of the lake, but so near the front of their lots as to cut off their access to the body of the lake, leaving along such front a pool of stagnant water; and by reason thereof the lots were greatly depreciated. It was held that plaintiffs were entitled to recover damages for the injury. *Delaplaine v. Chicago*, &c. R. R. Co., 42 Wis. 214. The rule that the value of lands taken for railroad purposes is to be fixed as at the date of the appraisal, and not as at the date of the location of the line, extends to the appraisal of damages to contiguous lands of the same owner. And where the company has in fact built its road over land of another without authority, and proceedings are afterwards taken to condemn the land, the measure of appraisal is the value which the land taken would now have if the road had not been constructed upon it, together with the difference between the present value of the owner's contiguous land with the road, properly constructed, where it is, and what would have been its present value if the road had not been built. In determining the damages under the above rule, the condition and value of the land, as it was just before the road was constructed, may be considered. *Lyon v. Green Bay*, &c. R. R. Co., 42 Wis. 538. A provision of a railroad charter authorizing the jury, in assessing the damages for taking one's land for the road, to consider the benefits accruing to other lands of his along the line was held to be void, as special legislation. The enhancement must be confined to the tract upon which the right of eminent domain is enforced. *Paducah*, &c. R. R. Co. v. *Stovall*, 12 Heisk. (Tenn.) 1. And the incidental benefits to the owner which may be set off against his incidental damages, in estimating the damages to be paid him for the taking of his land for rail-

and the difference is the proper measure or compensation; but merely conjectural or speculative damages are not to be included. Thus, dam-

road purposes, do not include the general advance in the value of land resulting from the construction of the road. *Mississippi R. R. Co. v. McDonald*, 12 Heisk. (Tenn.) 54; *Cleveland, &c. R. R. Co. v. Ball*, 5 Ohio St. 568; *Powers v. Hazleton, &c. R. R. Co.*, 33 Ohio St. 429; *Hatch v. Cincinnati, &c. R. R. Co.*, 18 Ohio St. 92; *Schuylkill Nav. Co. v. Farr*, 4 W. & S. (Penn.) 362; *Schuylkill Nav. Co. v. Thornburn*, 7 S. & R. (Penn.) 411; *Missouri, &c. R. R. Co. v. Haines*, 10 Kan. 437; *Atchison, Topeka, & Santa Fe R. R. Co. v. Blackburn*, 10 id. 477; *Tide Water Canal Co. v. Archer*, 9 G. & J. (Md.) 479; *Searle v. Lackawanna, &c. R. R. Co.*, 33 Penn. St. 57; *Patten v. Northern Central R. R. Co.*, 33 id. 426; *Pittsburgh, &c. R. R. Co. v. Bentley*, 88 Penn. St. 128; *Hoffer v. Penn. Canal Co.*, 87 Penn. St. 221; *Watson v. Pittsburgh, &c. R. R. Co.*, 37 Penn. St. 469; *Hornstein v. Atlantic, &c. R. R. Co.*, 51 Penn. St. 87; *Penn. & N. Y. R. R. Co. v. Bunnell*, 81 Penn. St. 414; *East Brandywine, &c. R. R. Co. v. Ranack*, 78 Penn. St. 454; *East Penn. R. R. Co. v. Heister*, 40 Penn. St. 53; *Wilmington, &c. R. R. Co. v. Stauffer*, 60 Penn. St. 374; *Western Penn. R. R. Co. v. Hill*, 56 Penn. St. 460; *Brown v. Corey*, 43 Penn. St. 453; *East Penn. R. R. Co. v. Hottenstine*, 47 Penn. St. 28. In *Henderson, &c. R. R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 173, the court say: "The Constitution secures to the owner of land just compensation for his property, before he can be deprived of its value to him, considering its relative position to his other land, and the other circumstances which may diminish or enhance that value; and this is the only mode which can afford him a just compensation for its loss. To third persons the same quantity of land of equal quality, on one of the boundaries of the farm, might be of as much value as if it were situated in the middle of the farm; but at the same time its value, thus ascertained, might be a very inadequate compensation to the owner, if the land were taken out of the middle of the farm, instead of being taken on one of its boundary lines. The real value of the

land to the owner as it is actually situated, and not merely its value regarding it as a separate and independent piece of land, he has a right to demand, and nothing less can secure him a just compensation for his property." *Scott v. St. Paul & Chicago, R. R. Co.*, 21 Minn. 322; *Rockford, R. I., & St. Louis R. R. Co. v. McKinley*, 64 Ill. 338; *Petition of Mount Washington R. R. Co.*, 35 N. H. 134; *Keithsburg & Eastern R. R. Co. v. Henry*, 79 Ill. 290; *Watson v. Pittsburgh, &c. R. R. Co.*, 37 Penn. St. 469; *Baltimore, Pitts. & Chicago R. R. Co. v. Lansing*, 52 Ind. 229; *White Valley R. R. Co. v. McClure*, 29 Ind. 536; *Montmorency Gravel Road Co. v. Stockton*, 43 Md. 328. The owner is, however, entitled to recover only for those injuries *which are direct in their nature, and can in no case recover for those which he shares in common with the rest of the public.* *Presbrey v. Old Colony & Newport R. R. Co.*, 103 Mass. 1; *Keithsburg & Eastern R. R. Co. v. Henry*, 79 Ill. 290; and as it is presumed that the company will only do that which it is authorized to do he will be permitted to recover only where the road, if properly constructed and operated, will with reasonable certainty injure his property. *Fremont, Eckhorn, &c. R. R. Co. v. Whalen*, 5 Am. & Eng. R. R. Cas. 364. The right to recover damages is sometimes confined by statute to the loss resulting from the actual taking, without considering the use of the part appropriated. *Albany Northern Central R. R. Co. v. Lansing*, 16 Barb. (N. Y.) 68; *Brooks v. Davenport & St. Paul R. R. Co.*, 37 Iowa, 99. But this is not usually the case, the use to which the part appropriated is put being ordinarily taken into account, and the remarks of HARRIS, J., in *Albany Northern R. R. Co. v. Lansing*, *ante*, that the question "whether the land taken was to be used for a railroad or a garden was a question, so far as compensation is concerned, with which the commissioners had nothing to do," do not express the true rule as now held, and the use to which the land taken is to be devoted, is of the highest consequence in determining what is a just compensation for the taking.

ages for being deprived of the advantage of keeping off others from the neighborhood, and thus saving the owner from the risk and annoyance of their proximity, or by reason of the inconvenience and delay occasioned by having to convey his manufactured articles across the railroad, and of the obstruction by trains passing along it,¹ are not to be considered; nor is he entitled to be compensated for injury occasioned to his lands by persons in the trains *overlooking the grounds*, thus rendering them less comfortable and secluded for the walks of the family and visitors; nor can the party claim compensation for vibration of the ground caused by the use of the road, the statute only extending to damages caused by the *construction* of the works.² In England, where the statute provides for damages to lands injuriously affected, the owner of a house none of whose lands have been taken for the purposes of the railway, can recover compensation for injury to the house caused by vibration, smoke,

Bangor, &c. R. R. Co. v. McComb, 60 Me. 290; Pacific R. R. Co. v. Chrystal, 25 Mo. 544; Atchison, &c. R. R. Co. v. Blackshire, 10 Kan. 477; Newby v. Platte Co., 25 Mo. 258; Buchanan v. C. C. & D. R. R. Co., 46 Iowa, 366; Cleveland, &c. R. R. Co. v. Ball, 5 Ohio St. 568. Sometimes the mode in which the line of the railroad cuts the tract does peculiar damage, as for example, where it cuts obliquely instead of at right angles, and this is an element of damage. St. Joseph & Denver City R. R. Co. v. Orr, 8 Kan. 419. In such a case the owner is entitled to special damage for the special injury. And where a party owned a whole quarter-section of land, one forty of which only was traversed by the railroad, it was held that he was entitled to recover damages for the effect of the appropriation on the whole quarter-section, and not on the one forty merely. Bigelow & West Wisconsin R. R. Co., 27 Wis. 478. In estimating the injury done to the tract *the jury are not confined to a consideration of the use to which it is then applied by the owner. They may consider every circumstance, present or future, which affects its present value.* Montmorency Gravel Road Co. v. Stockton, 43 Ind. 328; Mississippi River Bridge Co. v. King, 58 Mo. 491, including the character, situation, present and probable use of the tract. Bangor and

Piscataquis R. R. Co. v. McComb, 60 Me. 290. If it is peculiarly fitted for building purposes, a plan with prospective streets laid down thereon, showing the peculiar damage done by the railroad, is admissible in evidence. Cincinnati & Springfield R. R. Co. v. Longworth, 30 Ohio St. 108. The proper method of computing the damage is to estimate the difference in market value before and after the taking. Bangor & Piscataquis R. R. Co. v. McComb, 60 Me. 290; Edmands v. City of Boston, 108 Mass. 535; Somerville & Eastern R. R. Co. v. Doughty, 22 N. J. L. 495; Watson v. Pittsburgh & Connellsville R. R. Co., 37 Penn. St. 469; *In re Utica*, Chenango, &c. R. R. Co. 56 Barb. (N. Y.) 456; Charleston, &c. R. R. Co. v. Blake, 12 Rich. (S. C.) 634; Greenville, &c. R. R. Co. v. Partlow, 5 id. 528; Galena, &c. R. R. Co. v. Birbeck, 70 Ill. 208; Chicago, &c. R. R. Co. v. Hall, 90 Ill. 42; Milwaukee, &c. R. R. Co. v. Eble, 4 Chand. (Wis.) 72; Snyder v. Western Union R. R. Co., 25 Wis. 60; Driver v. Western Union R. R. Co., 32 Wis. 569; Bigelow v. West Wisconsin R. R. Co., 27 Wis. 478.

¹ Patten v. Northern Central R. R. Co., 33 Penn. St. 426.

² Regina v. Southeastern Ry. Co., 29 L. T. 124; Penny, *in re*, 7 El. & Bl. 660.

and noise, in running locomotives with trains in the ordinary manner after the construction of the railway.¹ But he cannot claim damage in respect of lands being injuriously affected by reason of their track crossing a public highway near his dwelling upon a level, the highway being the principal approach to his grounds.²

The owner of a tavern, none of whose land is taken by the railway, is entitled to compensation for the diversion of the highway from his premises, and for prospective profits from unfinished houses.³ Neither sentiment nor fancy is to be considered, and the actual value of the land, independent of any estimate placed upon it by the owner, or his attachment thereto, or the associations connected therewith, is the true measure of compensation.⁴ The circumstance that the owner does not wish to sell is not to be considered,⁵ but the circumstance that the land taken affords the only route by which the company can make a connection with other railways terminating at that point, is proper to be considered.⁶ The diversion of trade from one locality to another caused by the erection of any public improvement is of a speculative and consequential character, and not proper to be considered as an element of damage;⁷ nor can anything be recovered for an injury to the goodwill of a business.⁸

In Pennsylvania, where the charter of a railroad company provided that the viewers should award compensation to those whose land was taken "for the damages done or likely to be done, or that have been or may be sustained," it was held that such remote and contingent future damage as accidental fire from locomotives was not intended to be estimated or paid for. The phrase "damages likely to be done" provides for any damage, direct or consequential, but does not imply that which is speculative and imaginary. Railroad companies are liable at common law for the damages done by

¹ *Brand v. Hammersmith & City Ry. Co.*, L. R. 2 Q. B. 223.

² *Caledonian Ry. Co. v. Ogilvy*, 29 Eng. L. & Eq. 22.

³ *Chamberlain v. West End Ry. Co.* &c., 11 Week. Rep. 472.

⁴ *Tufts v. Charlestown*, 4 Gray (Mass.), 537; *Somerville, &c. R. R. Co. v. Doughty*, 22 N. J. L. 495; *Giesy v. Cincinnati, &c. R. R. Co.*, 4 Ohio St. 308; *Elizabeth, &c. R. R. Co. v. Helm*, 8 Bush (Ky.), 681; *Searle v. Lackawanna, &c. R. R. Co.*, 33 Penn. St. 57.

⁵ *Henderson, &c. R. R. Co. v. Dickenson*, 17 B. Mon. (Ky.) 173.

⁶ *Brisbane v. St. Paul, &c. R. R. Co.*, 23 Minn. 114.

⁷ *Selma R. R. Co. v. Camp*, 45 Ga. 186; *Thompson v. Androscoggin Improvement Co.*, 54 N. H. 545; *Boston, &c. R. R. Co. v. Old Colony R. R. Co.*, 12 Cush. (Mass.) 605; *Mount Washington Road*, 35 N. H. 134.

⁸ *Edmands v. Boston*, 108 Mass. 535.

fire occasioned *by the negligent management of their locomotive engines*; and for the risk of such damage, no compensation can be allowed at the taking of the land for the construction of the road.¹ But according to the weight of authority, the increased danger of fire, from locomotives,² and the increased cost of insurance, and the decreased rental value of the remaining premises resulting from the proper and prudent operation of the road, are proper elements of damages,³ and are not speculative or remote, within the rule excluding that class of damages from estimation, as the increase in the cost of insurance diminishes the value of the property to the extent of such increase;⁴ and it has been held that the evidence of the secretary of an insurance company, that his company had declined the risk on account of the increased danger from fire, is competent.⁵

The damages are to be assessed in view of the uses to which the land may be put, and not necessarily in view of its present use, or productive value to the owner.⁶ The question is, what is its value

¹ *Sunbury & Erie R. R. Co. v. Hummell*, 27 Penn. St. 99; *Lehigh Valley R. R. Co. v. Lazarus*, 28 Penn. St. 203. But see *Wilmington, &c. R. R. Co. v. Stauffer*, 60 Penn. St. 374, where such damages are held proper elements to be considered.

² *Swinney v. Fort Wayne, &c. R. R. Co.*, 59 Ind. 205; *Curtis v. St. Paul, &c. R. R. Co.*, 20 Minn. 28; *Colville v. St. Paul, &c. R. R. Co.*, 19 Minn. 283; *Bloomfield, &c. Gas L. Co. v. Calkins*, 1 T. & C. (N. Y.) 549; *Philadelphia, &c. R. R. Co. v. Yeiser*, 8 Penn. St. 366; *Snyder v. Western Union R. R. Co.*, 25 Wis. 60; *Somerville, &c. R. R. Co. v. Doughty*, 22 N. J. L. 495; *Oregon, &c. R. R. Co. v. Barlow*, 3 Oregon, 311; *Lafayette, &c. R. R. Co. v. Murdock*, 68 Ind. 137; *St. Louis, &c. R. R. Co. v. Teters*, 68 Ill. 144; *Jones v. Chicago, &c. R. R. Co.*, 68 Ill. 144; *Small v. Chicago, &c. R. R. Co.*, 50 Iowa, 338; *Proprietors of Locks, &c. v. Nashua & Lowell R. R. Co.*, 10 Cush. (Mass.) 385.

³ *Atlantic & Great Western R. R. Co. v. Robbins*, 35 Ohio St. 531. See *Patten v. Northern Central R. R. Co.*, 33 Penn. St. 426, where it was held that the probable increased cost of insurance was too remote to be considered as an element of damage; and see *Wilmington, &c. R. R. Co. v. Stauffer*, 60 Penn. St. 374, where increase in the cost of insurance is held to be a proper element of damages.

⁴ *Bangor, &c. R. R. Co. v. McComb*, 60 Me. 290; *Keithsburgh R. R. Co. v. Henry*, 79 Ill. 290; *Pierce v. Worcester, &c. R. R. Co.*, 105 Mass. 199; *Somerville, &c. R. R. Co. v. Doughty*, 22 N. J. L. 495; *Adden v. White Mountain R. R. Co.*, 55 N. H. 413; *Matter of Utica, &c. R. R. Co.*, 56 Barb. (N. Y.) 456; *Wilmington, &c. R. R. Co. v. Stauffer, ante*; *Curtis v. St. Paul, &c. R. R. Co.*, 20 Minn. 28; *Oregon R. R. Co. v. Barlow*, 3 Oregon, 311; *In re Slackport, &c. Ry. Co.*, 83 L. J. Q. B. 251. But see *Rademacher v. Milwaukee R. R. Co.*, 41 Iowa, 297; *Fleming v. Chicago, &c. R. R. Co.*, 34 Iowa, 353; *Lehigh Valley R. R. Co. v. Lazarus*, 28 Penn. St. 203, where increase in rates of insurance is held not to be an element of damage in such cases.

⁵ *Webber v. Western R. R. Co.*, 2 Met. (Mass.) 147.

⁶ *Haslam v. Galena, &c. R. R. Co.*, 64 Ill. 353; *Burt v. Wigglesworth*, 117 Mass. 302; *Dorlan v. East Brandywine, &c. R. R. Co.*, 46 Penn. St. 520; *Mississippi River Bridge v. Ring*, 58 Mo. 491; *Regina v. Brown*, 36 L. J. Q. B. 322. Evidence of an offer made for land is inadmissible to prove its value. Such testimony is easily manufactured. It is warranted neither on principle nor on authority, and is too dangerous to be tolerated. *St. Joseph, &c. R. R. Co. v. Orr*, 8 Kan. 419. In estimat-

for the uses to which men of ordinary prudence and business sagacity would devote it, if it was their own?¹ But no prospective value can be considered, — as, what the land would be worth if buildings of a certain class were erected upon it;² or in the case of timber land, what its value would be if cleared up and converted into tillable land.³ If a surplus water-power is taken, it should be valued at its

ing location damages, the sheriff's jury may consider as elements thereof the value of the land taken; the disfigurement of the remainder of the lot by the strip taken, and the use made of it; the character, situation, present and probable use of the remainder of the lot; the distance of the owner's buildings from the location; and all inconveniences from the noise of whistles and bells, rattling of trains, jarring of the ground, and from smoke, so far as arising from the legal use of the strip taken, excluding all common and indirect damages. *Bangor, &c. R. R. Co. v. McComb*, 60 Me. 290. And consideration should be had of the depreciation of dependent or adjoining property not condemned, as well as the value of property actually taken. *Matter of Poughkeepsie, &c. R. R. Co.*, 63 Barb. (N. Y.) 151. And the alleged loss of the beneficial enjoyment of a spring thereon is a proper subject for the consideration of the jury. *Peoria, &c. R. R. Co. v. Bryant*, 57 Ill. 473. All injuries which are appreciable, and result to the owner of land from the construction of a railroad thereover, are legitimate subjects in the estimation of damages, in a proceeding for condemning the right of way. Where, by reason of embankments thrown up for the road, ditching of the adjacent land becomes necessary, the expense thereof is a proper element to be considered in assessing the damages; but cattle-guards under the track are not such an element, because they are an obstruction to the free use of the right of way. The mode of the assessment is immaterial, so that the damages are assessed fairly and truly. *St. Louis, Vandalia, & T. H. R. R. Co. v. Mollet*, 59 Ill. 235.

¹ *Dwight v. Hampden*, 11 Cush. (Mass.) 201; *Shenango, &c. R. R. Co. v. Braham*, 79 Penn. St. 447. The true test as to the damages to be paid for land taken is its market value, but in estimating the dam-

ages reference may be had, not merely to the uses to which the land is actually applied, but its capabilities, so far as they add to its market value, may also be taken into consideration. If the land has a mine under its surface, that fact may be considered if the mine adds to the market value of the land, even though said mine has never been used. So of a water-power, even though it has never been utilized. *Haslam v. Galena & Southern Wisconsin R. R. Co.*, 64 Ill. 353. The damage done to a mill shoal, by taking land for railway uses, should be established by showing the actual value at the time of the taking, and then showing how much it is diminished by the location of the railway. *Selma, &c. R. Co. v. Keith*, 53 Ga. 178.

² *Burt v. Wigglesworth*, 117 Mass. 302.

³ *Rider v. Striker*, 63 N. Y. 136. In a Massachusetts case it appeared that there was upon the petitioner's remaining land chestnut timber suitable for ties. The respondent offered evidence that there would be a greater demand for such ties in the vicinity by reason of the construction of the railway; and also offered evidence "of a convenient place of delivery at a new depot of said railroad." There was evidence of a station of another line more accessible from the petitioner's woodland by the distance of one third of a mile. The evidence offered was rejected. It was held that the respondent had no ground of exception. *Childs v. New Haven & Northampton Co.*, 133 Mass. 253. Where a town-plat, not executed pursuant to the statute, is used to show the intention to dedicate to public use certain lands appearing on it, and other evidence of acts, declarations, and circumstances — some tending to prove, and others to disprove, the existence of such an intention — is given, it is not for the court to determine the force and effect of the plat, but the whole question should

market value in its then condition.¹ A farm should ordinarily be valued as a farm; but instances might occur where from its proximity to a large and growing town or city, it might be proper to place a value upon the land for the purposes of building-lots, and it may be shown that the land is in demand for such purposes. So it

be left to the jury. *Downer v. St. Paul & Chicago R. R. Co.*, 23 Minn. 271. A witness who had testified fully as to the actual value of a block of ground both before and after the taking, was asked what a particular front of the block was worth before the road was constructed. It was held that there was no error in excluding the question. *Diedrich v. Northwestern Union R. R. Co.*, 47 Wis. 662. So where the question on trial was the market value of two lots with a dwelling-house and other improvements thereon, in the city of Columbus, on March 30, 1880, it was held that testimony that on April 10, 1877, the said lots were bought by D., at administrator's sale, for seventy-five cents each, was erroneously admitted. *Dietrichs v. Lincoln & Northwestern R. R. Co.*, 12 Neb. 225. Upon an issue as to the value of real estate, evidence is not admissible to prove what other property in the vicinity has been offered at. *Lehmick v. St. Paul, Stillwater, & Taylor's Falls R. R. Co.*, 19 Minn. 464. A witness was properly allowed to be asked what another portion of the property was valuable for, and to answer that it would be valuable for building and residence purposes. *Colvill v. St. Paul & Chicago R. R. Co.*, 19 Minn. 283. But proof of the value of the land to the railway company is not admissible. *Selma, &c. R. R. Co. v. Keith*, 53 Ga. 178. On a trial before a jury on appeal, there is no inflexible rule which limits the period over which inquiry may be extended as to the market value of the lands taken. How long anterior or subsequent to the first appraisal the investigation may be carried must be left in a great measure to the sound discretion of the court. *Montclair R. R. Co. v. Benson*, 36 N. J. L. 557. The respondent being called as a witness in his own behalf was asked: "What was the farm worth at the time of the commencement of these proceedings in 1870, without the railroad being upon the farm, and what was its value at that time with the railroad

upon the farm?" It was held proper. *St. Paul & Sioux City R. R. Co. v. Murphy*, 19 Minn. 500; *Colvill v. St. Paul, &c. R. R. Co.*, 19 Minn. 283. Where, on appeal, the jury, under charge of an officer, examined the premises, it was held to be error to instruct the jury that the testimony bearing upon the subject in controversy, and such reasonable deductions as were legitimately to be drawn from it, in connection with such facts as presented themselves in viewing the premises, constituted the only proper basis on which to rest their verdict. It is impossible to know what facts might present themselves to the jury upon the view of the premises. *Pittsburg, Ft. Wayne, &c. R. R. Co. v. Swinney*, 59 Ind. 100. In a Massachusetts case, upon the assessment of damages it appeared that the estate out of which the land was taken was a farm, and that the land taken was on the bank of a river. The bill of exceptions stated that a farmer who had lived many years in the vicinity, and had known of sales of land in the neighborhood, and was allowed without objection to testify as to the value of the land taken, and of the inconvenience resulting to a farmer from being deprived of access to the river, was asked what, in his opinion, was the damage to the remainder of the farm by the loss of the river bank, which was excluded; that the petitioner also claimed damages by reason of being excluded from the river bank for the purposes of fishing, and from a fishing-ground, but that it did not appear that the witness had any special or superior knowledge on the subject inquired about; and that other witnesses for the petitioner testified to the value of the river bank as affording facilities for fishing. It was held that the bill of exceptions disclosed no error in the exclusion of the testimony. *Boston & Maine R. R. Co. v. Montgomery*, 119 Mass. 114.

¹ *Dorlan v. East Brandywine R. R. Co.*, 46 Penn. St. 320; *Selma, &c. R. R. Co. v. Keith*, 53 Ga. 178.

may be shown that the land is in demand for the purpose of erecting shops.¹ If the land has been sought for certain specific purposes within a recent period, or if within a short time the owner has had a *bond fide* offer for the land, these might undoubtedly be shown as bearing upon the question of value. So it may be shown that there are quarries upon, or minerals in the land, which give it a special value.² If the land is adapted to the building of wharves, or any special purpose which increases its value, these facts may be shown; but unless there is a fair probability that they would be required for that purpose, such evidence would have but little weight upon the question of actual value. A farm situated at a considerable distance from a town or city, where there is no reasonable likelihood that it would for a great many years, if ever, be sought for building purposes, would derive no increased value from the circumstance that it had been divided into building-lots. In order to derive any added value from such a circumstance, it must not only appear that the land is desirable for that purpose, but also that there is a reasonable probability that it will soon be sought for such purposes. Neither is it competent for the company to show, to reduce the damages, what its value would be if it was devoted to a certain purpose,—as, what a factory would be worth if converted into a tenement house,³ or what premises would be worth if devoted to the pork-packing business,⁴ or otherwise improved.⁵ If the use of the premises is restricted to certain purposes by covenants running with the land, of course its value for such purposes only can be considered.⁶

Not only the abstract value of the land taken is to be estimated, but compensation should also be given for the damages arising from the severance of the part taken from the remainder of the land, and for the loss of value caused by the appropriation for the special use for which it is taken,⁷ and for the difficulty and inconvenience

¹ *Whitney v. Boston*, 98 Mass. 312.

² *Haslam v. Galena, &c. R. R. Co.*, 64 Ill. 353.

³ *New Britain v. Sargent*, 42 Conn. 137.

⁴ *Selma, &c. R. R. Co. v. Keith*, 53 Ga. 178.

⁵ *Fleming v. Chicago, &c. R. R. Co.*, 34 Iowa, 353.

⁶ *Matter of Albany St.* 11 Wend. (N. Y.) 149; *First Parish v. Middlesex*, 7 Gray (Mass.), 106.

⁷ *Cleveland & Pittsburgh R. R. Co. v. Ball*, 5 Ohio St. 568. Statutory provisions

for the assessment of damages occasioned to a land-owner by the taking of land for a railroad extend to the injury occasioned by the interruption of the proprietor's passage from one part of his land to another, as well as to any other injury which may be caused by the construction and use of the road; and when such damages as may be anticipated from its future construction, if it has not been made, are assessed, they are made up of the whole injury done or expected to be done, including not only the loss of the use of the land produced by

arising in getting to and from the several parts, the expense of additional fences and all other injuries not of a remote or speculative

the road, but the probable expense of fences and the diminution of the value of the land by a separation from each other of different parts. *Mason v. Kennebec & Portland R. R. Co.*, 31 Me. 215. Where the words of a railway company's act are capable of two interpretations, but the general intent of the legislature is complete indemnification to the party whose land is taken by the company, the court will incline to that construction of the words which will make them consistent with the general intent. *Eton College, ex parte*, 15 Jur. 45. The jury are to take into consideration the injury to the lands not taken, to the owner's dwelling-house on the estate, the subjection of his family to danger, his buildings to risk of fire, the inconvenience caused by embankments and excavations, and deterioration of his lands for agricultural purposes or for building-lots. *Somerville & Easton R. R. Co. v. Doughty*, 22 N. J. L. 495. But they cannot take into account damages to any other land than that which forms a part of the tract taken. *St. Louis, &c. R. R. Co. v. Brown*, 58 Ill. 61; *Bangor, &c. R. R. Co. v. McComb*, 60 Me. 290; *New York Central, &c. R. R. Co.*, 6 Hun (N. Y.), 144. The amount paid as compensation for land taken and for injury to the remaining estate, in pursuance of an award, covers all damage, known or contingent, by the construction of the railway on the lands purchased, and all other damage from the construction of the railway at other places, which is apparent and capable of being ascertained and estimated when the compensation is awarded; but it does not include any contingent and possible damage which may arise afterwards by the works of the company at other places, which cannot be foreseen by the arbitrator. *Lawrence v. Northern Ry. Co.*, 16 Q. B. 643; *Hatch v. Vt. Central R. R. Co.*, 25 Vt. 49; *Clark v. Birmingham, &c. Bridge Co.*, 41 Penn. St. 147; *Stetson v. Chicago, &c. R. R. Co.*, 75 Ill. 74; *Struthers v. Dunkirk, &c. R. R. Co.*, 87 Penn. St. 82; *Bradley v. New York & New Haven R. R. Co.*, 21 Conn. 294; *Thompson v. Androscoggin R. R. Co.*, 54 N. H. 545; 58 id. 108; *Gould v. Hudson River R. R. Co.*, 6 N. Y.

522; *Whittier v. Portland, &c. R. R. Co.*, 38 Me. 26; *Bellinger v. N. Y. Central R. R. Co.*, 23 N. Y. 42; *Carter v. Albany*, 43 N. Y. 399. Where the waters on certain lowlands were flowed back upon the plaintiff's land, by reason of insufficient openings in a railway constructed across such lowlands, it was held that the company were liable to make good the damages sustained by plaintiff, although no statute required them to make the openings, and they could not be compelled to do so by writ of *mandamus*. *Lawrence v. Great Northern Ry. Co.*, 16 Q. B. 643. In estimating the "loss or damage" occasioned by a railroad company whose charter requires compensation to be paid for damages and benefits, in taking the right of way, the jury may estimate the value of the land taken by the company; the deterioration of the parcels isolated; the alteration of arrangement required about the homestead; the loss of time and expenditures caused by any increase of care or distance which had been occasioned; and the injury to the value of the place as a stand for a public house, a mill, store, factory, or any purpose to which the land is devoted at the time of its taking. If the land is used for the purposes of a dwelling, its deterioration in value for that purpose, by reason of the dust, noise, and vibration from the trains, the smoke and cinders from the engine, is to be considered in estimating the damages. *White v. Charlotte & South Carolina R. R. Co.*, 6 Rich. (S. C.) L. 47. Where the arbitrators appointed to assess damages for land taken by a railroad are required to take into consideration the advantages to be derived by the owner, such damages must be assessed as are the direct and immediate consequence of the road to the whole tract through which it passes. The exclusive appropriation of a part, the inconvenience arising from a division of the property, or from increased difficulty of access, and the cost of additional necessary fencing, are alike the direct and immediate result of such construction. *Watson v. Pittsburgh & Connellsville R. R. Co.*, 37 Penn. St. 469. The market value of the land taken is the proper standard

character.¹ Not only is damage for the severance to be given, but also, in a case where justice demands it, the land-owner is entitled to

to be adopted. In addition to this, the jury may allow for the disadvantages to the land from the manner in which it may be cut by the road as projected or constructed. This is always done, unless the advantages to the whole property outweigh it; in such case the amount of the preponderating advantages will stand against the value of the property taken, or other specific injury done. *East Pennsylvania R. R. Co. v. Hottensine*, 47 Penn. St. 28. Evidence is also admissible, in such a proceeding, as to what the property would have sold for before and after the road was made and in successful operation; and such difference in value is a measure of damages. On the trial of an appeal from the award of damages by appraisers for land taken by a railroad company in the construction of their road, evidence of the price paid or amount received for land in the neighborhood, in particular instances, is inadmissible; the only proper test is the opinion of witnesses as to the value of the land taken, in view of its location and productiveness, or other uses, not speculative, or its market value, or the general selling price of land in the neighborhood. *East Pennsylvania R. R. Co. v. Hiester*, 40 Penn. St. 53. But see *Shattuck v. Stoneham Branch R. R. Co.*, 6 Allen (Mass.), 115. The opinions of witnesses, in regard to the extent of damages which a land-owner will sustain by the appropriation of a part of his land for the construction of a railway over it, are not admissible; but they may express their opinion of the value of the land. *Atlantic & Great Western R. R. Co. v. Campbell*, 4 Ohio St. 568; *Cleveland & Pittsburgh R. R. Co. v. Ball*, 6 Ohio St. 383. Where the law casts the duty of maintaining fences, crossings, &c., upon the adjacent land-owner, the expense of doing so is an important consideration in estimating damages for the land taken; and this expense should be borne by the company, in addition to paying the value of the land, for otherwise the land is taken without an equivalent. *Quimby v. Vermont Central R. R. Co.*, 23 Vt. 387; *Kyle v. Auburn & Rochester R. R. Co.*, 2 Barb. Ch. (N. Y.) 489; *Matter of Rensselaer, &c.*

R. R. Co., 4 Paige (N. Y.), 553; *Milwaukee, &c. R. R. Co. v. Eble*, 4 Chand. (Wis.) 72; *Evansville R. R. Co. v. Stringer*, 10 Ind. 551; *Evansville, &c. R. R. Co. v. Cochran*, 10 Ind. 560; *Evansville, &c. R. R. Co. v. Fitzpatrick*, 10 Ind. 210; *Plank-Road Co. v. Ramage*, 20 Penn. St. 95; *Sacramento Valley R. R. Co. v. Moffatt*, 6 Cal. 74. When suitable crossings over its road between the different parts of an owner's land are made by the company, the jury, in assessing land damages, should not allow the expense of making crossings to the land-owner. *March v. Portsmouth & Concord R. R. Co.*, 19 N. H. 372; *Philadelphia, &c. R. R. Co. v. Trimble*, 4 Whart. (Penn.) 47. A jury, in assessing damages, may allow the actual damages incident to taking the road, arising from inconvenience in crossing the railroad, and interference with crossings already established, which the land-owner has sustained, together with damages for the failure or neglect of the company to build the crossings as required by law, but not for making the crossings themselves,—the latter being a duty of the corporation. *East Pennsylvania R. R. Co. v. Heister*, 40 Penn. St. 53.

¹ *St. Louis, Arkansas, &c. R. R. Co. v. Anderson*, 36 Ark. 167; *Galena, &c. R. R. Co. v. Birbeck*, 70 Ill. 208; *Texas & Pacific R. R. Co. v. Durrett*, 57 Tex. 48. If the effect is to make it more inconvenient and expensive to manage the remaining portion of the land, that is an element of damage to be considered, and witnesses acquainted with the land and the proper modes of carrying it on may give their opinion as to the increased expense of carrying on the farm in consequence of the building of the road. *Tucker v. Mass. Central R. R. Co.*, 118 Mass. 546; *Jones v. Chicago, &c. R. R. Co.*, 68 Ill. 380; *Peoria, Atlanta, &c. R. R. Co. v. Sawyer*, 71 Ill. 361; *Page v. Chicago, &c. R. R. Co.*, 70 Ill. 324; *Eberhart v. Chicago, &c. R. R. Co.*, 70 Ill. 347; *Sheldon v. Minneapolis & St. Louis R. R. Co.*, 20 Minn. 318; *St. Paul & Sioux City R. R. Co. v. Murphy*, 19 Minn. 500; *Kansas City, &c. Co. v. Merrill*, 25 Kan. 421; *Parks v. Wisconsin Central R. R. Co.*, 33 Wis. 413; *Hartshorn v. Burlington, Cedar*

have damages allowed him for destroying the symmetry of his fields or lots; and the amount awarded for this should be the deterioration

Rapids, &c. R. R. Co., 52 Iowa, 613; Atchison, &c. R. R. Co. v. Gough, 29 Kan. 94; Keithsburg, &c. R. R. Co. v. Henry, 79 Ill. 290; Wilmes v. Minneapolis, &c. R. R. Co., 29 Minn. 242; Michigan Air Line R. R. Co. v. Barnes, 44 Mich. 222; Miss. Riv. Bridge Co. v. Ring, 58 Mo. 491; Union R. R. Co. v. Moore, 80 Ind. 458. The expense of building fences should be given when the statute makes no provision for their being built by the railroad company. Milwaukee, &c. R. R. Co. v. Eble, 4 Chand. (Wis.) 72; Winona, &c. R. R. Co. v. Denman, 10 Minn. 257. Damages for cutting off access to streets, are to be considered. Little Miami, &c. R. R. Co. v. Naylor, 2 Ohio St. 235. If a railroad corporation takes by the right of eminent domain a part of a lot of flats, and thereby cuts off access from tide-water to the remaining portion, the value of such access is an element proper to be considered by the jury in estimating the injury to the land-owner; but not the possibility that the corporation might be willing to allow spur tracks to be built on the remaining flats for the purpose of filling the same, or for purposes of business. Drury v. Midland R. R. Co., 127 Mass. 571. In a proceeding by a railroad company for the condemnation of land for a right of way across the defendant's farm, it was held that the fact that the railroad separates the wood, water, and timber from the balance of the farm, the inconvenience to the owner from the perpetual use of the track for moving trains, danger to stock kept on the farm, etc., might be considered, as elements of damage, as well as the actual increase or decrease in the market value of the farm; and where a railroad company has located and is operating its road over land, without condemnation thereof or otherwise acquiring the right of way, a purchaser at a judicial sale of land in which that part covered by the right of way is included, is, in subsequent condemnation proceedings, entitled to compensation for the land taken for the right of way, and damages for injury to the remainder. He is also entitled to the benefit of any increase in the value of the land

between the time of the tortious taking and the time of the condemnation. Chicago & Iowa R. R. Co. v. Hopkins, 90 Ill. 316. Where a railroad company, in constructing a second track on its right of way over the plaintiff's farm, obstructed the prior drainage under the first track, so as to dam up and flow the water back on the farm, thereby rendering a considerable portion of it useless for cultivation, it was held that it was proper to instruct the jury that, in estimating the damages, they might consider the value of the land at the time the injury occurred, the decrease in value, and the damage to crops in consequence of the overflow, or the increased expense occasioned thereby in harvesting the same; but that it was erroneous to further instruct the jury that they might allow damages for the inconvenience of having one part of the farm separated from the other by the overflow, the damages occasioned by such overflow to the portion not overflowed, and the necessary expense, if any, which the plaintiff sustained in the construction of necessary roads and bridges in consequence of such overflow, and upon the whole case that they were to give the plaintiff such damages as they believed, from the evidence, he had sustained. Chicago, Rock Island, &c. R. R. Co. v. Carey, 90 Ill. 514. The fact that a railway company appropriated a right of way over a fill or embankment, between the mainland and a crib which the plaintiff was not authorized to erect, would not deprive him of the right to damages for the right of way so appropriated. In such case, the damages to the entire property used in the plaintiff's business of sawing, planing, &c., may be considered, although a street runs through the same. Renwick v. D. & N. W. R. R. Co., 49 Iowa, 664. In estimating the damages to land by the locating of a railroad through it, the plaintiff may show the depreciation in value of his whole farm, without regard to the governmental subdivisions into which it is subdivided; he may also show all the inconveniences directly caused by the road, which tend to show a depreciation in the market value of the land. Hartshorn v.

in value which the change in the shape of the farm or lots produces.¹ The manner in which the land is cut, and all the surrounding circumstances should be considered, and evidence is admissible to show how the road affected the whole lot of which only a small portion is taken,² and such damages should be considered, although largely conjectural.³ Where a tract of five acres was cut off from the body of the plaintiff's farm, it was held that the value of the five acres might be considered, and that it was the duty of the jury to consider the value of the component parts;⁴ and the fact that when the road is built, suitable provision is made for the owner to cross and recross the location from one part to the other, and for the drainage of

B., C. R., & N. R. Co., 52 Iowa, 613. A street-railway track may be lawfully authorized in a city street without compensating adjacent owners, but a steam-railroad cannot, and where one is so built without making compensation, an adjoining owner, who owns the soil of such street, may recover damages for the consequent injury to the freehold; one not owning such soil can recover only for such damages as he can prove arising from such misconduct of the company as constitutes a nuisance. *Grand Rapids & Ind. R. R. Co. v. Heisel*, 38 Mich. 62. In assessing damages for railroad purposes, work already done by the company upon the land cannot be regarded as part of the realty, for the purpose of increasing the damages. *Morgan's Appeal*, 39 Mich. 675. Where certain land on the Potomac River, leased for a fishery for a term of years, was taken by a railroad company, the lessee's buildings pulled down, and his fish-berth obstructed, it was held that the assessment and payment of damages into court by the company upon the condemnation proceeding did not preclude him from recovering damages for the injury. *Alexandria & Fredericksburg R. R. Co. v. Faunce*, 31 Gratt. (Va.) 761. So it is liable for damages to crops resulting from an embankment causing an overflow. *Houston & Texas Central R. R. Co. v. Knapp*, 51 Tex. 592. A railroad company had the right to take land for a right of way, not exceeding 100 feet in width; it entered certain land, without instituting any proceedings, and built its road. In an action of trespass brought by the owner of

the land, it was held that if the jury found that the company had used the land as far as 50 feet from the centre of its track at any point on one side, they might regard it as an election to take the 50 feet on both sides for the entire length, and give damages accordingly. *Duck River Valley, &c. R. R. Co. v. Cochrane*, 3 Lea (Tenn.), 478. Where a railroad company so lays its track as to permanently obstruct access to an adjoining lot, the owner thereof may recover damages for the permanent injury to his lot. *Central Branch Union Pacific R. R. Co. v. Twine*, 23 Kan. 585. Where a railroad company occupies a public highway for its track, without appropriating or otherwise acquiring the right to do so, an owner of abutting lands, having the fee in the lands covered by the highway, may proceed, under 69 Ohio L. 95, § 21, to compel the company to appropriate the right of way for its road. *Lawrence R. R. Co. v. Williams*, 35 Ohio St. 168. In an action for an injury to abutting property by reason of the construction of a railroad on a public street or highway, the plaintiff's title may be established by proof of adverse possession. *Lawrence R. R. Co. v. Cobb*, 35 Ohio St. 94.

¹ *Plank-Road Co. v. Ramage*, 20 Penn. St. 95.

² *Dreher v. Iowa, &c. R. R. Co.*, 59 Iowa, 599; *Brooks v. Davenport & St. Paul R. R. Co.*, 37 id. 99.

³ *McReynolds v. Baltimore & Ohio R. R. Co.*, 106 Ill. 152.

⁴ *Harrison v. Iowa Midland R. R. Co.*, 36 Iowa, 323.

the part of the land which is severed, and that he accepts the same and uses it with an understanding between himself and the company that he has the right to do so, is held not to be admissible in reduction of his damages.¹ But it has been held that, even though the company has an absolute right, by the erection of high fences, etc., to prevent the passage of a land-owner across its road, to the different parts of his estate, yet he cannot rely upon such anticipated obstruction as a ground of damages against the company.²

The value of land for farm use is a proper subject of inquiry,³ and in an action to recover for a right of way through a farm it was held that a question put to a witness as follows was not erroneous: "How much less in value was the farm immediately after taking the land for a right of way, and in consequence thereof, than it was immediately before, — not taking into account any supposed benefits to result from the building of the road?"⁴ The elements composing

¹ *Old Colony R. R. Co. v. Miller*, 125 Mass. 1.

² *Boston & Worcester R. R. Co. v. Old Colony R. R. Co.*, 12 Cush. (Mass.) 605.

³ *Michigan Air Line R. R. Co. v. Barnes*, 44 Mich. 222.

⁴ *Harrison v. Iowa Midland R. R. Co.*, 36 Iowa, 333; *Brooks v. Davenport, &c. R. R. Co.*, 37 id. 99. The injury to the entire tract, out of which a part is taken, must be considered. *Reisner v. Union Depot Co.*, 27 Kan. 382; *Sheldon v. Minneapolis, &c. R. R. Co.*, 29 Minn. 318. Thus, where a railway ran through one quarter-section of a stock farm of nine hundred and sixty acres, it was held that the damage to the tract as a whole should be considered. *Kansas City, &c. R. R. Co. v. Merrill*, 25 Kan. 421. So the plaintiff being the owner of six forty-acre tracts lying in one body, over two of which the defendant's railway had been built, there was no error in permitting him to prove the diminution in value of the whole tract by reason of such taking. *Parks v. Wisconsin Central R. R. Co.*, 33 Wis. 413. Where a part of the respondent's land lay north, and the rest, being an eighty-acre tract, lay south of a public road, running on a line between it and the rest, respondent testified that he bought said eighty-acre tract in 1858 of K.; that K. occupied it as a separate farm, and had a farm-house on it; that the road was

there when he bought it; that it was tillable, and had been cultivated by a tenant the last two years. The jury were instructed that, for the purpose of assessing the respondent's damages, his farm must be considered as a unit, but what such unit includes the jury must determine; that the petitioner contended that said eighty acres was a separate parcel of land, and not within the farm, and not to be considered in estimating the damages; that this was a question for them; if it was a part of the farm, they might consider the effect of the road upon respondent's convenience and safety in cultivating it from his dwelling, in connection with his other land constituting his farm, otherwise not; and this instruction was held to be proper. *St. Paul & Sioux City R. R. Co. v. Murphy*, 19 Minn. 500. Where a farm, through which a railroad ran, consisted of two hundred and forty acres, and the petition for the condemnation of the right of way describes the road as running through both the quarter-section and the eighty-acre piece, the jury, in assessing damages, should consider the damage done to the whole farm by reason of the construction of the road. *Keithsburg & Eastern R. R. Co. v. Henry*, 79 Ill. 290. G. was the owner of a contiguous and compact farm of two hundred and forty acres. Independence creek ran in a curved and irregular line through the southwestern

the damages include not only the value of the land taken for the way, but also the injury to the remaining land *which forms a part*

portion of the farm. This creek was the boundary line between Atchison and Doniphan counties, and some sixty acres of the farm were in Atchison, and the balance in Doniphan, county. Proceedings were instituted in Doniphan county to condemn a right of way for the A. & N. R. R. Co. through this farm. The right of way crossed the farm only in Doniphan county, and touched no part of the land in Atchison. The commissioners, in their report, fixed the value of the land taken, and also awarded damages to the balance of the farm as an entirety. The amount of this award was deposited by the railroad company with the treasurer of Doniphan county. On a trial of an appeal from this award to the district court of Doniphan county, it was held that such court did not err in permitting an inquiry as to the damages to the farm as a whole, including that part in Atchison county, and in rendering judgment for such damages. *Atchison & Nebraska R. R. Co. v. Gough*, 29 Kan. 94. The injury should not be limited to the legal subdivisions of land traversed by the road, but the injury to the farm as a whole should be considered. *Hartshorn v. Burlington, Cedar Rapids, & Northern R. R. Co.*, 52 Iowa, 613. Thus, the plaintiff was the owner of one hundred and twenty acres of land consisting of three forties in line from east to west; the land was occupied and used by him as one farm, his residence being on the easterly forty. Defendant, having located its line of railway across the two westerly sections, instituted proceedings for condemnation. It was held that in assessing the compensation to be paid to the plaintiff, he is entitled to have the effect of the appropriation of the right of way across the two westerly forties upon the easterly forty considered and taken into account, although the petition for the appointment of commissioners described the two westerly forties only. *Wilmes v. Minneapolis, &c. R. R. Co.*, 29 Minn. 242. In awarding damages to the owner of land taken for a railroad, the exposure of his remaining land and buildings to fire from the company's engines is a proper

element to be considered in making the estimate. The statute which imposes on railroad corporations an absolute liability for all damages caused by fires from their locomotives, does not necessarily preclude a recovery of anything for this cause; but the question is, how much will the property be diminished in value by reason of such exposure, considering at the same time the indemnity provided by the statute? *Adden v. White Mountains, N. H. R. R. Co.*, 55 N. H. 413. Increased exposure to fire by the passage of a railroad track directly through lands near where buildings are already erected may be considered by the jury in estimating the compensation due to the land-owner. An instruction is objectionable which tends to mislead the jury into the belief that they should take into consideration the injury to the property for farming purposes only. *Colvill v. St. Paul & Chicago R. R. Co.*, 19 Minn. 283. So, under the statutes of Indiana, danger from fire should be considered in the assessment of damages. *Swinney v. Ft. Wayne, Muncie, & Cincinnati R. R. Co.*, 59 Ind. 205; *Lafayette, Muncie, & Bloomington R. R. Co. v. Murdock*, 68 Ind. 137. But in Iowa, evidence of the value of the buildings and a grove, and the increased hazard from fire by reason of their proximity to the track, is improper. The increased danger of the destruction of buildings and the like by fire is too remote and contingent for legal inquiry. *Lance v. Chicago, Milwaukee, & St. Paul R. R. Co.*, 57 Iowa, 636. If the effect of constructing a railway through a farm is to make it more inconvenient and expensive to cultivate and manage the remaining land of the owner, this is a proper element of damage for the consideration of the jury; and a witness who is acquainted with the land and knows the proper mode of cultivating it may give his opinion as to the increased expense to the owner in carrying on the farm arising from the location of the railway through it. *Tucker v. Massachusetts Central R. R. Co.*, 118 Mass. 546. The value is to be assessed with reference to what it is worth for sale in view of the use to which it may

of the same tract; and as important factors, the difficulty of communication with the severed parts, and the inconvenient shape in which the remaining land is left, the cost of new fences and suitable farm crossings,¹ — unless by statute the company is bound to build and maintain them, — as well as all other causes not of a remote or speculative character are to be considered.² Where the company is by law required to build and maintain the fences, neither the expense of building or maintaining them should be considered, nor the fact

be put, and not simply with reference to its productiveness to the owner in the condition in which he has seen fit to leave it. *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491.

¹ *Atchison & Nebraska R. R. Co. v. Gough*, 29 Kan. 94.

² *St. Louis, Arkansas & Texas R. R. Co. v. Anderson*, 39 Ark. 167; *Galena & Southern Wisconsin R. R. Co. v. Birbeck*, 70 Ill. 208; *Hartshorn v. Burlington*, Cedar Rapids, & Northern R. R. Co., 52 Iowa, 613; *Chicago & Iowa R. R. Co. v. Hopkins*, 90 Ill. 316; *Bowen v. Atlantic, &c. R. R. Co.*, 17 S. C. 574. All special matters affecting the value of the land should be considered. *Bowen v. Atlantic & French Broad Valley R. R. Co.*, 17 S. C. 574. Where a tract of five acres was by the right of way cut off from the body of the plaintiff's farm, it was held that the value of the five acres might be proved, and that the jury might well consider the value of the component parts, which is the difference in value before and after the taking. *Harrison v. Iowa Midland R. R. Co.*, 36 Iowa, 323; *Danville, Hazleton, & Wilkesbarre R. R. Co. v. Gearhart*, 81 * Penn. St. 266; *East Brandywine & Waynesburg R. R. Co. v. Runck*, 78 Penn. St. 454. The cash value of the property to be taken is the true measure of damages, and the cost of improvements upon the land should not be considered unless they in fact increase its value to the extent of their cost. *Jacksonville & Southeastern R. R. Co. v. Walsh*, 106 Ill. 253. The jury are to take into consideration the real value of the land taken, and the diminished value of the remainder, and may for that purpose take into account not only the purposes to which the land is or has been applied, but any other benefi-

cial purposes to which it may be applied, which would affect the amount of compensation or damages. *Cincinnati & Springfield R. R. Co. v. Longworth*, 30 Ohio St. 108. Thus the owner is entitled to have as one item of damage in all cases *the fair market value of the part actually taken. And where a portion of the tract remains, if it can be said with reasonable certainty that the road properly constructed and carefully operated will injure it, he is also entitled to recover for that.* But injuries merely speculative and contingent upon the improper construction or negligent operation of the road are too remote and uncertain to be considered. *Fremont, Elkhorn, & Missouri Valley R. R. Co. v. Whalen*, 11 Neb. 585. An award embraces only those damages which may reasonably be anticipated upon the assumption that the line will be built and operated with due care and skill, and with no unnecessary injury to property outside of the right of way. *Burlington & Missouri River R. R. Co. v. Schluntz*, 14 Neb. 421. And the jury should value the property without reference to the person of the owner or the actual state of his business. *Pittsburgh & Lake Erie R. R. Co. v. Robinson*, 95 Penn. St. 426. In assessing the damages to another portion of a farm, aside from the value of the land taken for a right of way, the jury should consider the road as running only through the farm, and not consider any general benefit which the road may prove in making a better market or convenience for travel; and in some cases they would be justified in estimating the damages to the farm the same as though the road commenced on one side of it and ran across to the other side and no further. *St. Louis, Jerseyville, &c. R. R. Co. v. Kirby*, 104 Ill. 345.

that the company has neglected to build or maintain them, as the landowner has an adequate remedy for this breach of duty on the part of the company.¹ So, too, it has been held that the expense of fencing uncleared or uncultivated lands, should it at any time be cleared or cultivated, should not be considered, as it is too uncertain and remote to be estimated.² The value of growing crops destroyed by the appropriation of the lands both inside and outside of the location,³ the value of trees and timber upon the land taken, the inconvenience and danger of crossing the track, the danger to horses and cattle, the liability of teams to be frightened by passing trains, and the increased danger from fire have all been held proper elements of damages.⁴

¹ *Jones v. Chicago, &c. R. R. Co.*, 68 Ill. 380. The inconvenience of having the land temporarily thrown open in the progress of the construction of the road, is an element of damage. *St. Louis, Jerseyville, & Springfield R. R. Co. v. Kirby*, 104 Ill. 345. Evidence of the value of trees standing on the lands taken, that the farm would be depreciated by reason of the inconvenience and danger of crossing the track, the danger to horses and cattle, the liability of teams to be frightened, the danger from fire, &c., is admissible. *Parks v. Wisconsin Central R. R. Co.*, 33 Wis. 413. An instruction that the marketable value of property is the amount for which the property would sell if put upon the open market and sold in the manner in which property is ordinarily sold in the community in which it is situated is correct, and is not necessarily calculated to raise the inference that a forced sale was meant by the court. *Everett v. Union Pacific R. R. Co.*, 59 Ia. 243. Upon the question of the value of the land in controversy, any purpose for which the same is adapted, and which enters into and affects its market value, may be properly considered. *Sherman v. St. Paul, Minneapolis, & Manitoba R. R. Co.*, 30 Minn. 227. A compensatory, not a speculative remuneration is guaranteed. The difference in the value of the owner's property with the appropriation, and that without it, is the rule of compensation. This difference must be ascertained with reference to the value of the property in view of its present character and sur-

roundings. It cannot be enhanced by proving facts of a contingent and prospective character, such as the probable rents that may be derived from the property, or its special value as a prospective monopoly of a roadway to the adjoining lands of other persons. *Powers v. Hazelton & Letonia R. R. Co.*, 33 Ohio St. 429. In a proceeding to condemn land for a right of way, the jury allowed a lessee of the land taken, whose lease had three years to run, the amount of rent he was to pay per acre for the whole farm as to the land condemned, while he contended that for gardening it might yield much more. There was no proof that it would be used for such purpose, and no other damages were shown, and it appeared that the lessee had the option of terminating the lease at any time. It was held that the verdict would not be set aside as against the evidence, and that future profits of the land taken were too uncertain to be depended upon as a measure of damages. *Booker v. Venice & Carondelet R. R. Co.*, 101 Ill. 333.

² *Raleigh & Augusta R. R. Co. v. Wicker*, 74 N. C. 220. Owners of wild land are entitled to compensation when such land is taken under the power of eminent domain. *Wallace v. Karlenowefski*, 19 Barb. (N. Y.) 118.

³ *Lance v. Chicago, Milwaukee, & St. Paul R. R. Co.*, 57 Iowa, 636.

⁴ *Parks v. Wisconsin Central R. R. Co.*, 33 Wis. 413. But it has been held not proper to consider the extra care necessary in the use of teams liable to be frightened, because of the proximity of the

Damages from the diminution of the value of adjacent property by smoke, sparks, cinders, the noise and rumbling of trains, as well as the cracking of the walls from the vibration caused by the trains, may be considered in determining the compensation to which the land-owner is entitled, where there are buildings upon the land occupied as dwellings or for other purposes.¹ So the expense of removing buildings or other erections from the land taken, which he has the right to remove,² or necessary changes in the land not taken, or of making erections thereon which are necessary to be made to put it in a situation or condition to be used should be considered;³ but the expenses are to be limited to a sum reasonably necessary for the purpose, and not by such expense as the owner may see fit to incur from personal reasons, or to gratify his own tastes. So it has been held that where the danger from fire to buildings outside the location is such as to render it advisable, the owner is to be allowed the expense of removing them.⁴ But he is not entitled to be allowed for the expense of removing personal property from the land taken,⁵ nor can any personal inconvenience or injury not connected with the land be considered.⁶

Cutting off access from houses, mills, and other places of business,⁷ the interruption of business occasioned by taking down a part of the building⁸ should be considered; and where the statute provides for compensation for "all damages" that may be occasioned by the tak-

railroad. *Atchison, &c. R. R. Co. v. Lyon*, 24 Kan. 745.

¹ *Jeffersonville, &c. R. R. Co. v. Esterlee*, 13 Bush (Ky.), 667; *Union R. R., &c. Co. v. Moore*, 80 Ind. 458. At a commissioners' hearing to appraise damages to an abutter for occupation by a railroad company of a portion of a street for two additional tracks, evidence that the jarring of the walls by heavy trains would require repairs costing \$1,000 per year, and that the portion of the lot not taken was depreciated by the noise, smoke, and increased danger, was held to be admissible, and the rejection of such evidence is a ground for setting aside the commissioners' award. *Re New York Central, &c. R. R. Co.*, 15 Hun (N. Y.), 63.

² *Chicago, &c. R. R. Co. v. Carey*, 90 Ill. 514.

³ *Estabrook v. Erie R. R. Co.*, 51 Barb.

(N. Y.) 95; *St. Louis, &c. R. R. Co. v. Mullett*, 59 Ill. 235; *Price v. Milwaukee, &c. R. R. Co.*, 27 Wis. 98; *Chase v. Worcester*, 108 Mass. 60; *Com. v. Boston, &c. R. R. Co.*, 8 Cush. (Mass.) 25; *Buell v. Worcester*, 119 Mass. 372.

⁴ *Oregon R. R. Co. v. Barlow*, 3 Oregon, 311.

⁵ *Central Pacific R. R. Co. v. Pearson*, 35 Cal. 247.

⁶ *Bird v. Great Eastern Ry. Co.*, 34 L. J. C. P. 366; *Rickett v. Metropolitan Ry. Co.*, 34 L. J. Q. B. 257.

⁷ *West Penn. R. R. Co. v. Hill*, 56 Penn. St. 460; *East & West India Docks Ry. Co. v. Gattke*, 3 Mac. & G. 165; *Chamberlain v. West End Ry. Co.*, 31 L. J. Q. B. 201. But see *Ricketts v. Metropolitan Ry. Co.*, L. R. 2 H. L. 175, where a street is only temporarily obstructed.

⁸ *Patterson v. Boston*, 23 Pick. (Mass.) 435.

ing of the land, the assessment should embrace inconveniences from excavations, endangering buildings or adjacent land, embankments in, or obstruction of streets, obstructing light, air, or otherwise impairing the value of the premises for the purposes of residence or business, and many other elements which properly come under the head of consequential damages.¹ And where the statute provides for damages to "those who may be injured," or "damaged thereby," all injuries for which an action would lie at common law should be considered; and a person so injured, whether any part of his estate is taken or not, is entitled to compensation for such injuries; but such damages need not be paid in advance.² Disadvantages which impair the value of the property remaining are elements of damage, such as the inconvenience from the noise of whistles, the ringing of bells, the noise of the trains,³ the inconvenience of opening gates and bars,⁴ and any and every cause which directly deteriorates the value of the remaining estate.⁵ But these are only elements to be con-

¹ *Bradley v. New York & N. H. R. R. Co.*, 21 Conn. 294.

² *Columbia Bridge Co. v. Geisse*, 35 N. J. L. 558; *Koch v. Williamsport, &c. R. R. Co.*, 65 Penn. St. 288; *Spangler's Appeal*, 64 id. 387; *Stetson v. Chicago, &c. R. R. Co.*, 75 Ill. 74; *Patterson v. Chicago, &c. R. R. Co.*, 75 Ill. 588; *Hutton v. London, &c. Ry. Co.*, 18 L. J. Ch. 345.

³ *White v. Charlotte R. R. Co.*, 6 Rich. (S. C.) 47; *Bangor, &c. R. R. Co. v. McComb*, 60 Me. 290.

⁴ *Minnesota, &c. R. R. Co. v. Doran*, 17 Minn. 188. The damages in an action for injuries to property by reason of the construction of a railway in the street adjacent thereto, is the difference between the rental value of the property as the road is constructed and what it would be if it had been properly constructed. *O'Connor v. St. Louis, &c. R. R. Co.*, 56 Iowa, 735. Where there are other railways running through the farm near the one from which damages are claimed for the taking of land, this circumstance is to be taken into account in estimating the damages resulting from the additional burden upon the estate. *Union R. R. Transfer & Stock Yard Co. v. Moore*, 80 Ind. 458.

⁵ *Curtis v. St. Paul, &c. R. R. Co.*, 20 Minn. 28; *Wilson v. Rockford, &c. R. R.*

Co., 59 Ill. 273; *St. Louis, &c. R. R. Co. v. Teters*, 68 Ill. 144. Inconvenience from new fences or ditches, — *Whitewater, &c. R. R. Co. v. McClure*, 29 Ind. 536, — and evidence of all matters bearing upon the question of damages is admissible. — *Danville, Hazleton, &c. R. R. Co. v. Gearhart*, 81* Penn. St. 266, — as of cuts made in the land, — *Atchison, &c. R. R. Co. v. Blackshire*, 10 Kan. 477, — the fact that the road passes through a ledge of rocks near by, which will have to be blasted, — *Sabin v. Vt. Central R. R. Co.*, 25 Vt. 363, — or that a stream is to be diverted from the lands, or a mill-race will be destroyed. *Baltimore & Potomac R. R. Co. v. Magruder*, 34 Md. 79; *Beaver v. Western Maryland R. R. Co.*, cited 34 Md. 79. If growing crops are damaged, their value may be proved as an element of damage, and also the increased risk from fire. *Lance v. Chicago, &c. R. R. Co.*, 57 Iowa, 686. If the construction of a railroad lessens the value of adjoining land of the land-owner by preventing the flow of surface water thereon, this circumstance is an element of damage. *Pflegar v. Hastings, &c. R. R. Co.*, 28 Minn. 510. The inquiry as to damages should be confined to the tract of land described in the petition, in the absence of a cross-bill by the defendant showing that

sidered in determining what the market value of the land remaining is, and the difference between its market value, and the market

he owns contiguous lands which will be damaged. *Jones v. Chicago & Iowa R. R. Co.*, 68 Ill. 380. The true measure of compensation for land not taken by a railway for a right of way is the difference between what the whole property would have sold for unaffected by the railroad and what it would sell for as affected by it, if it would sell for less. The damages must be for an actual diminution of the market value of the land, and not speculative. *Page v. Chicago, Milwaukee, & St. Paul R. R. Co.*, 70 Ill. 324; *Eberhart v. St. Paul, &c. R. R. Co.*, id. 347. The fact that by the construction of a railroad through a farm, a part of it is cut off should be taken into consideration in assessment of the damages. *Peoria, Atlanta, & Decatur R. R. Co. v. Sawyer*, 71 Ill. 361. In the case of damage to a party whose lands are not entered upon, but are injuriously affected by the exercise of the powers of a railway company upon its own lands, or upon the lands of another party, and for which damage compensation is required to be made by § 6 of the Railway Clauses Consolidation Act (8 Vict. c. 20), it is not unlawful for the company to erect the works which occasion the damage before the amount of compensation for the same is ascertained, paid, or deposited. *Hutton v. London & South-Western Ry. Co.*, 7 Hare, 259. Where a tract of land consists of several parcels all connected and constituting one body, the jury, in estimating the damages sustained by the owner by reason of the condemnation of a right of way for a railroad across the tract, should consider the injury to the whole, and not simply the injury to the parcels touched by the road. *Wyandotte, Kansas City, & Northwestern R. R. Co. v. Waldo*, 70 Mo. 629. The leaseholder of a house, with a forecourt abutting on a road, constructed a building on the forecourt, subsequently to which a railway company made a trench in the road for the purpose of constructing its railway, in consequence of which the building was deprived of its lateral support from the adjacent land. A claim having been made for compensation, a jury was summoned, who found

that the sinking of the ground had been caused by the erection of the new building upon it, and that the lands of the claimant had not been injuriously affected by the works of the company. It was held that the jury had exceeded their jurisdiction. *Horrocks v. Metropolitan Ry. Co.*, 4 B. & S. 315. In a proceeding upon appeal to recover damages for the right of way appropriated to the use of a railroad company, the owner of the land filed a petition setting forth the claim, but made therein no reference to the construction of any crossings or bridges, and no sufficient evidence was offered showing any necessity for the land-owner to build a bridge for a farm crossing. It was held that a finding of \$85 for a bridge as an element of damage could not be sustained. *Atchison & Denver R. R. Co. v. Lyon*, 24 Kan. 745. Danger to teams and persons is too uncertain an element of damage to be considered. *McReynolds v. Baltimore & Ohio R. R. Co.*, 106 Ill. 152; *Atchison & Denver R. R. Co. v. Lyon*, 24 Kan. 745. But see *Parks v. Wisconsin Central R. R. Co.*, 33 Wis. 413. Depreciation in the value of land, occasioned by the construction of a railroad, is not in any legal sense a consequential damage. *Turner v. R. R. Co.*, 8 Phila. (Penn.) 485. The law requires that for all the property taken by a railway company for its use, or damaged by it, just compensation must be made to the owners. If a building stands in the way of a road, which it is necessary to destroy, its value must be paid by the corporation, and the jury in estimating its value will take into consideration, not the value of the materials composing the building, but the value of the building as such. Should any of the *débris* remaining on its removal or destruction be appropriated by the owner of the land, to the extent of its value will the claim of the owner be less. *Lafayette, &c. R. R. Co. v. Winslow*, 66 Ill. 219. Under statutes giving damages for lands injuriously affected, damages should be assessed for consequential injuries. Thus, a land-owner, whose property was not taken, used, or directly interfered with by the railway

value of the whole lot before the railway was constructed, is the amount of damage to which the land-owner is entitled.¹

An appraisement of lands taken by an incorporated company of any kind should include prospective damages resulting naturally and directly from the works of the company for all future time;² and railroad commissioners, and the jury on appeal, when appraising the damages, should take into consideration and appraise all which are direct and consequential, present and prospective, certain and contingent, which may be judged by them fairly to result to the land-owner from the construction of a railroad in a suitable and prudent manner. But for all such damages as result from an improper and unsuitable construction, the corporation must remain liable;³ and all

company, gave the company notice of his claim for compensation by reason of his property being "injuriously affected" by the execution of the works, whereby his goods were damaged by the dust and dirt, and customers were prevented from coming to his shop, and required the company either to give a written agreement for payment of the amount claimed, or to issue a precept to the sheriff to summon a jury for settling the compensation. The company filed a bill against the land-owner, alleging that the property in question was not "injuriously affected" within the meaning of said section, and praying an injunction to prevent the defendant from proceeding on his notice. *WIGRAM, V. C.*, granted the injunction on the authority of *The London and North Western Ry. Company v. Smith*, 1 McN. & G. 216. It was held, dissolving the injunction, that the right to compensation was not confined to damage sustained by persons whose lands are taken, used, or directly interfered with, but extended to consequential damage; that the proper jurisdiction to decide the question of damage and the *quantum* was the sheriff's jury, and that there was no equity for this court to interfere. *East & West India Docks Ry. Co. v. Gattke*, 15 Jur. 261. Consequential damages should be considered where they are the direct and immediate result of the taking. Thus, where a malt-house was destroyed, it was held that its effect upon the business with which it was connected should be considered, but that if it could be removed

to the brewery lot and be as valuable thereto as before, the measure of recovery should be the expense of removal and the value of the time lost in effecting it. *Hannibal Bridge Co. v. Schaubacher*, 57 Mo. 582.

¹ *Henderson v. N. Y. Central R. R. Co.*, 78 N. Y. 423; *Baltimore, &c. R. R. Co. v. Lansing*, 52 Ind. 229; *Hoffer v. Penn. Canal Co.*, 87 Penn. St. 221; *Powers v. Hazleton, &c. R. R. Co.*, 33 Ohio St. 429; *Harrison v. Young*, 9 Ga. 359; *Scott v. St. Paul, &c. R. R. Co.*, 21 Minn. 323. Where a railway is wrongfully constructed upon lands, and not abandoned to the land-owner, it cannot be treated as a part of the realty for the purpose of increasing the land damages upon subsequent proceedings to condemn the land. *Toledo, Ann Arbor, &c. R. R. Co. v. Dunlap*, 47 Mich. 456. See also *Justice v. Nesquehoning Valley R. R. Co.*, 87 Penn. St. 28. And no deduction should be made for the value of the rails, ties, &c., unless they increase the value of the land. *Schroeder v. DeGraff*, 28 Minn. 290. It is erroneous to charge a jury "to consider what the value of the farm would be if the railroad was not on it, but if it was in the immediate neighborhood." *Morin v. St. Paul, Minneapolis, &c., R. R. Co.*, 30 Minn. 100. A railway company has no right to cut ice from its right of way. The ice belongs to the owner of the fee. *Julien v. Woodsmall*, 82 Ind. 568.

² *Trenton Water Power Co. v. Chambers*, 2 Beas. 199.

³ *Dearborn v. Boston & Montreal R. R.*

the land appropriated, as well as all improvements destroyed, deducting therefrom the benefits and advantages derived from the road, and the additional value given by it to the property, should be allowed.¹ The market value of land taken should be the measure of the damages, *to which should be added all actual damages which must be produced by the manner in which the road passes through the property, and affects the improvements.* Contingent future disadvantages, though they may be set off against advantages, should not be taken into consideration as an element of damages.² In general, appraisers are not to allow speculative, or consequential damages, but are confined to an estimate of the value of the land taken.³

If the construction of the road will operate to drain springs or wells upon the owner's land, this is a matter to be considered.⁴ The value of timber upon the land taken may be given, but the estimate should not include timber upon adjacent land, cut down and destroyed by the company.⁵ Nor does this principle carry with it an exemption from liability for diverting a stream of water from its natural course, to the injury of a neighboring proprietor, — especially where such damage is occasioned by a negligent construction of the road;⁶ and consequential damages may be claimed and assessed against a corporation if their organic law requires it. Thus, where it was provided in the charter of a bridge company that referees should assess the damages, "if any," which the owner of a contiguous ferry should sustain by the erection of the bridge, it was held

Co., 24 N. H. 179; *Van Schoick v. Del. & Raritan Canal Co.*, 20 N. J. L. 249.

¹ *Plank-Road Co. v. Thomas*, 20 Penn. St. 91.

² *Searle v. Lackawanna & Bloomsburgh R. R. Co.*, 33 Penn. St. 57.

³ *Meacham v. Fitchburg R. R. Co.*, 4 Cush. (Mass.) 291; *Upton v. South Reading Branch R. R. Co.*, 8 Cush. (Mass.) 600; *Greenville & C. R. R. Co. v. Partlow*, 5 Rich. (S. C.) 528; *White v. Charlottesville & S. C. R. R. Co.*, 6 Rich. 47; *A. & S. R. R. Co. v. Carpenter*, 14 Ill. 190; *Symonds v. City of Cincinnati*, 14 Ohio, 147; *Brown v. Cincinnati*, 14 id. 541; *McIntire v. State*, 5 Blackf. (Ind.) 384; *State v. Digby*, 5 id. 543; *James River & Kanawha Co. v. Turner*, 9 Leigh (Va.), 313; *Schuylkill Co. v. Thoburn*, 7 S. & R. (Penn.) 411; *Henry v. Pittsburgh & Alleghany Bridge Co.*, 8 W. & S. (Penn.) 85.

⁴ *Peoria & R. I. R. R. Co. v. Bryant*, 57 Ill. 473. And it will be presumed that such damages were considered. Thus, the plaintiff's buildings were supplied with water from a permanent spring. After an excavation had been made on his land for the purposes of a railroad, water appeared in the excavation, about fifteen feet below the surface of the ground, and the spring disappeared. Damages were assessed to him before the excavation was made. It was held that the injury to the spring must be presumed to have been considered by the commissioners, and that an action to recover damages therefor could not be sustained. *Aldrich v. Cheshire R. R. Co.*, 21 N. H. 359.

⁵ *Oregon & California R. R. Co. v. Barlow*, 3 Oreg. 311.

⁶ *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 49.

that the words of the act required the payment of damages for all injurious consequences, proximate and remote, to the owner of the ferry.¹ So consequential damages to existing works by the erection

¹ *Buckwalter v. Black Rock Bridge Co.*, 38 Penn. St. 281. In *Carman v. Steubenville, &c. R. R. Co.*, 4 Ohio St. 399, it is held that throwing fragments of rock, by blasting, upon the land of adjoining proprietors is an actionable injury; and as in this case it was done by the contractor in the performance of his contract, in the manner stipulated, the company were held liable. The result of the cases seems to be, that where the damage done, by blasting rocks, or in any similar mode, in the course of the construction of a railway, is done to land a portion of which is taken by the company under compulsory powers, the damage will not lay the foundation of an action, in any form, as it should be taken into account in estimating the compensation to the land-owner for the portion of land taken. *Brown v. Prov. & Bristol R. R. Co.*, 5 Gray (Mass.), 35. And if not included in the appraisal, it is nevertheless barred. *Dodge v. County Comm'rs*, 3 Met. (Mass.) 380; *Dearborn v. Boston, &c. R. R. Co.*, 24 N. H. 179; *Whitehouse v. Androscoggin R. R. Co.*, 52 Me. 208; *Sabin v. Vt. Central R. R. Co.*, 25 Vt. 363. *But if the damage is done to land no part of which is taken, and where no land of the same owner is taken*, it may be recovered, under the statute, if provision is made for giving compensation for consequential damage, or where lands are "injuriously affected." But if the statute contain no such provision, the only remedy will be by a general action. And in this view many of the cases cited above seem to assume, that blasting rocks, by an ordinary proprietor of land, is a nuisance to adjoining proprietors if so conducted as to do them serious damage. *Carman v. Steubenville, &c. R. R. Co.*, *ante*. But if a railway is not liable for necessary consequential damage, unless the statute gives a remedy, it may be questioned how far a recovery could be maintained, in a general action for damage done by blasting rocks, as that is confessedly within the range of their powers. *SHAW, C. J.*, in *Dodge v. County Comm'rs*, 3 Met. (Mass.) 380, says: "An authority

to construct any public work carries with it an authority to use the appropriate means. An authority to make a railway is an authority to reduce the line of the road to a level, and for that purpose to make cuts, as well through ledges of rock as through banks of earth. In a remote and detached place, where due precaution can be taken to prevent danger to persons, blasting by gunpowder is a reasonable and appropriate mode of executing such a work, and, if due precautions are taken to prevent unnecessary damage, is a justifiable mode. It follows that the necessary damage occasioned thereby to a dwelling-house or other building, which cannot be removed out of the way of such danger, is one of the natural and unavoidable consequences of executing the work, and within the provisions of the statute. Of course, this reasoning will not apply to damages occasioned by carelessness or negligence in executing such a work. Such careless or negligent act would be a tort, for which an action at law would lie against him who commits, or him who commands it. But where all due precautions are taken, and damage is still necessarily done to fixed property, it is alike within the letter and the equity of the statute, and the county commissioners have authority to assess the damages. This court are therefore of opinion that an alternative writ of *mandamus* be awarded to the county commissioners, to assess the petitioners' damages, or return their reasons for not doing so." See also *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 257; *Whitehouse v. Androscoggin R. R. Co.*, *ante*. In the latter case it was held that the damage resulting to the land-owner, for not removing the stone thrown upon land adjoining that taken, could not be taken into account in estimating damages, since it was presumable the company would remove them in proper time, according to their duty; and, if they did not, the remedy would be by special action. Damages for the use of adjoining land as a cart-way may be recovered where six rods were allowed to be taken by the com-

of new ones are required to be compensated, and the period for estimation is limited to the yearly value of the works *antecedent* to the

pany throughout the line of the road, which would give ample space for cart-ways upon the land taken. *Sabin v. Vt. Central R. R. Co.*, 25 Vt. 363. But it was held, in a Pennsylvania case, that the company were not liable for entering upon the adjoining lands, and occupying the same with temporary dwellings, stables, and blacksmith shops, provided no more was taken than was necessary for that purpose. *Lauderbrun v. Duffy*, 2 Penn. St. 398. But it is questionable whether this case can be maintained as a general rule. But if a party is entitled to compensation for injuries of this kind, as where his lands adjoining the railway, and no part of which is taken, are injuriously affected, as by blasting rocks, his only remedy is under the statute. *Dodge v. County Comm'rs*, 3 Met. (Mass.) 380. So the appraisal of damages is a bar to claims for injuries by fire, from the engines obstructing access to buildings, exposing persons or cattle to injury, and many such risks. *Phila. & Reading R. R. Co. v. Yeiser*, 8 Penn. St. 366; *Aldrich v. Cheshire R. R. Co.*, 21 N. H. 359; *Mason v. Kennebec, &c. R. R. Co.*, 31 Me. 215; *Furniss v. Hudson River R. R. Co.*, 5 Sand. (N. Y.) 551; *Huyett v. Phil. & Read. R. R. Co.*, 23 Penn. St. 373; *Lafayette Plank-Road Co. v. New Albany, &c. R. R. Co.*, 13 Ind. 90. And it will make no difference, that the damages were not known to the appraisers, or capable of anticipation at the time of assessing land damages. *Aldrich v. Cheshire R. R. Co.*, *ante*. But see *Lawrence v. Great Northern Ry. Co.*, 16 Q. B. 643. As where a spring of water is cut off by an excavation for the bed of a railway fifteen feet below the surface, from which the plaintiff's buildings had been supplied with water. So, also, where the company's works cut off a spring of water, below high-water mark, on a navigable river, it was held the riparian owner was entitled to claim damages of them on that account, in a proceeding under the statute. *Lehigh Valley R. R. Co. v. Trone*, 28 Penn. St. 206. But where, in the construction of a canal, with waste weirs, erected by direction, and under the inspection of the com-

missioners appointed to designate the route of the canal, with all the works connected therewith, and to appraise damages, the waste water, after flowing over the land of adjoining proprietors, flowed upon the land of the plaintiff, and thereby greatly injured it, it was held that he was entitled to recover damages. *Hooker v. New Haven, &c. R. R. Co.*, 14 Conn. 146. But in such case, the owner of property overflowed by water, through the defective construction of a railway, is bound to use reasonable care, skill, and diligence, adapted to the occasion, to arrest the injury, and if he do not, notwithstanding the first fault was on the part of the company, he must be regarded as himself the cause of all damage, which he might have prevented by the use of such care, diligence, and skill. *Chase v. N. Y. Central R. R. Co.*, 24 Barb. (N. Y.) 278. The same rule was adopted by a special referee, in *Lemmex v. Vt. Central R. R. Co.*, in regard to damage to wool, by being exposed to rain at one of the company's stations through the fault of the agents of the company, where the owner did not remove it as soon after he obtained knowledge of its condition, or take as effective measures to arrest the injury, as he reasonably should have done. It was held the company were only liable for such damage as necessarily resulted from their own fault, and beyond that the plaintiff must be regarded as the cause of his own loss. The assessment of compensation for land taken for a railway covers all damages, whether foreseen or not, and whether actually estimated or not, which result from the proper construction of the road. But the company are liable to an action for damages resulting to any one from the defective construction of their road. In the present case the plaintiff's meadows were injured in consequence of the insufficient culverts in the defendant's road, there being no impediment to the construction of proper ones. Suitable bridges and culverts to convey the water across the railway, at or near the places where it naturally flows, are necessary to the proper construction of the road, except where they cannot be made, or where the

passing of the act.¹ The damages should be estimated by taking the marketable value of the premises affected by the improvement, before the company enter, and from that deducting their value, under all the circumstances of the case, after the improvement is completed.²

The commissioners are to determine the compensation to be made to the owner for the land "proposed to be taken," and "appraised by them," and not the damages that will be occasioned by the construction and operation of the company's works over his premises. *The true and only inquiry is, what is the whole property affected worth now in the market, and what will it be worth after the improvement is*

expense of making them is greatly disproportionate to the interests to be preserved by them. *Johnson v. At. & St. Law. R. R. Co.*, 35 N. H. 569. But the occasional flow of land by water caused by public works is to be estimated as part of the damages under the English statute. *Ware v. Regent's Canal Co.*, 3 De G. & J. 212. And where the appraisal of land damages is reduced below what it otherwise would have been, by the representations of the agents of the company that the road would be constructed in a particular manner, made at the time of the appraisal to the commissioners, and which representations are not fulfilled in the actual construction of the road, whereby the plaintiff sustained serious loss and injury, it was held, that the adjudication of the commissioners was a merger of all previous negotiations upon the subject, and that no action could be maintained for constructing the railway contrary to such representations, provided it was done in a prudent and proper manner. *Butman v. Vt. Central R. R. Co.*, 27 Vt. 500; *Railway Co. v. Washington*, 1 Rob. 67; *Baltimore, &c. R. R. Co. v. Compton*, 2 Gill (Md.), 20; *Kyle v. Auburn, &c. R. R. Co.*, 2 Barb. Ch. (N. Y.) 489. But see *Wheeler v. Roch. &c. R. R. Co.*, 12 Barb. (N. Y.) 227, where it is held that a railway company will be enjoined from building a road-crossing at a different place from that named at the time damages were assessed. But it has been held that it was competent for the company to show, by experts, the necessity of putting a culvert through an embankment at a particular point, in order to preserve the work,

as an answer to a claim for damages on account of the prospective obstruction of the water, and setting it back upon the land at that point by the embankment. But it should be shown that such culvert is absolutely indispensable, before any deduction can be made on that account, unless the company are in some legal way bound to make it. The company are not estopped from proving this necessity because the plat of the location of the road does not indicate a culvert at that point. *Nason v. Woonsocket Union R. R. Co.*, 4 R. I. 377. But where no part of the plaintiff's land is taken, and the statute gives all parties suffering damage by the construction of railways the right to recover, as in England, and some of the States of this country, and the water is drawn off from the plaintiff's well upon lands adjoining the railway, he may recover. *Parker v. Boston & Maine R. R. Co.*, 3 Cush. (Mass.) 107. So, too, may the proprietor of a mill-pond recover damages sustained by the construction of a railway across the same, although the dam was authorized by the legislature, upon a navigable river, and in constructing it, the conditions of the act were not complied with. *White v. South Shore R. R. Co.*, 6 Cush. (Mass.) 412.

¹ *Manning v. Commissioner of Compensation, &c.*, 9 East, 165. But future damages expected to accrue to land-owners cannot be estimated properly until after the completion of the works. *Lee v. Milner*, 2 M. & W. 824.

² *Henry v. Dubuque & Pacific R. R. Co.*, 2 Clarke, 288; *Pennsylvania Railroad v. Heister*, 8 Penn. St. 445.

*made?*¹ The difference between what the whole property would have sold for unaffected by the railroad, and what it would have sold for as affected by it is the true measure of damages;² but the fact that others have been brought by the construction and extension of the road into competition with the plaintiff, cannot be construed as a ground of damage.³ In estimating the disadvantages resulting from such road, consequential or speculative damages are to be rejected; and in estimating the advantages, such only as are special and peculiar to the property in question are to be considered, and not such as are common to the public.⁴ The value of the land taken for a railroad means its actual value, independent of the location of the road; and the "disadvantages" to be considered in assessing damages for such appropriation are the injuries to the part which is left arising from the taking.⁵ The object of an appraisal is to make the owner of the land good, by rendering an equivalent in money for the loss he sustains in the value of his property by being deprived of a portion of it. Compensation includes, not only the value of the portion taken, but also the diminution of the value of that from which it is severed.⁶

The present value of the lands, *not at a forced sale, but at a sale which a prudent holder would make, if he had the power of election as to time and terms, is to govern.* It is also proper to regard the location of the land, and the probabilities which a prudent man would entertain of the increased value of the property for building purposes.⁷

The question, however, is not, what estimate does the owner place upon the land? *but, what is its real worth, in the judgment of honest, competent, and disinterested men?* The use to which the owner has applied his property is of no importance, beyond its influence upon the present value. In deciding these questions, neither the purpose to which the property is now applied, nor the intention of the owner in relation to its future enjoyment, can be matters of much importance. In both cases, the proper inquiry is, what is the value of the property for the most advantageous uses to which it may be applied? If a man suffer his land to lie open and unim-

¹ Troy & Boston R. R. Co. v. Lee, 13 Barb. (N. Y.) 169; Canandaigua & Niagara Falls R. R. Co. v. Payne, 16 id. 273.

² Watson v. Pittsburgh & Connellsville R. R. Co., 37 Penn. St. 469.

³ Harvey v. Lackawanna & Bloomsburgh R. R. Co., 47 Penn. St. 428.

⁴ Hornstein v. Atlantic & Great Western R. R. Co., 51 Penn. St. 87.

⁵ Pacific R. R. Co. v. Chrystal, 25 Mo. 544.

⁶ Rochester & Syracuse R. R. Co. v. Budlong, 6 How. Pr. (N. Y.) 467.

⁷ Somerville & Easton R. R. Co. v. Doughty, 22 N. J. L. 495.

proved, that will not authorize the commissioners to say that it is worthless. They must award what the land would be worth in the hands of another who would cultivate and improve it; that is its value to the owner, because he can procure that sum of money for it. And in estimating the probable influence of any public improvement upon the value of land, the commissioners should not regard so much the intention of the owner in relation to the future use, as the purpose to which the property may be applied in the hands of one who is disposed to make it yield the greatest income. What price will it bring in the market, is the proper inquiry in a proceeding of this kind.¹ The true rule is, to appraise the property at its present value to the owner, considering the extent of interest which he has, and the qualified rights which may be exercised over it. In the case of a churchyard, if the church cannot use it for any purpose but burial, for such purpose one part of the ground is as valuable as another, and the part taken cannot be considered of more value than the part assessed for benefit.² So where a part of lands used by a hospital was taken, the fact that the improvement did not render the remaining property more valuable to the society, or for any purpose of the institution, than before, is not to be regarded. The particular use to which the property was then applied is not to be considered, except where, as in the case of churches and cemeteries, the land can be put to no other use.³

In the case of damages done to mill-property by the construction of the road, the injury to the unused and surplus water-power of the mill-owner is a legal ground of claim; and the measure of damages *is its actual market value for any useful purpose, to drive any kind of machinery which it was capable of driving, not what can be done with it if used in some supposed way, or other imagined improvements have been made.*⁴ The owner of land a part of which is flowed by means of a mill-dam erected by a manufacturing company may, by reason of the situation of the part flowed in relation to the other part, sustain damages beyond the value of the land actually flowed, for which he is entitled to compensation. But the benefits likely to result from the building of the dam by reason of an increase of business and

¹ Matter of Furman Street, 17 Wend. (N. Y.) 650, 670; Matter of William and Anthony Streets, 19 id. 678, 690; Troy & Boston R. R. Co. v. Lee, 13 Barb. (N. Y.) 169.

² Matter of Albany Street, 11 Wend. (N. Y.) 149.

³ Matter of William and Anthony Streets, 19 Wend. (N. Y.) 678.

⁴ Dorlan v. East Brandywine, &c. R. R. Co., 46 Penn. St. 520.

population, markets, schools, stores, and other like improvements, cannot be considered by way of set-off to the damages done to the land flowed. The benefits to be set off must obviously be of the like kind with the opposite injuries for which damages are sought. In assessing the damages occasioned by such erections, regard is to be had, not to the condition of the land as it may have been affected by maintaining the dam several years preceding the date of the complaint for assessment, but to the condition of the land at the commencement of the injury, as if no dam had been erected.¹

In arriving at the market value of the land, it is not proper to show what a person would give for the land rather than to be turned out,² nor what it is worth to the owner, but, what is its just value to a person who desires to purchase, and is willing to pay its full value.³ The price paid at a forced sale, or at a sale where there was no competition in the bidding,⁴ does not afford the true criterion. The purposes for which the land is used and its adaptability for that purpose, whether as a dwelling, a farm, or for manufacturing purposes, are all to be considered. If the land is mining land, its value should be estimated with reference to the minerals in it, and not with reference to the profits which the minerals would yield when taken out of the land.⁵ The price paid for the land may be shown, but is not the true criterion of value. The owner may show the circumstances under which he bought it, the improvements he has put upon it, and all the elements that go to make up its real value.⁶ If the grounds have been laid out with expensive walks, shrubs, fountains, or with fruit trees, etc., all these elements are to be considered, and their destruction by the taking is to be allowed for at their fair and just value.⁷

The owner of land taken by a railroad company is entitled to recover the value of *such interest or title in the land as he is shown to have, as it stood at the time of taking*, without any diminution for any benefits, advantage, or offset whatever; such damages as result im-

¹ Palmer Company v. Ferrill, 17 Pick. (Mass.) 58.

² Lawrence v. Boston, 119 Mass. 126; Robb v. Maysville T. Co., 8 Met. (Ky.) 117; Tufts v. Charlestown, 4 Gray (Mass.), 537.

³ Memphis v. Bolton, 9 Heisk. (Tenn.) 508; Lawrence v. Boston, *ante*.

⁴ Cobb v. Boston, 112 Mass. 181; How-

ard v. Providence, 6 R. I. 514; Fall River Iron Works v. Fall River, 110 Mass. 428.

⁵ Searle v. Lackawanna, &c. R. R. Co., 38 Penn. St. 57.

⁶ Swan v. Middlesex, 101 Mass. 178; Dickerson v. Fitchburg, 13 Gray (Mass.), 546; Sexton v. New Bridgewater, 116 Mass. 200.

⁷ Chambers v. Cincinnati, &c. R. R. Co., 10 Am. & Eng. R. R. Cas. 376.

mediately and directly, — as, the destruction of wells, springs, barns, outhouses, etc., — but not remote or speculative damages ; the value of fences made necessary ; the injury to his whole tract from the less convenient communication, etc. But against these special and peculiar damages may be set off any peculiar benefits resulting to his premises, beyond those enjoyed by all the neighbors.¹

The value of the property taken, in market *at that time and no other*, and the injury then necessarily known to result to the owner as the necessary and immediate consequence of such use of his property, without reference to the uncertain or remote benefits or disadvantages that may or may not occur in the future, is what the owner loses, and the legislature has no power to prescribe a different measure of damages ;² and its value at the time of the trial, or at any time subsequent to the construction of the work, cannot be referred to in determining the benefits conferred upon that portion of the land not taken.³

Interest is to be allowed the land-owner from the time of the taking. Thus, if a railroad corporation, by its location, takes land, interest is to be allowed from the time of the taking ; and the fact that there has been a delay for many years in bringing a petition for damages, seasonably filed, to a hearing, is immaterial.⁴ Where an appeal is taken, and the railroad company has paid the money into court, and takes possession of the land, if the assessment is set aside, the land-owner upon a new assessment may recover interest on the sum at which the damages are assessed from the time when the company took possession.⁵ Where a person's business is not destroyed by the laying out of the road, as would be the case where a brickyard, quarry, etc., is taken, but he is only driven to another locality to prosecute it, he is not to be allowed damages as for the destruction of his business, but only the expense of re-establishing it elsewhere. Thus, in a New York case,⁶ the plaintiff's business was that of raising and training blooded horses, and he had

¹ *Robbins v. Milwaukee & Horicon R. R. Co.*, 6 Wis. 636. But see *Milwaukee & Mississippi R. R. Co. v. Eble*, 4 Chand. (Wis.) 72.

² *Isom v. Mississippi Central R. R. Co.*, 36 Miss. 300 ; *Giesy v. Cincinnati, &c. R. R. Co.*, 4 Ohio St. 308.

³ *Indiana Central R. R. Co. v. Hunter*, 8 Ind. 74.

⁴ *Drury v. Midland R. R. Co.*, 127

Mass. 571 ; *Hartshorn v. B., C. R. & N. R. R. Co.*, 52 Iowa, 613.

⁵ *Atlantic, &c. R. R. Co. v. Koblenz*, 21 Ohio St. 334 ; *Rhys v. Valley Ry. Co.*, 1. R. 19 Eq. 93 ; *Warren v. St. Paul, &c. R. R. Co.*, 21 Minn. 424.

⁶ *New York, Lackawanna, &c. R. R. Co. in re*, 29 Hun. (N. Y.), 1. See also *Woodhaven & Rockaway R. R. Co. in re*, 21 Hun. (N. Y.), 250.

also a race-track on his farm. A railway company took land for its railway through the track, and destroyed it for that purpose. Damages were assessed as though his entire business had been destroyed. The court held that the damages should have been restricted to the cost of a new track. Land was taken for a railroad running along a navigable river, and the approach of the owner to the river from his land, which he used for a brickyard, was thereby obstructed. Commissioners awarded as land damages a sum far in excess of the cost of restoring communication with the river, by means of a tramway, etc. It was held that the award should be set aside as excessive, the measure of damages allowable being the expense of restoring communication with the river.¹ Where a person grants to a railroad company a right of way through his land, he can recover damages resulting from a want of due care and skill in constructing the road, but not damages resulting from a depreciation of the value of his other land because of the road, or for the use of the right of way, or for inconvenience occasioned to himself.²

SEC. 260. Blasting, Injuries from to be Assessed.—In the taking of lands for the construction of a railway, all such injuries as are likely to result from the building of the road in a proper manner are to be taken into account in the estimation of the damages; and this includes injuries likely to result to buildings and the remainder of the estate by means of blasting, in a proper manner, a ledge of rocks through which the railroad passes.³ But the compensation awarded does not cover damages resulting from blasting conducted in an im-

¹ *Re New York, West Shore, &c. R. R. Co.*, 29 Hun (N. Y.), 646. In determining the amount of compensation due to one whose land has been appropriated by a railroad company, not only the value of the land may be considered, but matters of special damage. *Bowen v. Atlantic & French Broad Valley R. R. Co.*, 17 S. C. 574. Where a railroad company, with the full knowledge of the owner, took and used land for a right of way without condemnation, and subsequently secured the condemnation of that and an additional tract for depot purposes, but made no entry thereon, it was held that the owner was entitled to compensation for the land actually taken, with election to take the present value, or the value at the time of entry, and the company could elect to take all the land condemned, or only that used

for right of way. A condemnation of land secured by the trustees of the first mortgage bondholders when the road was wholly in their possession, was held to be the act of the purchasers under the foreclosure of said mortgage, who could not escape payment of the damages assessed. *Williams v. New Orleans, Mobile, &c. R. R. Co.*, 60 Miss. 689. In assessing damages for the taking of land for a railroad, the inconvenience caused by cutting plaintiff's land in two may be considered. *Texas & Pacific R. R. Co. v. Durrett*, 57 Tex. 48.

² *Houston & E. T. R. R. Co. v. Adams*, 58 Tex. 476.

³ *Dodge v. County Commissioners*, 3 Met. (Mass.) 380; *Brown v. Providence R. R. Co.*, 5 Gray (Mass.), 35; *Whitehouse v. Androscoggin R. R. Co.*, 52 Me. 208; *St. Peters v. Denison*, 58 N. Y.

proper or negligent manner, nor from allowing the stones and rocks thrown upon the adjoining land, even by blasts properly conducted, to remain there for an unreasonable period; and where large stones from blasts properly conducted were thrown upon the lands of the plaintiff, which sunk into the earth and made large holes in his meadow-land, and the company neglected to remove them and restore the land to its proper condition, it was held that they were liable to the land-owner therefor in an action on the case.¹

SEC. 261. Private Ways.—Where the statute provides a remedy for injuries occasioned by railroads in obstructing highways, bridges, and private ways, by the construction of a railroad, it is held that a person cannot be regarded as having a private way through his own land independent of his right to the land; and where a railway company obstructed a pathway which the owner had made for his own use, it was held that the commissioners must have taken this into consideration, and that an independent action for the injury could not be maintained.² But where a person has a way by necessity across another's land, his right thereto is independent of the land taken, and he may maintain an action for its obstruction.³ But in the absence of any such statute, it has been held that a person who has merely a private way over the land of another, used as a street, although never laid out as such whether by grant or prescription, cannot recover for the obstruction of the way by the construc-

416. See *Carman v. Steubenville, &c. R. Co.*, 4 Ohio St. 399.

¹ *Sabin v. Vt. Cent. R. Co.*, 25 Vt. 363; *Georgetown, &c. R. Co. v. Eagles*, 9 Col. 544; 30 Am. & Eng. R. Cas. 228; *Id. v. Doyle*, 9 Col. 540; 30 Am. & Eng. R. Cas. 231.

² *Clark v. Boston, &c. R. Co.*, 24 N. H. 114; *Cate v. Nutter*, 24 id. 108. The right of the owner of a lot in a town or city to the use of the adjoining street, is as much property as the lot itself; the owner of the lot cannot be deprived of this right by the obstruction of the street, without compensation. It is immaterial in such case whether the owner of the lot owns to the middle of the street, or not. *Lackland v. North Missouri R. Co.*, 31 Mo. 180. Where a railroad company obstructs an alley in a city, by building a railroad track through the alley, so as afterwards to make the alley useless as an alley, an abutting lot-owner

has the right, if he chooses, to consider the obstruction as a permanent taking and appropriation of the alley by the railroad company, and may commence an action against the railroad company and recover damages for such obstruction; and in such case the measure of his damages will be the injury to his lot at the time the alley was taken and appropriated by the railroad company, and not at the time of the trial of the case. *Central Branch, &c. R. Co. v. Andrews*, 26 Kan. 702. Where a person had acquired a possessory title to land never opened to the public as a street, it was held that a railway company constructing a railway thereon so as to destroy a public road leading to his quartz-mill, and materially damaging the accessibility to his dwelling-house, was liable therefor. *Virginia, &c. R. Co. v. Lynde*, 13 Nev. 92.

³ *Kimball v. Coheco R. Co.*, 27 N. H. 448.

tion of a railway along or across it, because under such circumstances others are not precluded from acquiring a similar right over the same soil, and therefore the right is not a distinct right, but rather in the nature of a public right.¹ But where a person has a *distinct* right of way over the land of another, whether by grant or prescription, he is entitled to compensation for its destruction; and it is quite difficult to understand why he is not entitled to compensation therefor, even though the way is used by others either with or without authority from the owner of the land. If the right of way exists by grant or prescription, *it is a distinct right*, and the circumstance that others may have a similar right over the same way does not strip it of its character as an easement, or as property,² as it is one of the peculiarities of easements that a multitude of persons may have a distinct property therein.

SEC. 262. Damages Confined to the Particular Tract.—The damages to be awarded are confined to injuries to the particular estate from which the land is taken, and cannot be extended to other lands of the owner entirely separate and distinct from that a part of which is taken.³ But ordinarily the damages must be confined to the lot or

¹ *Boston & Worcester R. R. Co. v. Old Colony R. R. Co.*, 12 Cush. (Mass.) 605; *Parker v. Boston, &c. R. R. Co.*, 3 id. 107. Nor can one have a private right of way across his own land. *Presbrey v. Old Colony, &c. R. R. Co.*, 103 Mass. 1. See holding that a person may have a distinct right of way in an alley, *Kansas City, &c. R. R. Co. v. Farrell*, 76 Mo. 183.

² *Kansas City, &c. R. R. Co. v. Farrell*, 76 Mo. 183.

³ *Bangor, &c. R. R. Co. v. McComb*, 60 Me. 290; *St. Louis, &c. R. R. Co. v. Brown*, 58 Ill. 61; *Fleming v. Chicago, &c. R. R. Co.*, 34 Iowa, 353. In *N. Y. Central, &c. R. R. Co., in re*, 6 Hun (N. Y.), 146, the appellants owned several blocks of land in the city of New York, lying between Sixty-fifth and Sixty-sixth streets, intersected by Eleventh and Twelfth avenues. The block lying between Eleventh and Twelfth avenues, a portion of which was taken by these proceedings, was further divided by a strip of land used for respondent's railroad, no right of way over such strip being possessed by the appellants. It was held (1), that no consequential damages to the block

lying between Tenth and Eleventh avenues, or to that portion of the block between Eleventh and Twelfth avenues which lay on the other side of the railroad track from the portion taken in these proceedings, could be allowed; (2), that the questions to be determined by the commissioners were: 1. The value of the ground taken, in the estimate of which they might take into account its value for any use to which it might be appropriated. 2. The consequential damage, if any, to that portion of the land in the block between Eleventh and Twelfth avenues which lay on that side of the existing railroad track from which the land for the new route was taken by these proceedings. Twelfth avenue, which belonged to the city, though not actually opened, was held to constitute a boundary of a distinct parcel. In such proceedings, it is proper for the party whose land is taken to show the purpose for which the land had been purchased, and how far the taking of a portion of such land damages the residue for such purpose. *Sherwood v. St. Paul, &c. Co.*, 21 Minn. 127; *Minnesota Valley R. R. Co. v. Doran*, 15 Minn. 230; *St. Paul,*

subdivision from which the land is taken, and injury to other lots, separated by streets and alleys, is not generally taken into consideration. The damages and benefits should be considered in relation to the entire tract, and not to a limited strip immediately adjoining the railroad or improvement.¹ Damages to lands of the same owner, at a considerable distance, caused by injuring a franchise out of the land, cannot be added to damages to land actually taken.² The damages to separate tracts are to be considered separately.³ If, however, more than one lot or block is occupied in one business, as in that of a brewery, with necessary buildings on each side of an alley, the damages to the entire property must be paid, and not only the damages to the lot from which the strip of land is taken. But if the fixtures, engines, and appliances could be transferred to the other side of the alley, and placed in such a situation that the brewery could have been just as effectively operated as it was before, then the actual loss to the owners would have been the trouble and expense of making the removal, together with compensation for the use of the brewery for whatever time it would have been necessarily idle whilst the change and transfer were being made.⁴ Again, if the several lots are used as one property, as a lumber-yard and saw-mill, and all the blocks are necessary to the enjoyment of the mill-property, damages may be allowed to the whole tract, for taking away and separating necessary portions of the establishment, although the lots may be separated from each other by a public street.⁵ The same doctrine has been applied to the case of a brickyard, where the different lots were used together, and where the owners were prevented from enlarging by proximity to the railroad.⁶ The fact that a tract had been laid out into city-lots, but not used as such,

&c. *R. R. Co. v. Matthews*, 16 Minn. 341.

¹ *Page v. Chicago, &c. R. R. Co.*, 70 Ill. 324; *Robbins v. Milwaukee, &c. R. R. Co.*, 6 Wis. 636. In *New York, &c. R. R. Co., in re*, 27 Hun (N. Y.), 153, where the land had been divided into building lots, although never used for any other purpose than pasturage, it was held that the depreciation in the value of the lots through which the road did not pass could not be taken into account. But in an action for damages where the land was all used as a part of the same tract, although separated by a highway, it was held that damages to the whole tract should be con-

sidered. *New York, West Shore, &c. R. R. Co. v. Le Feare*, 27 Hun (N. Y.), 537.

² *Fuller v. Edings*, 11 Rich. (S. C.) L. 239.

³ *St. Louis, &c. R. R. Co. v. Brown*, 58 Ill. 61.

⁴ *Hannibal Bridge Co. v. Schaubacher*, 57 Mo. 582.

⁵ *Chapman v. Oshkosh, &c. R. R. Co.*, 33 Wis. 629. *Contra* (in a case almost exactly similar), *Fleming v. Chicago, &c. R. R. Co.*, 34 Iowa, 353.

⁶ *Sherwood v. St. Paul, &c. R. R. Co.*, 21 Minn. 127; s. c. 21 Minn. 122.

will not prevent the consideration of the damages to the entire tract. The court is not to consider the map, but the land as it stands, and the use to which it is applicable. The division into lots is accidental.¹ Hence an eighty-acre tract, separated from the rest of a farm by a public road, may be considered as a part of the farm, if actually so in fact.² The tract is to be a compact tract, and not two farms separated by a high bluff and distant from each other, through only one of which the railroad passed.³ When the blocks and tracts are not used together, no damages can be allowed for blocks separated by streets from the block in which the land is taken; and if a strip is taken adjoining an existing railroad, there will be no damages for land on the other side of the existing railroad.⁴ The question cannot arise in considering damages to vacant and unoccupied land.⁵ Where the company institutes proceedings, and describes the land in its petition, the damages are to be confined to the land mentioned in the petition, unless the owner, by cross-bill, shows that he owns contiguous land which will be damaged.⁶

SEC. 263. Measure of Compensation for Property of one Corporation taken for its Use by another.—The proper rule of valuation of property of one corporation taken for the use of another, is held not to be what the property is worth to the first corporation for its uses, but what it is worth for general purposes,—what is its value in the market.⁷ The same principles prevail in this respect as prevail in reference to compensation to individuals for the taking of their property,⁸ and merely speculative or conjectural damages should not be allowed. Thus, in taking a part of a turnpike road, the fact that the railway will diminish the business of a turnpike is not to be considered;⁹ nor where one railway crosses another are

¹ *Welch v. Milwaukee, &c. R. R. Co.*, 27 Wis. 108; *Driver v. Western R. R. Co.*, 32 Wis. 569.

² *St. Paul, &c. R. R. Co. v. Murphy*, 19 Minn. 500.

³ *Minnesota, &c. R. R. Co. v. Doran*, 15 Minn. 230.

⁴ *Matter of New York Central R. R. Co.*, 6 Hun (N. Y.), 146.

⁵ *Walker v. Old Colony R. R. Co.*, 103 Mass. 10; *Presbrey v. Old Colony R. R. Co.*, 103 Mass. 1.

⁶ *Jones v. Chicago, &c. R. R. Co.*, 68 Ill. 380; *Mix v. Lafayette, &c. R. R. Co.*, 67 Ill. 319; *Mill's Em. Dom.* § 167.

⁷ *Goodin v. Cincinnati Canal Co.*, 18 Ohio St. 169. In condemning a right of way across another railroad, the company whose road is crossed is entitled to damages sufficient to put and keep its embankments and track in as safe a condition as before. *St. Louis, Jacksonville, &c. R. R. Co. v. Springfield, &c. R. R. Co.*, 96 Ill. 274.

⁸ *Fitchburg R. R. Co. v. Boston & Maine R. R. Co.* 3 Cush. (Mass.) 58; *Boston & Worcester R. R. Co. v. Old Colony R. R. Co.*, 3 Allen (Mass.), 142.

⁹ *Troy & Boston R. R. Co. v. Northern T. Co.*, 16 Barb. (N. Y.) 100.

damages to be given on account of a statutory requirement to stop trains at such crossings, and the consequent impairment of the hauling capacity of the engines.¹ Nor are damages to be given for the delay, inconvenience, trouble, and danger resulting from such crossing.² But in estimating the compensation in such cases, the damages are not to be restricted to such as arise from the mere physical injury to the land, but should extend to all such loss, inconvenience, and damage as may be reasonably expected to result from the construction and use of the crossing.³ In a recent case in Illinois where the second road condemned a right of way across the road of the first, passing under the track by cutting through its embankment, the court held that the compensation should be such a sum as would enable the first company to place its track over the crossing in as

¹ Chicago, &c. R. Co. v. Joliet, &c. R. Co., 105 Ill. 388; 44 Am. Rep. 799; 14 Am. & Eng. R. Cas. 62.

² Peoria & Pekin R. Co. v. Peoria & F. R. Co., 105 Ill. 110; 10 Am. & Eng. R. Cas. 129. In this case the court went on to say: "The law requiring railroad trains to stop before crossing another railroad being a mere police regulation, and subject to repeal at any time, the damages sustained by a railroad company for the delay, inconvenience, and trouble in stopping before crossing another road seeking a condemnation for right of way across the track of an existing railroad, are too vague, indefinite, and contingent to be an element in the assessment of damages in favor of the road to be so crossed. Nor is the increased danger, arising from the crossing of the track of one railroad by the trains of another, to be considered as an element of damage in such proceeding. To allow damages on such a claim would violate the rule that they cannot be allowed on mere conjecture, speculation, fancy, or imagination. They must be real, tangible, and proximate. Nor is this rule in conflict with what was said in a case before this court (Lake Shore, &c. R. Co. v. Chicago, &c. R. Co., 100 Ill. 21; 2 Am. & Eng. R. Cas. 454), in which it was held that only such injury and inconvenience as reduce the capacity of the corporation to transact its business, and necessarily result in damage and loss, are elements of damage. *Direct and immediate damages alone are recoverable in this class of cases,*

and remote or 'merely incidental damages cannot be considered. It is that injury which depreciates the value of the property, whether by taking a portion of it or rendering the portion left less useful, or in case of a railroad company or other corporate body, less capable of transacting its business, — such a hindrance and inconvenience as to occasion loss, or diminish and limit its capacity to transact its business by decreasing the power to transact as much, or necessarily increasing the expense of what may be done, although not diminished; and this hindrance must produce immediate or future loss. If the new structure, when made, does not necessarily abridge the owner's capacity without increased expense to transact an equal volume of business, then, although there may be inconvenience and annoyance, unless the property is depreciated in value these are not elements of damages." See also Lake Shore, &c. R. Co. v. Cincinnati, &c. R. Co., 30 Ohio St. 604; Boston, &c. R. Co. v. Old Colony R. Co., 3 Allen (Mass.), 142; Old Colony R. Co. v. Plymouth Co., 14 Gray (Mass.), 155; Massachusetts, &c. R. Co. v. Boston, &c. R. Co., 121 Mass. 124; Boston, &c. R. Co. v. Old Colony R. Co., 12 Cush. (Mass.) 605; Chicago, &c. R. Co. v. Joliet, &c. R., 105 Ill. 388.

³ Lake Shore, &c. R. Co. v. Chicago, &c. R. Co., 100 Ill. 21; 2 Am. & Eng. R. Cas. 454; Chicago, &c. R. Co. v. Springfield, &c. R. Co., 67 Ill. 147.

safe condition, as nearly as practicable as it was originally ; that the damages should include the additional expense of a watchman when one was rendered necessary, also the expense of building and maintaining permanent abutments for retaining the walls ; losses incident to rebuilding or repairing, and contingent losses by fire or otherwise ; and if any other kind of bridge over the excavation is more safe than a wooden one, the compensation should be sufficient to enable the company to erect and maintain perpetually a bridge of that degree of safety, and likewise to reimburse it for all inconvenience and expense incident to the erection and maintenance of such a bridge.¹ In a proceeding by one railroad company against another for damages caused by taking the petitioner's land under legislative authority, it is not a proper consideration for enhancing the damages, that the petitioners own a railroad extending far into the interior, and are doing a large and profitable business, which would be incommoded by the track and conveniences of the respondents. But the fact of the proximity of the railroad communication with tide-waters and a harbor, and the consequent increased value of the property for any and all useful business purposes, are proper considerations in estimating the damages.² The rule as to the measure of damages where part of the road-bed of a railway is condemned for a highway crossing has been clearly stated by Chief-Justice SHAW, in a Massachusetts case,³ where he said : " The petitioners (the railroad company) are entitled to recover damages for taking their land for the purposes of a highway, subject, however, to its use for a railroad ; for the expense of erecting and maintaining signs required by law at the crossing ; for making and maintaining cattle-guards at the crossing, if necessary ; and for the expense of flooring the crossing and keeping the planks in repair." ⁴ But increased liability to damage from accidents from collision and otherwise, the increased expense of ringing the bell and sounding the whistle at the crossing, etc., cannot be considered as an element of damage.⁵ Nor can evidence be introduced showing payments by the company for accidents at their crossings.⁶ The parties seeking to condemn the land cannot introduce evidence tending to

¹ *St. Louis, &c. R. Co. v. Springfield, &c. R. Co.*, 96 Ill. 274 ; 2 Am. & Eng. R. Cas. 488.

² *Boston, &c. R. Co. v. Old Colony R. Co.*, 12 Cush. (Mass.) 605.

³ *Old Colony, &c. R. Co. v. Plymouth County*, 14 Gray (Mass.), 155.

⁴ See also *State v. Chicago, &c. R. Co.*, 43 Minn. 524 ; 45 Am. & Eng. R. Cas. 106.

⁵ *Old Colony, &c. R. Co. v. Plymouth County*, 14 Gray (Mass.), 155.

⁶ *Boston, &c. R. Co. v. Middlesex County*, 1 Allen (Mass.), 824.

show the supposed future benefit to the company from a probable increase of business in consequence of the establishment of the new highway.¹

If the whole franchise and property of the corporation are taken, of course its true and just value must be given, — that is, its fair market value.

SEC. 264. What Benefit may be allowed. — In a proceeding against a railroad company to recover damages done to land by the location and construction of the road, where the statute directs the advantages as well as disadvantages of the road to be considered, it is competent for the company to prove that the land has increased in value by the construction of the road;² and any direct and peculiar

¹ Old Colony, &c. R. Co. v. Plymouth County, 14 Gray (Mass.), 155; Boston, &c. R. Co. v. Middlesex Co., 1 Allen (Mass.), 324; State v. Chicago, &c. R. Co., 43 Minn. 524; 45 Am. & Eng. R. Cas. 106. But in State v. Chicago, &c. R. Co., 43 Minn. 524; 45 Am. & Eng. Corp. Cas. 106, it is held that the cost of cattle-guards and wings and crossing signs is not to be allowed to the company as damages for laying out a highway across its tracks, though the cost of planking a crossing and grading it are proper items to be considered in determining the compensation. See also State v. District Court, 42 Minn. 247; 42 Am. & Eng. R. Cas. 241.

² Plank-Road Co. v. Rea, 20 Penn. St. 97; Guess v. Stone, &c. Co., 72 Ga. 320; 28 Am. & Eng. R. Cas. 236; Britton v. Des Moines, &c. R. Co., 59 Iowa, 540; 10 Am. & Eng. R. Cas. 412; Smith v. Combs, 78 Mo. 32; 20 Am. & Eng. R. Cas. 209; St. Louis, &c. R. Co. v. Kirby, 104 Ill. 345; 10 Am. & Eng. R. Cas. 214 (general benefit to farm by making better market facilities cannot be considered); Pueblo, &c. R. Co. v. Rudd, 5 Col. 270; 10 Am. & Eng. R. Cas. 404; Grafton, &c. R. Co. v. Foreman, 24 W. Va. 662; 20 Am. & Eng. R. Cas. 215; Morin v. St. Paul, &c. R. Co., 30 Minn. 100; 10 R. Cas. 223. But benefits shared in common with all other property-owners along the line of improvement, such for example as improved market facilities, cannot be considered. Chicago, &c. R. Co. v. Blake, 116 Ill. 163; 23 Am. & Eng. R. Cas. 97;

Pittsburgh, &c. R. Co. v. McCloskey, 110 Penn. St. 436; 23 Am. & Eng. R. Cas. 86. In assessing compensation for a local incidental injury from the construction of a railroad, a local incidental benefit to the remainder of the land, arising from the building of a railroad, but not connected with the subject-matter or locality of the injury, cannot be taken into account. In the case of compensation claimed for the building of a railroad between a navigable river and coal mines, whereby the river transportation was injured or cut off, to reduce damages, the railroad company may show that the river transportation had lessened in value, by the facilities for transportation furnished by the railroad. Where the indirect evidence was that there were such coal mines between, and that such building would prevent coal being shipped on the river, the question on cross-examination, whether the facilities of coal transportation would be diminished by such railroad, was held legitimate and proper. In assessing damages for land taken by a railroad company, the jury cannot legally take into consideration and make allowance for any such benefits as accrue to the community generally from the construction of the road. Little Miami Railroad Co. v. Collett, 6 Ohio St. 182. The defendant asked that the following instruction should be given to the jury: "In ascertaining the extent of the injury to the plaintiffs, an estimate of the value of the property taken at the time of the taking is a necessary step; but if the benefits resulting to the plaintiffs, by the con-

benefit or increase of value accruing therefrom to land of the same owner adjoining or connected with the land taken, and forming part

struction of the railroad, equal in pecuniary value the value of the property taken by the defendant, it is a just and legal compensation for the property so taken." It was held that the instruction should have been given; but it is not proper to receive evidence of its value at the time of trial; it is proper to prove what was its value at the time of the construction of the road. *Indiana Central R. Co. v. Hunter*, 8 Ind. 74. If by the construction of a railroad, a landholder is obliged to build additional fences, that fact is to be considered in estimating the land damages. *Evansville R. Co. v. Fitzpatrick*, 10 Ind. 120; *Same v. Stringer*, Ind. 551. In assessing land damages, the jury are to disregard benefits which may be supposed to accrue to the land-owner, as drainage by the railroad ditches. *Evansville, &c. R. Co. v. Fitzpatrick*, 10 Ind. 120. Any direct and peculiar benefit or increase of value accruing therefrom to land of the same owner adjoining or connected with the land taken, and forming part of the same parcel or track, is to be considered by the jury and allowed by way of set-off; but not any general benefit or increase of value received by such land in common with other lands in the neighborhood, nor any benefit to other land of the same owner, though in the same town. The time at and from which the benefit accruing to the owner of land taken for a highway or railroad is to be estimated, in assessing his damages for such taking, is that of the actual location. *Meacham v. Fitchburg R. Co.*, 4 Cush. (Mass.) 291.

When benefits are to be allowed for, from the damages incident to "the construction of the road," — the phrase, "the construction of the road," as used in the charter, does not mean the completion of the whole work, but the construction of that particular portion which runs through the party's land. *Milwaukee, &c. R. Co. v. Eble*, 4 Chand. (Wis.) 72; *Vicksburg, &c. R. Co. v. Calderwood*, 15 La. An. 481. And the commissioners or jury, in estimating the "benefit or advantage" to the owner, should take into consideration the

speculative or salable increase in the value of the land attributable to the construction of the road. The owner is to be assessed for any benefit, without exception, that he may receive from the construction of the road. And in estimating the "loss or damage," the expense of fencing along the line of the road, where it passes through fields, should be considered, and also the incidental depreciation of the value of the track by reason of the road passing through it. *Greenville, &c. R. Co. v. Partlow*, 5 Rich. (S. C.) L. 428. Where damages to an estate by the construction of a railroad are under advisement by a jury, they are to take into consideration the injury to the lands not taken, to the owner's dwelling-house on the estate, the subjection of his family to danger, his buildings to risk of fire, the inconvenience caused by embankments and excavations, and deterioration of his lands for agricultural purposes or for building-lots. It is not competent, in order to rebut the opinions of witnesses as to the value of land, to show that in other towns lands had been increased in value by the proximity of the road. *Somerville, &c. R. Co. v. Doughty*, 2 N. J. L. 495. In Missouri the benefit derived which is to be taken into account is the direct and peculiar benefit resulting to the land in particular, not the general benefit accruing to it in common with other land which is enhanced in value by the building of the road. *St. Louis, &c. R. Co. v. Richardson*, 45 Mo. 466. But in Alabama, where land is taken for public works, any increased value of the remaining lands of the owner, arising from the public works for which the lands are taken, cannot be considered in assessing the amount of compensation to be paid for the portion taken; nor, in arriving at the amount of such compensation, can conjectural and speculative estimates as to possible advantages or disadvantages arising from the public works be taken into the account. *Alabama, &c. R. Co. v. Burkett*, 42 Ala. 83.

of the same parcel or tract, is to be considered by the jury and allowed by way of set-off; but not any general benefit or increase of value received by such land in common with other lands in the neighborhood, nor any benefit to other land of the same owner, though in the same town.¹ The benefits must be the direct and

¹ *Meacham v. Fitchburg R. Co.*, 4 Cush. (Mass.) 291; *Upton v. South Reading Branch R. Co.*, 8 Cush. (Mass.) 600; *Chicago & Mexican Central R. Co. v. Ritter*, (Tex. 1883) 10 Am. & Eng. R. R. Cases, 202; *Philadelphia & Erie R. Co. v. Cake*, 95 Penn. St. 139. The incidental benefits to the owner which may be set off against his incidental damages, in estimating the damages to be paid him for the taking of his land for railroad purposes, do not include the general advance in the value of land resulting from the construction of the road. *Railroad Co. v. McDonald*, 12 Heisk. (Tenn.) 54. While the general advantage resulting as well to the public as to the property which is the subject of assessment is not to be considered in estimating the benefits to that property, yet anything and everything connected with the general improvement which tends to increase its value or usefulness to such property may be considered. *Pittsburgh & Lake Erie R. Co. v. Robinson*, 95 Penn. St. 426. That the plaintiffs refused to avail themselves of the advantages which may have been afforded them by the railway is of no moment; for the question is not as to the disposition of the owners of the property, but whether or not the facilities afforded by the improvement have advanced the market value of the property. *Pittsburgh & Lake Erie R. Co. v. Robinson*, 95 Penn. St. 426. LAKE, J., expresses the rule very clearly thus: "The owner of land taken for a railroad is entitled to recover, in any event, as one item of damage, the fair value of the portion actually taken. *Wagner v. Gage Co.*, 3 Neb. 237. And in addition to this, he should have allowed to him a reasonable compensation for whatever damage the evidence shows must necessarily be done to the residue of the track from the proper construction and future careful operation of the road. Where the evidence shows that the landowner will be specially benefited by the location of the road, such benefit may go

to reduce the damages to the residue of the land, but cannot be set off against the value of the part actually taken. But those benefits which are common and shared in by others as well cannot be considered to reduce his damages. But damages from a supposed insufficiency of a culvert to the owner's remaining land in case of high water, and the possible destruction of property by fire and otherwise through the carelessness of the company's agent in operating the road, are too uncertain and remote to be taken into the estimate; and valuations of the land based in part thereon are entitled to no weight with the jury. *King v. Iowa Midland R. Co.*, 34 Iowa, 455; *Lehigh Valley R. Co. v. Lazarus*, 28 Penn. St. 203; *Patten v. Northam, &c. R. Co.*, 33 Penn. St. 426; *Fleming v. Cedar Rapids, &c. R. Co.*, 34 Iowa, 353. Damages to be paid by the company upon the condemnation do not cover those caused by injuries resulting from negligence or unskilfulness in either the construction or operation of the road. *Delaware, Lack., & West. R. Co. v. Salmon*, 40 N. J. L. 299. And even if they were in fact included in the assessment, their payment would be no bar to future actions brought for such injuries. The damages for which the law provides, and proper to be included in the assessment for the right of way, are simply those which it can be said with reasonable certainty the owner of the land will sustain by reason of its appropriation; in other words, such damages as are necessarily incident to the proper construction and careful management of the road, leaving injuries resulting from negligence to be compensated for by action whenever they occur. *Freemont, Elkhorn, &c. R. Co. v. Whalen*, 11 Neb. 585; *Whiteman v. Wilmington, &c. R. Co.*, 2 Harr. (Del.) 514; *Hatton v. Milwaukee*, 31 Wis. 27; *Indiana Central R. Co. v. Hunter*, 8 Ind. 74; *Louisiana, &c. Plank-Road Co. v. Pickett*, 25 Mo. 535; *Pennsylvania R. Co. v. Heister*, 8 Penn. St. 445; *Kramer v. Cleveland, &c. R. Co.*,

peculiar benefits resulting to them in particular, and not the general benefits they derive in common with other land-owners in the vicinity from the building of the road.¹ The distinction made in this class of cases seems to us to be without foundation, and if benefits and advantages are to be allowed at all there seems no good reason why, if they are equal to the entire value of the land taken, they should not be allowed in full satisfaction of the entire value found; and in several of the States, it is held that if the benefit will equal the value of the land, they may go to the entire payment of the damages, upon the principle that, as no damage is sustained, none can be claimed.² Although general resulting bene-

5 Ohio St. 140; *Malone v. Toledo*, 34 Ohio St. 541; *Columbus, &c. R. Co. v. Simpson*, 5 Ohio St. 251; *Newby v. Platte Co.*, 25 Mo. 258; *McIntire v. State*, 8 Blackf. (Ind.) 384. The rule is said to be that the benefits to be offset are only such as the land-owner derives in excess of those which his neighbor derives from the construction of the road. *Tebo, &c. R. Co. v. Kingsbury*, 61 Mo. 51; *Chapman v. Oshkosh, &c. R. Co.*, 38 Wis. 629; *Raleigh, &c. R. Co. v. Wicker*, 74 N. C. 220; *Quincy Mo., & Pacific R. Co. v. Ridge*, 57 Me. 599; *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491; *Hasher v. Kansas City, &c. R. Co.*, 60 Mo. 303; *Addin v. White Mountains R. Co.*, 55 N. H. 413; *Wyandotte, &c. R. Co. v. Waldo*, 70 Ill. 629.

¹ *Newby v. Platte County*, 25 Mo. 258; *Pacific R. Co. v. Chrystal*, 25 Mo. 544; *McCarty v. Chicago, &c. R. Co.*, 34 Ill. App. 273. In a number of the States there are constitutional provisions requiring that no right of way shall be appropriated until compensation is made irrespective of any benefits to the land-owner to be derived from the proposed road or improvements. In such cases, it is error to admit evidence of the enhanced value of the land-owner's adjacent property resulting from the construction of the road. *San Bernadino, &c. R. Co. v. Haven*, 94 Cal. 89; *Dulaney v. Nolan County (Tex.)*, 20 S. W. Rep. 70; *Packard v. Bergen Neck Ry. Co.*, 54 N. J. L. 229, 553; *Interstate Consol. Rapid Transit Co. v. Simpson*, 45 Kan. 714; *Chicago, &c. R. Co. v. Woodward*, 47 Kan. 191. See also *Col. Central R. Co. v. Humphreys*, 16 Col. 34.

² *Commonwealth v. Middlesex*, 9 Mass. 388; *Whitman v. Boston, &c. R. Co.*, 3

Allen (Mass.), 133; *Putnam v. Douglass*, 6 Oregon, 328; *Elgin v. Eaton*, 70 Ill. 324; *Trinity College v. Hartford*, 32 Conn. 452; *Nichols v. Bridgeport*, 23 Conn. 189; *Long Island R. Co. v. Bennett*, 10 Hun. (N. Y.) 91; *Chicago, &c. R. Co. v. Francis*, 70 Ill. 238; *McReynolds v. Burlington, &c. R. Co.*, 106 Ill. 158. But as holding the other doctrine as stated in the text, see *Shipley v. Baltimore & Potomac R. Co.*, 34 Md. 336; *Jones v. Wills Valley R. Co.*, 30 Ga. 43; *Atlanta v. Central, &c. R. Co.*, 53 Ga. 120; *New Orleans, &c. R. Co. v. Gay*, 31 La. An. 430; *Todd v. Kankakee, &c. R. Co.*, 78 Ill. 530; *Fremont, &c. Valley R. Co. v. Whalen*, 11 Neb. 585. The distinction noted by BIGELOW, J., in *Whitman v. Boston, &c. R. Co.*, 3 Allen (Mass.), 141, will serve to reconcile the apparent conflict. "It was especially necessary that in estimating the damages done to the land the jury should have been instructed that they were to deduct from the value of the land taken the amount of the benefit which accrued to the petitioners by the increase in the value of the residue of the lot, although other lots in the immediate vicinity bordering on the canal had received a similar benefit by the location of the road over them. Otherwise the jury might be led to think the case fell within the rule laid down in the decision read to them from *Meacham v. Fitchburg R. Co.*, 4 Cush. 291, in which it was decided that no deduction was to be made from damages caused by the location of the road by reason of a benefit received by the person whose land was taken, in common with other owners of real estate in the vicinity whose land was not taken for the construction of the road." See also

fit to the land-owner, in common with that occurring to other land-owners in the vicinity, is not to be taken into account in estimating damages for land appropriated to the use of a railway, yet where a local incidental benefit to the residue of the land is blended or connected, either in locality or subject-matter, with a local incidental injury to such residue of land, the benefit may be considered in fixing the compensation to be paid the owner, not by way of deduction from the compensation, but of showing the extent of the injury done the value of the residue of the land.¹ In some of the States it is held that whenever the property of an individual is required for public uses, the owner is entitled to just compensation in money; but if, in addition to its intrinsic value, he claims indemnity for the losses and inconveniences which will incidentally devolve upon him in consequence of such public appropriation of his property, in estimating those losses and inconveniences, the profits, advantages, and conveniences which will result to him from the uses to which the public applies the property taken are also to be estimated, and the excess of the former over the latter is the true amount of incidental damages. The just compensation guaranteed by the Constitution for the property taken must be ascertained and paid, regardless of any speculative advantage to flow from its use.²

Parks v. Hampden Co., 120 Mass. 395; *Allen v. Charlestown*, 109 id. 243; *Upton v. So. Reading Branch R. R. Co.*, 8 Cush. (Mass.) 600; *Vicksburg, &c. R. R. Co. v. Calderwood*, 15 La. An. 481; *Chesapeake, &c. R. R. Co. v. Tyree*, 7 W. Va. 693; *Mount Washington Road, in re*, 35 N. H. 134; *Carpenter v. Landaff*, 42 id. 218; *Adden v. White Mountains R. R. Co.*, 55 id. 413; *Senior v. Metropolitan Ry. Co.*, 2 H. & C. 258; *James River, &c. R. R. Co. v. Turner*, 9 Leigh (Va.), 313; *Keithsburg, &c. R. R. Co. v. Henry*, 79 Ill. 290; *Peoria, &c. R. R. Co. v. Black*, 58 id. 33; *Weir v. St. Paul, &c. R. R. Co.*, 18 Minn. 155; *Minnesota Central R. R. Co. v. McNamara*, 13 id. 508; *Lee v. Tebo, &c. R. R. Co.*, 53 Mo. 178; *Nicholson v. N. Y. & New Haven R. R. Co.*, 22 Conn. 74; *Nichols v. Bridgeport*, 23 Conn. 189; *Hornstein v. Atlantic, &c. R. R. Co.* 51 Penn. St. 87. But in some States general benefits, common to all in the vicinity, are held to be allowable as against the disadvantages. *New Orleans, &c. R. R. Co.*

v. Gay, 31 La. An. 430; *California, &c. R. R. Co. v. Armstrong*, 46 Cal. 85; *Alton, &c. R. R. Co. v. Carpenter*, 14 Ill. 190; *San Francisco, &c. R. R. Co. v. Caldwell*, 31 Cal. 367; *Credit Valley R. R. Co. v. Spraggs*, 24 Grant's Ch. (U. C.) 231.

¹ *Cleveland & Pittsburgh R. R. Co. v. Ball*, 5 Ohio St. 568.

² *Sutton v. City of Louisville*, 5 Dana (Ky.), 28; *Rice v. Danville, &c. Turnpike Co.*, 7 Dana (Ky.), 81; *Jacob v. City of Louisville*, 9 Dana (Ky.), 114; *Woodfolk v. Nashville & Chattanooga R. R. Co.*, 2 Swan (Tenn.), 422; *Shipley v. Baltimore, &c. R. R. Co.*, 34 Md. 336; *Hayes v. Ottawa, &c. R. R. Co.*, 54 Ill. 373; *Wilson v. Rockford, R. I., & St. L. R. R. Co.*, 59 Ill. 273; *Peoria, P., & J. R. R. Co. v. Laurie*, 63 Ill. 264; *Carpenter v. Jennings*, 77 Ill. 250; *Todd v. Kankakee & I. R. R. R. Co.*, 78 Ill. 530; *Oregon Cent. R. R. Co. v. Wait*, 3 Oreg. 91; *Woodfolk v. Nashville & C. R. R. Co.*, 2 Swan, 422; *East Tenn. & V. R. R. Co. v. Love*, 3 Head, (Tenn.) 63; *Paducah & M. R. R.*

A tenant for years whose lease began before, and who was in possession at the time an injury was done, is an owner within the provisions of a statute regulating the compensation to be paid to owners of land, etc., and is entitled to recover damages for an injury sustained by him in the building of the road; and the benefit accruing to him from the road, but not that accruing to the land-owner, may be deducted from the injury received.¹ But in assessing damages for land taken by a railroad company, the jury cannot legally take into consideration and make allowance for any such benefits as accrue to the community generally from the construction of the road.² And in some of the States it is held that the "just compensation" secured by constitutional provision to a land-owner for injury to his property taken by a railroad, excludes from consideration the general enhancement of the value of his property. The cash value and the actual damage are the true standard by which to determine the compensation to which in such cases the party is entitled.³ And in those States where benefits are allowed to be offset, the jury cannot estimate the benefit the road has been to property of the plaintiff situated in another place, and unconnected with the lot for which he claims damages;⁴ and evidence that the remaining land of the petitioner would be benefited by the location of a station at that place is inadmissible in reduction of damages, if no act has been done by the proprietors of the railroad towards establishing such a station.⁵ In several of the States the Constitution, and in others the statute, provides that damages shall be assessed without deduction for benefits, and of course, in those States full damages must be awarded. The fact that the building of the road will increase the demand for a certain species of property which the land-

Co. v. Stovall, 12 Heisk. (Tenn.) 1; & T. R. R. Co. v. Calderwood, 15 La. An. Miss. R. R. Co. v. McDonald, 12 Heisk. 481; Jones v. Wills Valley R. R. Co., 30 (Tenn.) 54; Mitchell v. Thornton, 21 Ga. 43; Atlanta v. Central R. R. & Bank- Gratt. (Va.) 164; Milwaukee & M. ing Co., 53 Ga. 120.

R. R. Co. v. Eble, 4 Chandler (Wis.), 72; Buffalo Bayou, B., & C. R. R. Co. St. 29.

v. Ferris, 26 Tex. 588; Paris v. Mason, 37 Tex. 447; Sutton v. Louisville, 5 Dana Ohio St. 182; Harvey v. Lloyd, 8 Penn. (Ky.), 28; Jacob v. Louisville, 9 Dana St. 331.

(Ky.), 114; Henderson & N. R. R. Co. v. Little Miami R. R. Co. v. Collett, 6 Dickerson, 17 B. Mon. (Ky.) 173; Louis- Ohio St. 182; Harvey v. Lloyd, 8 Penn. ville & N. R. R. Co. v. Thompson, 18 St. 331.

B. Mon. (Ky.) 735; Elizabethtown & P. Brown v. Beatty, 34 Miss. 227; Isom v. Mississippi Central R. R. Co., 36 Miss. R. R. Co. v. Helm, 8 Bush (Ky.), 681; 300.

New Orleans, O., & G. W. R. R. Co. v. Railroad Co. v. Gilson, 8 Watts (Penn.), 248.

Lagarde, 10 La. An. 150; Vicksburg, S., Brown v. Providence, &c. R. R. Co., 5 Gray (Mass.), 35.

owner has for sale — as, in one case, chestnut ties — is not admissible in reduction of damages. The benefit is held to be too remote.¹ As in the estimation of damages for the taking of land, the disadvantages and damages arising therefrom are confined to the particular tract from which the land was taken, so upon the other hand the benefits to be allowed are confined to the benefits to the particular tract in question, and benefits to other lands owned by the landowner in the vicinity cannot be considered.²

SEC. 265. Opinions as to Value: Expert Evidence. — As value rests largely in opinion, it follows as a matter of course that persons acquainted with the value of the land may give their opinion as to the value, and the amount of benefits or damages.³ In order to

¹ *Childs v. New Haven, &c. R. R. Co.*, 133 Mass. 253.

² *Philadelphia, &c. R. R. Co. v. Gilson*, 8 Watts (Penn.), 243; *St. Louis, &c. R. R. Co. v. Brown*, 58 Ill. 61; *Todd v. Kankakee, &c. R. R. Co.*, 78 id. 530; *Minnesota Valley R. R. Co. v. Doran*, 17 Minn. 188; *Paducah, &c. R. R. Co. v. Stovall*, 1 Heisk. (Tenn.) 1; *Buffalo Bayou, &c. R. R. Co. v. Ferris*, 26 Tex. 588.

³ *Walker v. Boston*, 8 Cush. (Mass.) 279; *Shattuck v. Stoneham Branch R. R. Co.*, 6 Allen (Mass.), 115; *Wyman v. Lexington R. R. Co.*, 13 Met. (Mass.) 316; *Whitman v. Boston, &c. R. R. Co.*, 7 Allen (Mass.), 313; *Vandine v. Burpee*, 13 Met. (Mass.) 288; *Snow v. Boston & Maine R. R. Co.*, 65 Me. 23; *Diedrich v. Northwestern Union R. R. Co.*, 47 Wis. 662; *Jacksonville, &c. R. R. Co. v. Caldwell*, 21 Ill. 75; *Galena, &c. R. R. Co. v. Haslam*, 73 Ill. 494; *Cairo, &c. R. R. Co. v. Woolsey*, 85 Ill. 370; *Brown v. Providence, &c. R. R. Co.*, 12 R. I. 238; *Indianapolis, &c. R. R. Co. v. Pugh*, 85 Ind. 279; *Leber v. Minneapolis, &c. R. R. Co.*, 29 Minn. 256; *Sherman v. Minneapolis, &c. R. R. Co.*, 30 Minn. 227; *Sheldon v. Minneapolis R. R. Co.*, 29 Minn. 318; *Selma, &c. R. R. Co. v. Keith*, 53 Ga. 178; *Russell v. Horn Pond Branch R. R. Co.*, 4 Gray (Mass), 607; *Atlantic & G. W. R. Co. v. Campbell*, 4 Ohio St. 583; *Cleveland & P. R. R. Co. v. Ball*, 5 id. 568; *Morehouse v. Mathews*, 2 N. Y. 514; *Dunham v. Simmons*, 3 Hill (N. Y.), 609; *Paige v. Hazard*, 5 id. 603; *Troy & Boston R. R. Co. v. Northern Turnpike Co.*,

16 Barb. (N. Y.) 100; *Lincoln v. Saratoga & Schen. R. R. Co.*, 23 Wend. (N. Y.) 425; *Montgomery & W. P. R. Co. v. Varner*, 19 Ala. 185; *Alabama & F. R. R. Co. v. Burkett*, 42 id. 83; *Evansville, I., & C. S. R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Baltimore, P. & C. R. R. Co. v. Johnson*, 59 id. 480; *Baltimore, &c. R. R. Co. v. Stoner*, id. 579; *Chicago & A. R. R. Co. v. S. & N. W. R. R. Co.*, 67 Ill. 142; *Harrison v. Iowa Midland R. R. Co.*, 36 Iowa, 323; *Prösser v. Wapello Co.*, 18 id. 327; *Henry v. Dubuque, &c. R. R. Co.*, 2 id. 288; *Dalzell v. Davenport*, 12 id. 437; *City of Parsons v. Lindsay*, 26 Kan. 430; *Burlington & Missouri River R. R. Co. v. Beebe*, 16 Neb. 463; *Missouri River, &c. R. R. Co. v. Owen*, 8 Kan. 409; *Curtis v. St. Paul, &c. R. R. Co.*, 20 Minn. 28; *Sherwood v. St. Paul, &c. R. R. Co.*, 21 Minn. 127; *Hosher v. Kansas City, &c. R. R. Co.*, 60 Mo. 303; *Swan v. Middlesex*, 101 Mass. 173; *Dwight v. Co. Commissioners*, 11 Cush. (Mass.) 201; *Lafayette, &c. R. R. Co. v. Winslow*, 66 Ill. 219; *Simmons v. St. Paul, &c. R. R. Co.*, 18 Minn. 184; *St. Paul, &c. R. R. Co. v. Murphy*, 19 Minn. 500; *Lehmick v. St. Paul, &c. R. R. Co.*, 19 Minn. 464; *East Penn. R. R. Co. v. Hottenstine*, 47 Penn. St. 28; *Frankfort, &c. R. R. Co. v. Windsor*, 51 Ind. 238; *Brown v. Corey*, 43 Penn. St. 495; *East Penn. R. R. Co. v. Heister*, 40 Penn. St. 495; *Tate v. M. K. & T. R. R. Co.*, 64 Mo. 149. But see *Burlington v. Missouri River R. R. Co. v. Beebe*, 16 Neb. 463. The evidence of witnesses as to the value of the premises

make such evidence admissible, the witness must be shown to possess some special knowledge of the value of the land in question.

immediately before the condemnation, and the value of the several parcels immediately thereafter, is competent to be considered by the jury. *Indianapolis, Decatur & Springfield R. R. Co. v. Pugh*, 85 Ind. 279; *Curtis v. St. Paul, Stillwater, & Taylor's Falls R. R. Co.*, 20 Minn. 28; *Colvill v. St. Paul & Chicago R. R. Co.*, 19 id. 283; *Sherwood v. St. Paul, &c. R. R. Co.*, 21 id. 127; *Sherman v. St. Paul, Minneapolis & Manitoba R. R. Co.*, 30 Minn. 227; *Snow v. Boston & Maine R. R. Co.*, 65 Me., 230; *Republican Valley R. R. Co. v. Arnold*, 13 Neb. 485. So it is competent for a witness who has a personal knowledge of the land, and who possesses the necessary information to enable him to form a proper estimate of its value, to state his opinion as to the value of the residue of the land after the appropriation; and it is not necessary that he should know of sales of such tracts of land. *Frankfort & Kokomo R. R. Co. v. Windsor*, 51 Ind., 238. But such opinions as to damages should be carefully weighed, not blindly followed. *McReynolds v. Baltimore & Ohio R. R. Co.*, 106 Ill. 152. A farmer may, as an expert, give his estimate of the value as farm land of realty so condemned, but his opinion generally of the value of such realty is inadmissible, since the market value of a farm may be much greater than its agricultural value. *Brown v. Providence & Springfield R. R. Co.*, 12 R. I. 238; *Kansas Central R. R. Co. v. Allen*, 24 Kan. 33; *Kansas Central R. R. Co. v. Ireland*, 24 Kan. 35. In a case a witness testified that he knew the property in question "by sight." He had lived for twenty-two years about three miles from the city of Stillwater. The property had been occupied as a tavern-stand for about ten years, and lay between Stillwater and his residence. It was held that he was acquainted with the property within the rule that, when the value of property is in controversy, persons acquainted with it may state their opinion as to its value. *Lehmick v. St. Paul, Stillwater, & Taylor's Falls R. R. Co.*, 19 Minn. 464. So in an action for damages for the taking of

part of plaintiff's block, a witness for plaintiff, who had acted for several years as his agent in looking after the block, had paid taxes, given leases, and collected rents thereon, received offers to purchase, and was personally acquainted with the block both before and after the taking, was competent to testify not only to the value of the strip taken, but also to the depreciation in value of the remainder of the block, by reason of the taking for railway purposes. *Diedrich v. Northwestern R. R. Co.*, 47 Wis. 662. So where a railway company sought to condemn city lots with buildings thereon for the use of its road, it was held that, as lands and city lots have no standard value, it was right and necessary to take the opinions of witnesses, and to hear the facts upon which such opinions were founded, to enable the jury to fix the compensation to be awarded to the owners. *Lafayette, Bloomington, & Mississippi R. R. Co. v. Winslow*, 66 Ill. 219. The owner, having resided upon and improved it for several years, who swears that he knows what it is worth, is a competent witness as to its value. *Burlington, &c. R. R. Co. v. Schluntz*, 14 Neb. 421. In a Kansas case ten witnesses were called, who testified that they knew the value of the farm before and after the appropriation, and gave such values. Thereafter two witnesses were called, who stated that they did not know the market value. They were then asked "to state if they knew the per cent difference, if any there was, in the value of the farm before the taking and after the right of way was taken." This question was objected to, but the witnesses testified as to the per-cent difference. None of the ten witnesses who had testified as to absolute values disclosed in their testimony a less per-cent difference than did these two witnesses; and after all the testimony was received, the jury were sent out to view the farm; and their verdict was less than two-thirds of the smallest difference in values before and after the appropriation which was disclosed by any of the plaintiff's witnesses. It was held, under the circumstances, that the admission of the

A shoemaker, who has never bought, sold, or owned land in the town, although he has lived there and rented property many years, would

testimony of these two witnesses, if erroneous, was not sufficient to justify a reversal of the judgment rendered in favor of the land-owner. *Leavenworth, Topeka, & Southwestern R. R. Co. v. Paul*, 28 Kan. 816. When commissioners reject legal and competent evidence, or mistake the principle that should govern their appraisal, their award will be set aside. *New York Central, &c. R. R. Co., in re*, 15 Hun (N. Y.), 63. It is proper to permit a witness for the railway company, who has given his opinion as to the effect of the railway on the market value of the plaintiff's land, to be cross-examined as to the effect upon such value of the probability or possibility that horses might be frightened or fire communicated by passing engines and trains. *Wooster v. Sugar River Valley R. R. Co.*, 57 Wis. 311. And where a witness for the land-owner has been examined in chief, generally, as to the land, the material it contains, value, etc., it is error to sustain an objection to a question, on cross-examination of such witness, requiring him to state the value of the land, including all the materials in it, as it lies, how much it is worth per acre in the market, though said witness may have answered such question on his examination in chief. *Pittsburgh, Ft. Wayne, & Chicago R. R. Co. v. Swinney*, 59 Ind. 100. It is not proper to ask a witness how much less a farm would be worth by reason of the construction of a railway across it. This would be an indirect mode of obtaining the opinion of the witness as to the amount of damages resulting from the construction of the road. *Baltimore, Pittsburgh, & Chicago R. R. Co. v. Johnson*, 59 Ind. 247. Nor is it admissible to ask a witness at what price he had offered for sale adjoining property. *Montclair R. R. Co. v. Benson*, 36 N. J. L. 557. Where a witness on cross-examination stated at length the grounds for his estimate of the diminished value of the premises, some of which were legitimate and proper, while it was claimed others were not, it was held that a refusal to exclude all was not erroneous, as the defendant might, by asking it, have had

the court instruct the jury as to their proper effect on the testimony of the witness and his estimate of damages. *Smalley v. Iowa Pacific R. R. Co.*, 36 Ia. 571. It is the province of the court, and not of the jury, to exclude improper testimony. *Karnes v. Bellville & Eldorado R. R. Co.*, 89 Ill. 269. Where the question asked was much longer than necessary, but inquired, in substance, how much less the land was worth after than before the appropriation, excluding benefits, it was held not erroneous. *Britton v. D. M., O. & S. R. R. Co.*, 59 Iowa, 540. Evidence as to noise of passing trains, and as to the inconvenience and interruption to the use of the property resulting from the ordinary operation of defendant's road, was held competent, as bearing upon the question of the diminished value of the property caused by the construction of the road, across the same. *County of Blue Earth v. St. Paul & Sioux City R. R. Co.*, 28 Minn. 503. Market value of land is not a question of science or skill upon which only an expert can give an opinion. *Pennsylvania & New York R. R., &c. Co. v. Bunnell*, 81 Penn. St. 414. And persons of the neighborhood are presumed to have sufficient knowledge of the market value to be competent to testify thereto. *Pennsylvania & New York R. R., &c. Co. v. Bunnell*, 81 Penn. St. 414; *Burlington & Missouri River R. R. Co. v. Schluntz*, 14 Neb. 421. Although their knowledge may have rested solely upon a few purchases made by the railway company, and from no other sales or purchases in the real-estate market, they have some knowledge upon which to base an opinion, and the value of that opinion is for the jury. *Pittsburgh & Lake Erie R. R. Co. v. Robinson*, 95 Penn. St. 426. It is held in some of the States that the opinions of witnesses as to the amount of damages sustained by a party are not competent evidence. The witnesses must testify as to facts, and the court or jury must determine the amount of damages from the facts proved. *Baltimore, Pittsburgh, & Chicago R. R. Co. v. Johnson*, 59 Ind. 247; *Baltimore, Pittsburgh, & Chicago R. R. Co. v. Johnson*, 59

not be a competent witness to prove the value of lands in the vicinity, because he is not shown to have had the means of forming an

Ind. 480 ; Same *v. Stoner*, id. 579 ; *Brown v. Providence & Springfield R. R. Co.*, 12 R. I. 238. Where the owner of the land taken was asked how much in his opinion, the railroad had depreciated the value of his farm as a whole, it was held that the question referred to the farm as owned by him at the time of the trial, exclusive of the land taken, and was proper. *Wooster v. Sugar River Valley R. R. Co.*, 57 Wis. 311. In some cases it is held that witnesses should not be permitted to give their opinions before the jury of the value of the land, subject to the right of way. This should be left to the jury to ascertain from facts affecting the value, and proper to be considered, uninfluenced by the opinion of others. *Fremont, Elkhorn, & Missouri Valley R. R. Co. v. Whalen*, 11 Neb. 585. Nor as to separate items of damage. *New York, West Shore, & Buffalo R. R. Co., in re*, 29 Hun (N. Y.), 609. The declarations of the owner of the land as to its value, his offer of it at a fixed price, and sale of a portion of it, are evidence on the question of damages, as constituting his estimate of its value as against the land-owner. *East Brandywine & Waynesburg R. R. Co. v. Rank*, 78 Penn. St. 454. And where the land-owner died while the proceedings were pending, and a trustee was substituted as a party, under an agreement that no rights of the defendant should be prejudiced thereby, it was held that the agreements, declarations, and admissions of the deceased were competent evidence as against the trustee so substituted. *Power v. Savannah, Skidaway, &c. R. R. Co.*, 56 Ga. 471. The evidence will be confined to the particular lands described in the petition, unless the defendant files a cross-petition setting up that he is the owner of ground not described in the original petition, which will be damaged and makes claim to have the damages thereto likewise assessed. *Chicago & Iowa R. R. Co. v. Hopkins*, 90 Ill. 316. Where land taken for railway purposes is appraised by commissioners, it is the duty of the court, on exceptions filed, to hear testimony, if offered, as to the adequacy of the compensa-

tion awarded. And where such testimony is presented, the refusal of the lower court to consider it will work a reversal of the cause. *St. Louis & Florissant R. R. Co. v. Almeroth*, 62 Mo. 343. The commissioners may on their own motion take testimony in relation to damages. *St. Paul & Sioux City R. R. Co. v. Covell*, 2 Dak. 483. The land-owner expressly waived the right to produce and examine witnesses, and consented with the counsel for the railroad company that the commissioners might act upon a view of the premises, which they proceeded to do, and make their award. On motion to set aside the award, it appeared from the affidavit of the land-owner, that in declining to produce witnesses he acted upon a misapprehension as to his legal rights, founded upon erroneous information derived by him from another person, to the effect that he would be entitled to rehearing, as a matter of right, before other commissioners, and that on such rehearing he could examine witnesses. It was held that the land-owner is entitled to the relief asked for by him, on the ground that he was misled to his prejudice by erroneous information as to his legal rights. *New York, Lackawanna, & Western R. R. Co.*, 63 How. Pr. (N. Y.) 265. The fact to be ascertained is the value of the land at the time of the taking ; and to arrive at this value, testimony to prove the annual net profits derived from the land for a particular use is not admissible. *Stockton & Copperopolis R. R. Co. v. Gagliani*, 49 Cal. 139. Upon a jury trial upon a land-owner's appeal to the district court, the applicant called a witness who testified to sales of other lands sold by him from time to time in the vicinity of the land sought to be condemned, and also gave testimony with reference to the similarity of situation and character of the lands so sold to the land sought to be condemned. It was held that evidence of the prices obtained for the lots so sold by the witness, and of the average price obtained for the lots so sold, was incompetent and inadmissible. *Stinson v. Chicago, St. Paul, & Minneapolis R. R. Co.*, 27 Minn. 284. In a proceeding to condemn an entire

intelligent opinion upon the subject.¹ Nor would a farmer be a competent witness as to the value of a fishing-privilege.²

Assessors accustomed to appraise land and who have assessed land in the vicinity,³ or jurors, selectmen, commissioners, etc., who have assessed damages for land taken for public purposes,⁴ farmers living in the vicinity who are acquainted with the land, as to the value of farm land,⁵ real-estate agents who are engaged in the purchase and sale of real estate, or indeed any persons who are shown to have adequate knowledge of the value of such lands are competent as experts.⁶ The question as to whether the witness is qualified to give

lot in a city, evidence of the price per foot an adjoining tract had been sold for, and the price per foot at which other lots had been offered for sale, is competent if offered by the company as evidence in chief, but is not after the defendant has closed. In a proceeding to condemn land, where the petitioner closes his case and the land-owner gives evidence⁶ of the value of the property sought to be taken, there is no error in refusing to allow the petitioner to prove the price at which an adjoining tract was sold, or at which other lots in the vicinity are offered for sale. Such evidence is in chief and not in rebuttal, and it is a matter of discretion to open the case and let in proof which ought to have been given in chief. *Chicago & Western Indiana R. R. Co. v. Maroney*, 95 Ill. 179. *Watson v. Milwaukee & Madison R. R. Co.*, 57 Wis. 332. Where the point was, "to arrive at the value of plaintiff's land, the inquiry is what it would sell for at a fair sale in the market, without reference to its use for any particular purpose; the best evidence of market value is the price paid for land in that neighborhood, making allowance for difference in position and improvements." It was held that the point was properly refused. *Pittsburgh, Virginia, & Charleston R. R. Co. v. Rose*, 74 Penn. St. 362. So evidence that some land near by that in controversy was sold ten or twelve years before the trial, and at a certain price, is too remote to determine the value of the land in controversy at the time of its appropriation. *Everett v. Union Pacific R. R. Co.* 59 Iowa, 243. A witness who has been examined on behalf of the land-owners to

show that the land was suitable to be platted into village-lots, and its probable value when so platted, may be cross-examined in regard to sales of lots in the vicinity, though some of such sales were made four or five years previous. The limits of such evidence are much within the discretion of the trial court. *Watson v. Milwaukee & Madison R. R. Co.*, 57 Wis. 332.

¹ *Whitney v. Boston*, 98 Mass. 312.

² *Boston, &c. R. R. Co. v. Montgomery*, 119 Mass. 114.

³ *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544; *Whitman v. Boston & Maine R. R. Co.*, 7 Allen (Mass.), 313; *Sexton v. North Bridgewater*, 116 Mass. 200. Their official valuations, however, are not admissible. *Brown v. Providence, &c. R. R. Co.*, 5 Gray (Mass.), 35; *Oregon Cascade R. R. Co. v. Bailey*, 3 Oregon, 164; *Flint v. Flint*, 6 Allen (Mass.), 34; *Kenerson v. Henry*, 101 Mass. 152.

⁴ *Fowler v. Co. Commissioners*, 6 Allen (Mass.), 92; *Dickerson v. Fitchburgh*, 13 Gray (Mass.), 546; *Webber v. Eastern R. R. Co.*, 2 Met. (Mass.) 142.

⁵ *Brown v. Providence & Springfield R. R. Co.*, 12 R. I. 238. But in this case it was held that his opinion generally of the value of such realty is inadmissible since the market value of a farm may be much greater than its agricultural value.

⁶ *Flint v. Flint*, 6 Allen (Mass.), 34; *Central Pacific R. Co. v. Pearson*, 35 Cal. 247; *Boston, &c. R. Co. v. Montgomery*, 19 Mass. 114; *Buffum v. New York, &c. R. Co.*, 4 R. I. 221.

an opinion is for the court,¹ but the weight of the evidence is for the jury.²

Witnesses having the requisite qualifications may testify as to the effects of the construction of a railroad upon certain classes of estates, — as upon the rental value of premises,³ upon the rates of insurance,⁴ the difference in the expense of carrying on a farm by reason of the land being cut by the railroad,⁵ of the capacity of the land for valuable uses,⁶ or indeed in reference to any matter which admits of an opinion founded upon experience. But such evidence is not competent as to matters which are purely speculative and conjectural.⁷

But it is a reversible error, in a proceeding by an abutting owner to recover damages for the occupation by a railroad of the street in front of his premises, to allow an expert witness for plaintiff to testify as to what, in his judgment, "is the value of that property damaged, if at all, by the presence of the road and the running of its trains." That is the exact question which the court and jury are to determine. The proper method in such a case would be to prove the value of

¹ *Tucker v. Mass. Central R. Co.*, 118 Mass. 546; *Swan v. Middlesex*, 101 Mass. 173.

² *Pennsylvania, &c. R. Co. v. Bunnell*, 81 Penn. St. 414. In proceedings to condemn a right of way for a railroad, witnesses who testify that they are acquainted with the value of lands in the locality are competent to testify to the value of the land before and after the railroad ran through it, without first disclosing a knowledge of the location, grades, and cuts of the road, since knowledge of such matters goes merely to affect the weight of their testimony. *Ohio Valley R. Co. v. Kerth*, 130 Ind. 314.

³ *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544.

⁴ *Webber v. Eastern R. Co.*, 2 Met. (Mass.) 147.

⁵ *Milwaukee, &c. R. Co. v. Eble*, 4 Chand. (Wis.) 72; *Rockford, &c. R. Co. v. McKinley*, 64 Ill. 388.

⁶ *Central Pacific R. Co. v. Pearson*, 35 Cal. 247; *Elizabethtown, &c. R. Co. v. Helm*, 8 Bush (Ky.), 681; *Troy, &c. R. Co. v. Northern T. Co.*, 16 Barb. (N. Y.) 100.

⁷ *Elizabethtown, &c. R. Co. v. Helm*, 8 Bush (Ky.), 681. Evidence of this character, to test the value of the opinion of a

witness who testifies as to the future value of land to be thereafter platted and sold in the shape of village-lots, is clearly admissible. Recent sales would be the best test; but the limits within which evidence of sales may be shown is very much in the discretion of the trial judge; and the court will not find that such judge has abused his discretion upon a question of this nature unless the abuse is clearly shown. *Chandler v. Jamaica*, 122 Mass. 305; *Shattuck v. Railroad Co.*, 6 Allen (Mass.), 115; *Green v. Fall River*, 113 Mass. 262; *Gardner v. Brookline*, 127 Mass. 358; *Presbrey v. Railroad Co.*, 103 Mass. 1. The cases recognize not only the propriety of this kind of evidence on the cross-examination of a witness who has given his opinion as to the value of the property in question, but as evidence in chief to disprove the correctness of the opinion of a witness who has given an opinion of the value of lands in dispute. *Benham v. Dunbar*, 103 Mass. 365. And generally, evidence of sales made in the vicinity of the lands in controversy, from one to eight years before, is admissible. *Paine v. Boston*, 4 Allen (Mass.), 168; *Railroad Co. v. Railroad Co.*, 3 Allen (Mass.), 142; *Davis v. Railroad Co.*, 11 Cush. (Mass.) 308.

the property before the construction of the road and its value afterwards, leaving the determination of the damages to be made by the court and jury having this and other evidence before them.¹ Indeed there appears to be a growing sentiment against the admission of expert evidence in cases of this kind wherever the truth can otherwise be arrived at. It is a matter of common observation that any kind of an expert opinion desired may be obtained by a slight search. "It is generally safer," observes Mr. Justice EARL, "to take the judgments of unskilled jurors than the opinions of hired and generally biassed experts."²

¹ *McGean v. Manhattan, R. Co.*, 117 N. Y. 219; *Jefferson v. New York El. R. Co.*, 132 N. Y. 486; *Roberts v. New York El. R. Co.*, 128 N. Y. 455; 50 Am. & Eng. R. Cas. 326. The court, by PECKHAM, J., in this last case, said: "Expert evidence as to the value of real estate is proper and in many cases essential. The present value of the property of the plaintiff can be proved by expert evidence,—both the value of the fee and the rental value. Both classes of values could also be proved by expert evidence, as of a time immediately prior to the building of this road. They are facts which now exist or which have existed; and if the expert have knowledge of them, he should be permitted to state it. As to what the value would have been under wholly different circumstances, he knows and can know nothing but must form an opinion wholly speculative in its nature, which opinion must be based upon data perfectly easy for him to state, and from which when once stated, an ordinary intelligent jury can draw as just and fair an inference of a possible value as could the expert. And that very inference must in some way be drawn by the jury, for it is the question it is called upon to decide." See also *Rochester v. Chester*, 3 N. H. 364–366, where the court refused to receive the opinions of witnesses as to the value of land even from those skilled in the market, holding that the land must be described and the jury must then judge from these facts. *Marcey v. Shults*, 29 N. Y. 346, in which the court refused to allow a witness to state his opinion as to the quantum of damages. That case was an action for damages for raising a dam so as to overflow the plaintiff's house. The court

held that the witness should describe the character of the overflow and its effect, and it would remain for the jury to estimate the damages. See further as sustaining the principle of the text, *Avery v. Railroad Co.*, 121 N. Y. 31; *Wycklen v. Brooklyn*, 118 N. Y. 424; *Green v. Plank*, 48 N. Y. 669; *Gray v. Manhattan R. Co.*, 128 N. Y. 499, 508. In the *McGean* case (117 N. Y. 219) the admission of such evidence was not considered ground for reversal, there being other evidence sufficient to sustain the finding of the court. But in the later cases it has been held ground for a reversal and for a new trial.

² *Ferguson v. Hubbell*, 97 N. Y. 507. In *Roberts v. New York El. R. Co.*, 128 N. Y. 455; 50 Am. & Eng. R. Cas. 326, the court, by PECKHAM, J., remarked: "Expert evidence, so called, or in other words evidence of the mere opinion of witnesses, has been used to such an extent that the evidence given by them has come to be looked upon with great suspicion by both courts and juries; and the fact has become very plain that in any case where opinion evidence is admissible, the particular kind of an opinion desired by any party to the investigation can be readily procured by paying the market price therefor. . . . This case is a good illustration of what may be almost termed the wholly worthless character, for judicial purposes, of the testimony on both sides upon this one point, as to what would be the value of this property if this railroad had not been built. The experts on the part of the plaintiff guessed that it would have been \$30,000 more valuable, while those on the part of the appellant (equally intelligent and, it would seem, equally honest) thought

In determining the value of property at any particular period of time, it is not competent to admit evidence of offers which had been made to the owner by would-be purchasers of the property.¹ It has been very well observed that this is a character of evidence "which it is much safer to reject than to receive. Its value depends upon too many circumstances. If evidence of offers is to be received, it will be important to know whether the offer was made in good faith, by a man of good judgment, acquainted with the value of the article, and of sufficient ability to pay; also, whether the offer was for cash, for credit, or in exchange, and whether made with reference to the market value of the article, or to supply a particular need, or to gratify a fancy. Private offers can be multiplied to any extent for the purpose of a cause, and the bad faith in which they were made would be difficult to prove."²

SEC. 266. Damages in Trespass. — In actions of trespass for the

the value of the property would have been less if the road had not been built." In *Sillocks v. New York El. R. Co.*, 19 N. Y. Supp. 476, it was held error to allow a real estate agent to testify as to the effect, in his opinion, of the operation of the elevated railway on abutting property. *Following McGay v. Elevated Ry. Co.*, 16 N. Y. Supp. 155.

¹ *Hine v. Manhattan R. Co.*, 132 N. Y. 480; 51 Am. & Eng. R. Cas. 603 n.; *Minnesota Transfer Co. v. Gluck*, 45 Minn. 463; *Leale v. Metropolitan El. R. Co.*, 61 Hun (N. Y.), 613; *Lawrence v. Metropolitan El. R. Co.*, 15 Daly (N. Y.), 502. See also *Linde v. Republic F. Ins. Co.*, 18 J. & S. (N. Y.) 362; *Fowler v. County Com'rs*, 6 Allen (Mass.), 92, 96; *Wood v. Firemen's Ins. Co.*, 126 Mass. 316, 319; *Whitney v. Thatcher*, 117 Mass. 527; *Louisville, &c. R. Co. v. Ryan*, 64 Miss. 399, 404; *St. Joseph, &c. R. Co. v. Orr*, 8 Kan. 419, 424.

² FOLLETT, J., in *Keller v. Paine*, 34 Hun (N. Y.), 177, quoted with approval in *Hine v. Manhattan R. Co.*, 132 N. Y. 480. The reception of evidence of private offers to sell stands upon an entirely different footing from evidence of actual sales between individuals or by public auction, and also upon a different footing from bids made at auction sales. *Young v. Atwood*, 5 Hun. (N. Y.) 234. Where in condemnation proceedings the deed of a person

not connected with the parties to the suit, conveying land in the vicinity of the land sought to be taken, was offered in evidence by appellant for the purpose of showing the value of the land proposed to be taken, and is not accompanied with evidence showing or tending to show that the sale was voluntary or in good faith, or that the lands so sold were similar in locality and character to the lands in question, — such a deed is properly excluded from the evidence. *O'Hare v. Chicago, &c. R. Co.*, 139 Ill. 151; 51 Am. & Eng. R. Cas. 605; 28 N. E. Rep. 923. See also *Seefeld v. Chicago, &c. R. Co.*, 67 Wis. 97; 27 Am. & Eng. R. Cas. 428. But evidence of voluntary *bond fide* sales of other lands in the vicinity similarly situated is admissible to aid in determining the value of the property condemned. *St. Louis, &c. R. Co. v. Haller*, 82 Ill. 211; *Chicago, &c. R. Co. v. Maroey*, 95 Ill. 182; 5 Am. & Eng. R. Cas. 360; *Seattle, &c. R. Co. v. Gilchrist*, 4 Wash. 509; 30 Pac. Rep. 738; 51 Am. & Eng. R. Cas. 605-606 n.; *Cherokee v. Sioux City, &c. Co.*, 52 Iowa, 279. But it is incumbent upon the party offering such proof to show that the lands so sold were similar in locality and character to the lands in question. *O'Hare v. Chicago, &c. R. Co.*, 139 Ill. 151; *King v. Iowa Midland R. Co.*, 34 Iowa, 458; *Cummins v. Des Moines, &c. R. Co.*, 63 Iowa, 397, 17 Am. & Eng. R. Cas. 26.

wrongful entry of a railway upon lands without authority of law, the damages generally are confined to such injuries as occurred *before* the action was brought; and the company is liable to successive actions for the continuance of the nuisance, as the satisfaction of the judgment does not validate the appropriation of the land.¹ But where the damages are of a permanent character, and go to the entire value of the estate affected by the nuisance, a recovery may be had of the entire damages in one action.² Thus, in an action for overflowing the plaintiff's land by a mill-dam, the lands being submerged thereby to such an extent and for such a period as to make it useless to the plaintiff for any purpose, the jury were instructed to find a verdict for the plaintiff for the full value of the land.³ So, too, when a railroad company by permanent erections imposed a continuous burden upon the plaintiff's estate, which deprived the plaintiff of any beneficial use of the portion of the estate so used by it, it was held that the whole damage might be recovered at once;⁴ but where the extent of a wrong may be apportioned from time to time, and does not go to the entire destruction of the estate, or its beneficial use, separate actions not only may, but *must*, be brought to recover the damages sustained.⁵ So, too, when a nuisance is of such a character that its continuance is *necessarily* an injury, and it is of a permanent character, so that it will continue without change from any cause but human labor, it is held that the damage is original, and may be at once fully compensated.⁶

¹ Bird v. Wilmington, &c. R. Co., 8 Rich. (S. C.) Eq. 46; Anderson, &c. R. Co. v. Kernodle, 54 Ind. 314; Bare v. Hoffman R. Co., 79 Penn. St. 71; Hetfield v. Central R. Co., 34 N. J. L. 251; Carl v. Sheboygan, &c. R. Co., 46 Wis. 625; Plate v. N. Y. Central R. Co., 37 N. Y. 472; Mahon v. N. Y. Central R. Co., 24 N. Y. 658; Cain v. Chicago, &c. R. Co., 54 Iowa, 255; Dickson v. Chicago, &c. R. Co., 71 Mo. 575.

² Troy v. Cheshire R. Co., 23 N. H. 101; Cheshire Turnpike Co. v. Stevens, 13 N. H. 28; Parks v. Boston, 15 Pick. (Mass.) 198; Blunt v. McCormick, 3 Den. (N. Y.) 283; Thayer v. Brooks, 17 Ohio, 489; Fowle v. New Haven, &c. R. Co., 107 Mass. 352; Cooper v. Randall, 59 Ill. 317; Dickson v. Chicago, &c. R. Co., 71 Mo. 575; Central Branch, &c. R. Co. v. Twine, 23 Kan. 585; Estabrook v. Erie R. Co., 51 Barb. (N. Y.) 94; Chicago, &c. R.

Co. v. Stein, 75 Ill. 41; Lamb v. Walker, 3 Q. B. Div. 389; Chase v. N. Y. Central R. Co., 24 Barb. (N. Y.) 273; Chicago, &c. R. Co. v. Carey, 90 Ill. 514; Chicago, &c. R. Co. v. Hoag, 90 Ill. 339. In such cases the statute of limitation commences to run from the time when the nuisance was created. Powers v. Council Bluffs, 45 Iowa, 652.

³ Anonymous, 4 Dall. (U. S.) 147. See also Tucker v. Newman, 11 Ad. & El. 41, in which it was held that a spout fixed to the eaves of a house so as to send the water into the plaintiff's yard and make it damp was a permanent injury.

⁴ Troy v. Cheshire R. Co., 23 N. H. 101.

⁵ Plumer v. Harper, 3 N. H. 88; Cheshire Turnpike Co. v. Stevens, 13 N. H. 28; Battishill v. Reed, 18 C. B. 714.

⁶ In Powers v. Council Bluffs, 45 Iowa, 652, the plaintiff was the owner of some

SEC. 267. Power not exhausted by First Taking: Lateral Roads.—

The power of a railway company to condemn land for its use is not exhausted by the taking of lands for its location, but, unless its power in that respect is expressly limited, it may exercise it from time to time, as a necessity for the increase of its facilities demands.¹ "We are aware of no rule of law," says MULKEY, J.,² "that requires a railway company to acquire by condemnation all the land necessary for the construction and operation of its road at the same time. Often it is difficult, if not impossible, to tell in the first instance what amount will be required for such purpose, as this depends so largely upon the growth and development of country towns and villages along the line of the road." Therefore, unless the legislature restricts the company to a certain quantity of land which it has taken, or limits the exercise of the power to a certain period which has passed, it may from time to time exercise the power, as the necessities of its business or even the convenient performance of it

city lots in Council Bluffs, which were crossed by a meandering stream. In order to remove this stream from the street, the city cut a ditch along the side of the street and across the end of the plaintiff's lots where they abutted on the street. By means of the ditch, the stream, being turned into it, was much shortened, and removed both from the street and the plaintiff's lands. This was done in 1859 and 1860. The ditch led the water into a county ditch, but was not as deep as the latter by about three feet. By reason of the ditch not being as deep as the county ditch, the fall of the water at the county ditch made a cavity, and also cut away the soil back of the ditch; and in 1866 the plaintiff began to sustain damage from the ditch by the washing away of the soil of his lots, and at the time of bringing the action the ditch had become fifty feet wide and twelve feet deep, and the plaintiff had been compelled to put in a wall which arrested the damage and preserved his lots from the further inroads of the water. More than five years had elapsed between the time when the water in the ditch first set back and washed away the plaintiff's land and the bringing of the action, and the defendant having pleaded the statute of limitations, the question was, whether the nuisance was continuing, in

the ordinary sense of the term, or whether the damage was permanent and accrued from the first injury, or from day to day. The court held that the entire damage accrued when the fall in the stream had moved back from the county ditch to the plaintiff's lots, and the ditch began to deepen and widen along those lots as it had along those below.

¹ *Fisher v. Chicago, &c. R. Co.*, 104 Ill. 323; *South Carolina R. Co. v. Blake*, 9 Rich. (S. C.) 228; *Chicago, &c. R. Co. v. Wilson*, 17 Ill. 123; *Philadelphia, &c. R. Co. v. Williams*, 54 Penn. St. 103; *Central Branch Union Pacific R. Co. v. Atchison, &c. R. Co.*, 26 Kan. 669; *Seldon v. Del. & Hud. Canal Co.*, 29 N. Y. 634. In *Lamer v. Chicago, &c. R. Co.*, 59 Iowa, 563, it was held that where a railway company has no authority under its charter to build a lateral road, there is no fraud upon a land-owner in organizing a new company composed of its own stockholders, for that purpose with such authority. *Pratt v. Jeffersonville, &c. R. Co.*, 52 Ind. 16; *Farnham v. Del. & Hud. Canal Co.*, 61 Penn. St. 265. A futile effort to condemn land does not exhaust the power to take effective measures to that end.

² In *Fisher v. Chicago, &c. R. Co.*, 104 Ill. 323.

requires. If these corporations, after having established their roads, were to be left without this power as to additional lands required for the prosecution of their business, and thus subject to the cupidity of land-owners along their line, it would often be disastrous to the interests of the public, because of the inability of the company to furnish the necessary facilities for the increase of its business, without submitting to ruinous extortion. If it becomes necessary to have additional terminal facilities, or an increased breadth of roadway, unless the company, by law, is expressly restricted either as to quantity or the time of taking, it may take additional lands for such purpose at any time during its existence.¹ The lessee of a railroad cannot bring proceedings in its name to condemn land for the use of the road, but must bring them in the name of the company for whose use it is taken.² But a new railway corporation which has succeeded to the rights of an old one may proceed in its own name.³

SEC. 268. *Costs.* — Costs are not recoverable in proceedings to condemn land unless the statute so provides,⁴ but usually provision is made that the party prevailing shall recover costs;⁵ and the company is held to be the losing party when damages are awarded against it upon its appeal, although the sum allowed is less than that found by the commissioners or tribunal from which the appeal was taken.⁶ But where the land-owner appeals and he fails to obtain a modification in his favor, the costs of the appeal are chargeable against him.⁷ When on an appeal by the company the order confirming the award is reversed and new commissioners are appointed, the company, though successful, must pay costs.⁸ If costs are

¹ *Beck v. United N. J. R. & Canal Cos.*, 39 N. J. L. 45; *In re N. Y. Central R. Co.*, 64 Barb. (N. Y.) 426; *Childs v. Central R. Co.*, 33 N. J. L. 323.

² *Dietrichs v. Lincoln, &c. R. Co.*, 13 Neb. 361; *Gottschalk v. Lincoln, &c. R. Co.*, 14 Neb. 389.

³ *Cogswell v. New York, &c. R. Co.*, 48 N. Y. Superior Ct. 31.

⁴ *Sherwood v. St. Paul, &c. R. Co.*, 21 Minn. 122; *Metler v. Easton, &c. R. Co.*, 37 N. J. L. 222; *Herbein v. Philadelphia, &c. R. Co.*, 9 Watts (Penn.), 272; *Philadelphia, &c. R. Co. v. Johnson*, 2 Whart. (Penn.) 275.

⁵ *Atlantic, &c. R. Co. v. County Com'rs*, 28 Me. 112; *Harvard Branch R. Co. v.*

Rand, 8 Cush. (Mass.) 218; *Rensselaer, &c. R. Co. v. Davis*, 55 N. Y. 145.

⁶ *Goodwin v. Boston, &c. R. Co.*, 63 Me. 363; *Bangor, &c. R. Co. v. Chamberlain*, 60 Me. 285.

⁷ *New Orleans, &c. R. Co. v. Gay*, 31 La. An. 430; *Metler v. Easton, &c. R. Co.*, 37 N. J. L. 222; *Leake v. Selma, &c. R. Co.*, 47 Ga. 345; *Noble v. Des Moines, &c. R. Co.*, 61 Iowa, 637; 14 Am. & Eng. R. Cas. 208; *Helm v. Short*, 7 Bush (Ky.), 623; *New Orleans, &c. R. Co. v. Gay*, 31 La. An. 430; *Childs v. New Haven, &c. R. Co.*, 135 Mass. 570; 17 Am. & Eng. R. Cas. 139. *Contra*, *People v. McRoberts*, 63 Ill. 28.

⁸ *Matter of New York, &c. R. Co.*, 94 N. Y. 287.

assessed against it, their payment as well as the payment of damages is a condition precedent to the company's right to enter on the land condemned.¹ In New York it is held that while the costs on appeal are the same as in other actions, there can be no extra allowance.²

¹ *Chicago, &c. R. Co. v. Bull*, 20 Ill. 218. Compare *Evansville, &c. R. Co. v. Fitzpatrick*, 10 Ind. 120. If on appeal the company abandons proceedings, costs must be taxed against it. *Leisse v. St. Louis, &c. R. Co.*, 72 Mo. 561 ; 2 Mo. App. 105 ; *North Missouri R. Co. v. Raynal*, 25 Mo. 534 ; *St. Louis, &c. R. Co. v. Martin*, 29 Kan. 750 ; 10 Am. & Eng. R. Cas. 514.

² *Rensselaer, &c. R. Co. v. Davis*, 55 N. Y. 145. In an action against an elevated railroad company for damages caused by the maintenance of its station opposite plaintiff's premises, counsel's fees paid for arguing an appeal involving the right to

maintain the station in question, though properly pleaded as a matter of special damages, cannot be allowed, since they are not such damages as naturally result from the maintenance of the structure. *Mattlage v. New York El. R. Co.*, 17 N. Y. Supp. 536. But a reasonable attorney's fee incurred in former condemnation proceedings, which were dismissed, may be recovered in an action for damages in a second proceeding to condemn the same tract ; and the jury may determine the reasonableness of such fee without the testimony of lawyers or other experts. *Gibbons v. Missouri Pacific R. Co.*, 40 Mo. App. 146.

CHAPTER XV.

LOCATION AND CONSTRUCTION.

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| SEC. 269. Location: What is, etc.
270. Location: Selection of by Company.
271. Change of Location.
272. Location: How described: Maps and Plans.
273. How Location may be lost.
274. Description of Termini: Construction of Words Relating to.
274 <i>a</i> . Contracts to influence Location.
275. Construction of the Road: Mode of Construction: Consequential Injuries.
276. Bridges: Over Navigable Waters and as a Part of the Highway over its Road.
277. Contracts for Construction of the Road.
278. Abandonment of Contract: New Agreement. | 279. Extra Work.
280. Entire Contract.
281. Modification of Contract.
282. Payment in Stock.
283. Subcontractors.
284. Liability of Company for Acts of Contractors or their Servants.
285. What Reservation of Control over the Work renders Contractee liable.
286. Where the Contractee owes a Duty to the Public or to Individuals.
287. Specific Performance of Contract for Construction.
287 <i>a</i> . Crossings where two Railroads intersect.
287 <i>b</i> . Highway and Private Crossings.
287 <i>c</i> . Duty to establish Stations.
287 <i>d</i> . Right to provide Reasonable Regulations as to Stations. |
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SEC. 269. **Location. What is.** — The accurate and technical meaning of "location" as used in railway law is the line or strip of land over which it is proposed to run the road, after such line has been surveyed and definitely fixed upon as the route of the road.¹ In its location the railroad company has a mere inchoate right of property, enforceable against all except the owner of the property, and which becomes perfected upon the acquisition of the land by purchase or condemnation.² Until such condemnation or purchase,

¹ *Sioux City, &c. R. Co. v. Chicago, &c. R. Co.*, 27 Fed. Rep. 770; 25 Am. & Eng. R. Cas. 150; *West v. West & East R. Co.*, 61 Miss. 536; 20 Am. & Eng. R. Cas. 402; *Hickey v. Chicago, &c. R. Co.*, 6 Ill. App. 172; 2 *Abbott's Law Dict.*, p. 58; 2 *Bouv., Id.*, p. 80; *Anderson's, Id.*, p. 636.

² *Lafferty v. Schuylkill, &c. R. Co.*,

124 Penn. St. 297; 36 Am. & Eng. R. Cas. 575; *Davis v. Titusville, &c. R. Co.*, 114 Penn. St. 308; 30 Am. & Eng. R. Cas. 341. Thus, in a New York case, GRAY, J., speaking for the court, said: "When, therefore, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required

however, the company has no right to use the location except for purposes of the preliminary survey, etc.;¹ but its right as against the land-owner is such that he cannot deprive it of the location by the conveyance of the land covered by it to another company.² The word may of course have other meanings in particular connections; thus as used in conditions in stock subscriptions it ordinarily means the construction and operation of the road.³ But what has been said was in reference to the word as used in this chapter.

Upon the location having been selected, the company's right to is perfect so far as other companies are concerned, and a rival company cannot institute proceedings to appropriate it. But to constitute such a location there must be some definite corporate action on the part of the company establishing and adopting some definite route; the mere fact that an engineer alone surveyed and marked out a line is not sufficient to amount to a valid appropriation of the location by the company, and it cannot afford ground for proceedings against a rival company occupying that line.⁴

SEC. 270. Location: Selection of by Company. — Where a charter is granted to a railway company to build a railway between certain termini without defining the route, the company is invested with discretion to select any route between the points named that it deems advisable; as it is presumed that the company, in the construction of its road and the selection of its route, will act as well

notice to all persons affected by such construction, and no change of route is made, as the result of any proceedings instituted by any land-owner or occupant, in our judgment it has acquired the right to construct and operate a railroad on such line, exclusive in that respect as to all other railroad corporations, and free from the interference of any party. By its proceedings it has impressed upon the lands a lien in favor of its right to construct, which ripens into title upon purchase or condemnation proceedings. We could not hold otherwise without introducing confusion in the execution of such corporate projects and without violating the obvious intention of the legislature." *Rochester, &c. R. Co. v. New York, &c. R. Co.*, 110 N. Y. 128; 35 Am. & Eng. R. Cas. 267.

¹ *Polly v. Saratoga, &c. R. Co.*, 9 Barb. (N. Y.) 449; *Bloodgood v. Mohawk, &c.*

R. Co., 14 Wend. (N. Y.) 51; *ante*, § 234.

² In upholding the rule of the text, the court said: "All that the owner can demand is that his damages shall be paid, and subject to this right of compensation to the owner, the State has the control over the right of way, and can, by statute, prescribe when and by what acts the right thereto shall vest, and also what shall constitute an abandonment of such right." *Sioux City, &c. R. Co. v. Chicago, &c. R. Co.*, 27 Fed. Rep. 770; 25 Am. & Eng. R. Cas. 150.

³ See *ante*, § 31; *Parker v. Thomas*, 28 Ind. 277; *Foster v. Park Com'rs*, 133 Mass. 332.

⁴ *Williamsport R. Co. v. Philadelphia, &c. R. Co.*, 141 Penn. St. 408. See also *Davis v. Railroad Co.*, 114 Penn. St. 308; *Appeal of New Brighton, &c. R. Co.*, 105 Penn. St. 13.

with a view to the public interest as to the interest of its stockholders, as the profits to be derived from the building of the road will largely depend upon the business interests of the country traversed thereby. But where the legislature has given it no discretion in the matter except as to the location of the road over the designated route, it can only follow the route so designated, and any departure therefrom is unauthorized. The question whether the location adopted is authorized by the charter or general law is one for the courts to determine. But the exercise of this discretion by the company will not be disturbed except where there is a plain case of an abuse of it.¹ In determining the extent of the company's discre-

¹ Walker v. Mad River, &c. R. Co., 8 Ohio, 38; Hentz v. Long Island R. Co., 13 Barb. (N. Y.) 646; Fall River Iron Works v. Old Colony R. Co., 5 Allen (Mass.), 221; Parke's Appeal, 64 Penn. St. 137; Cleveland, &c. R. Co. v. Speer, 56 Penn. St. 325; 94 Am. Dec. 84; Struthers v. Dunkirk R. Co., 87 Penn. St. 282; People v. New York Central R. Co., 74 N. Y. 302; Southern Minn. R. Co. v. Stoddard, 6 Minn. 150. As a rule, a railway company may select its own route, fix its terminal points, and lay out its road, and acquire the right of way and other property necessary for the construction of its road on any and every part of its line, whether within city limits or without them, according to its own discretion. The lines selected may, without the assent of the city, cross streets, and the company may, without such assent, acquire the right of way and construct its road on every part of such line, except the parts to be constructed upon or across streets. Chicago, &c. R. Co. v. Dunbar, 100 Ill. 110; 5 Am. & Eng. R. Cas. 253. See, also, s. c. 95 Ill. 571. An illegal location may be made perfect by legislative confirmation. Com. v. Old Colony R. Co., 14 Gray (Mass.), 93; Salem v. Eastern R. Co., 98 Mass. 431. When a railway company has ascertained and located where its road shall be, it is not competent for another company to step in and take its route, agree with the owners and occupy the land. The selection and location of route secures the title of the first company to that route, which it may carry to completion without dis-

possession by another. Titusville, &c. R. Co. v. Warren, &c. R. Co., 12 Phila. (Penn.) 642. Under a statute authorizing railway companies to lay out their roads exceeding five rods in width, and requiring the location of the road to be filed with the county commissioners, defining the courses, distances, and boundaries in each county, a location which does not state the width of the land taken or the boundaries of the location, nor refer to a map of the land placed on file, is invalid. Housatonic R. Co. v. Lee, &c. R. Co., 118 Mass. 391. A., the owner of a tract of land over which a railway company was about to locate its line, made a contract with G., the attorney and agent of the company authorized to settle land damages, by which the location over A.'s land was to be twenty feet in width, and not to include within it certain buildings. This contract was reported to the managing officers and agents of the company, and was ratified by them. At a meeting of the directors, a plan and location were exhibited, showing a location five rods wide, and G. stated that he had agreed with various owners of land to have the location of less width, and was directed by the president, in the presence of the directors, to make the necessary changes. G. thereupon made several changes in the plan and written location, but, by inadvertence, did not alter the plan and location to conform to the contract made with A., but left the location five rods wide, which included portions of his buildings. The plan and location were then adopted by vote of the directors as the location of

tion, limitations upon it are not to be too easily implied. Thus, if a charter grants authority to build a road over a certain route, the company is not bound by a plan of the route which was exhibited to the legislature, the plan not being referred to in the act; nor is it admissible in evidence to control the construction of the charter as to the limits within which the road is to be constructed;¹ nor are

the railway, and were duly filed. A. having filed a bill in equity against the company to have the location reformed so as to correspond with the agreement, it was held that there was no evidence that either G. or the managing officers had any authority from the company to make such a contract, or that the president and directors had notice or knowledge of the same, or of the fact that G. inadvertently omitted to alter the location over A.'s land; and that the bill must be dismissed. *Central Mills Co. v. New York, &c. R. Co.*, 127 Mass. 537.

¹ *Boston, &c. R. Co. v. Midland R. Co.*, 1 Gray (Mass.), 340. In *North British Ry. Co. v. Tod*, 5 Bell's App. Cas. (Sc.) 184, the question arose as to the right of the company to intersect an approach leading to a mansion-house at a different level from that laid down in the parliamentary plans, in which it appeared as a cutting of fifteen feet, and the way raised upon a bridge two feet. The owner of the mansion had at first opposed the bill, but upon the representations contained in the plans, withdrew his objections. It was held that the plans were only binding to the extent that they were referred to in the act. *Beardmer v. London, &c. Ry. Co.*, 1 H. & T. 161. When the plans are referred to generally in the charter, they are held to be binding upon the company to the extent of determining the *datum* line and the line of railway with reference to such *datum* line, but not the surface levels unless expressly so provided in the act. *North British Ry. Co. v. Tod*, *ante*. In another case the plaintiff, the owner of a piece of land through which a railway company, by their plans and sections, represented they intended to pass an embankment, so as to cross a public road on the level, filed a bill, and obtained an *ex parte* injunction to restrain the company from lowering or excavating the road, or

affecting the plaintiff's land in any manner inconsistent with the provisions of their act, or the deposited plans or sections, or an agreement entered into by the plaintiff with the company. The Lands Clauses Consolidation Act having been incorporated with the special act, and the agreement referring to the latter act, it was held that the company were entitled to exercise all the powers given by the general and special act, although the plaintiff's bill and affidavits stated that the agreement was entered into on the understanding that the line would be made according to the plans and sections. *Braynton v. London, &c. Ry. Co.*, 10 Beav. 238. A railway company, before applying for a deviation act, deposited with the clerk of the peace for the county, plans and sections of the proposed line, and cross-sections, showing the manner in which roads were to be carried over the line. One of these cross-sections delineated the manner in which it was proposed to carry a road at I. over the line by a bridge, and the proposed inclination of the altered line of road. The deviation act was incorporated with this act, and authorized the company to construct the bridges for carrying the railway thereby authorized over any roads, or for carrying any roads over the said railway, of the heights and spans, and in the manner shown on the sections deposited. The company made the line, and at I. deviated two feet vertically from the level marked on the plans. They carried the road over the line on a bridge of the proposed height and span, but with a different inclination of the altered road. A *mandamus* having commanded the company to make the bridge, and carry the road over it in conformity with the cross-section, and at the rates of inclination delineated thereon as the rates of inclination of the road when altered, it was held, on demurrer to a plea to the

the petitions to the legislature to secure a charter admissible to show that a particular route was intended by the legislature.¹ The circumstance that no restriction is imposed upon the company in the charter, as to the route, affords ground for a conclusive presumption that the legislature intended to clothe it with a discretion as to the route to be selected; and after the company has selected its route, in an action against it for injuries resulting from the construction of the road, it is not proper to submit to the jury the question as to whether it could not, at a reasonable expense and without undue injury to the road, have so located it as to avoid the injury.² The corporation itself, through its proper officers, is the tribunal to decide this question; and so long as they comply with the provisions of the statute and do not abuse this discretion, their decision cannot be disturbed, and the parties who suffer injury therefrom have no other redress than such as the statute provides. This was well illustrated in a New York case,³ in which by the statute the company was

return, that the mere exhibition of plans and sections whilst a bill is depending in Parliament, does not make them obligatory on the promoters after the act has passed, unless there be something in the special act when passed, or in the general acts with which it is incorporated, which requires that the plans should be followed. The exhibition of plans and sections before the act is passed is analogous to parol negotiations and proposals preliminary to the making of the private agreement, which is afterwards reduced into writing; such proposals do not bind the parties, except in so far as they are in writing. *Reg. v. Caledonian Ry. Co.*, 16 Q. B. 30. In another case, by an act of Parliament authorizing an extension of a line of railway and the construction of a station, which act incorporated the Railways Clauses Consolidation Act and this act, it was enacted that subject to the powers of deviation in this act contained, it shall be lawful for the said company to make and maintain the said extension and the said station, and the works connected therewith, in the lines, etc., and upon the lands delineated upon the said plans, etc., and to enter upon, take, and use such of the said lands as shall be necessary for the purpose. The plaintiff's lands were delineated upon the plans and marked 1 and 4, and the line of deviation passed through both lots. The com-

pany required the entire lots of 1 and 4 for the purpose of extension and the station. It was held, dissolving an injunction obtained by the plaintiff, that the company were empowered to take all or any part of the lands delineated on the plans, although beyond the line of deviation, and although they were not so entitled under the powers of deviation contained in the Railways Clauses Consolidation Act. The court thought that, inasmuch as the plans showed where the stations should be made, it was the intention of the legislature to empower the company to make it on the whole of the land without attention to the limits of deviation at all. *Crawford v. Chester, & Ry. Co.*, 11 Jur. 917. See also *River Dun Nav. Co. v. North Midland Ry. Co.*, 1 Ry. Cas. 135; *Payne v. Bristol, & Ry. Co.*, 6 M. & W. 320; *Reg. v. Eastern Counties Ry. Co.*, 2 P. & D. 648.

¹ *Com. v. Fitchburg R. Co.*, 8 Cush. (Mass.) 240. A special reference to the plans, etc., in the charter for one purpose, does not make them admissible for another. *Reg. v. Caledonian Ry. Co.*, 16 Q. B. 19.

² *New York, & R. Co. v. Young*, 33 Penn. St. 175; *Southern R. Co. v. Stoddard*, 6 Minn. 150; *Cleveland, & R. Co. v. Stockhouse*, 10 Ohio St. 567.

³ *People v. New York Central R. Co.*, 12 Hun (N. Y.), 195, *affirmed*, 74 N. Y.

authorized to construct its road "across, along, or upon any highway, etc., but the company shall restore the highway thus inter-

302. Where the legislature authorizes the board of directors of a railroad company to locate and construct their road along and across the public grounds and streets of an unincorporated town, and the directors, in pursuance of that authority, do so locate and construct their road, they act as public agents in so doing. Such location is the act of the State, and within the legislative authority, unless such use of the land is inconsistent with the use to which such public grounds had been previously applied by the legislature. *Chicago, &c. R. Co. v. Joliet*, 79 Ill. 25. *Matter of Coney Island R. Co.*, 12 Hun (N. Y.), 451. A legislative grant of authority to construct a railroad along a river does not authorize the construction of the road in or upon such river. *Stevens v. Erie R. Co.*, 21 N. J. Eq. 259. *Compare Hays v. Briggs*, 3 Pittsb. (Penn.) 504. Where a railroad company acquired a right of way one hundred feet wide, over a tract of land situated in two sections of a township, under an agreement by which the railroad was to be located "on the section line," it was held that the company did not forfeit its right to the land, because its track was not laid immediately on and along the section line, it being constructed within the limits of the one hundred feet, and that strip embracing the section line. *Munkers v. Kansas City, &c. R. Co.*, 60 Mo. 334. Where two railroad companies have the right to extend their tracks in and through a certain street to the terminus thereof, the company which first actually takes qualified possession of the middle of the street, by locating and constructing an extension of its tracks thereon, for a part of the distance, until interfered with by the agents or servants of the other company, acquires the right to complete the construction of its tracks, to the terminus of the street, to the exclusion of the right of the other company to interfere in any way with the construction and operation of such extension so located. *Waterbury v. Dry Dock, &c. R. Co.*, 54 Barb. (N. Y.) 888. A commission appointed to ascertain and determine the points and manner

of the crossing by one railroad of another has no power to locate the crossing at any place other than that stated in the order; nor to review any fact on which the order was based; nor to question the right of the petitioner to a crossing; nor to prescribe the rate of speed at which trains on the intersecting roads shall pass the crossing. *Matter of Central R. Co.*, 1 Th. & C. (N. Y.) 419. Under the Connecticut act of 1866, c. 67, empowering railroad commissioners to discontinue any railroad station, their determination must be definite, and not dependent upon conditions to be performed by parties over whom they have no control. *Chester v. Connecticut, &c. R. Co.*, 41 Conn. 348; *State v. New Haven, &c. R. Co.*, 42 Conn. 56. A charter authorizing the building of a railroad to a city named does not restrict the right to build the road to the limits of the city, but imports an authority to extend the road within the city limits. *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88. Under a railroad charter fixing the terminus "at or near P.," it was held that a location a mile and a half from P. was within the discretion allowed. *Parke's Appeal*, 64 Penn. St. 137. But under a statute authorizing a railroad company "to extend the line of said road to the south line of the State," it was held that the power to extend could be exercised only by building a road continuously from the fixed terminal point of the road. The extension is accessory to the principal road; and power to change the "location" or "route" does not include power to change the termini. *Attorney-General v. West Wisconsin R. Co.*, 36 Wis. 466. Authority given to a street railway corporation to extend the location of its tracks, whenever this can be done without entering upon the tracks of another corporation, may include the location of additional tracks not connected with its existing tracks except by the tracks of another corporation. *South Boston R. Co. v. Middlesex R. Co.*, 121 Mass. 485. A railroad company may alter the location of its depots and tracks, after the road

sected or touched to its former state, or to such state as not unnecessarily to have impaired its usefulness." The defendant, in the exercise of its discretion, carried a highway in the town of Sweden, which it crossed, over its railway, by means of a bridge and embankment. For this it was indicted as for a nuisance, convicted, fined \$2,000, and ordered to abate the nuisance. But the judgment was reversed because of errors in the charge of the court to the jury. TALCOTT, J., in delivering the opinion of the General Term gave expression, as it seems to us, to the true rule controlling in such cases. He said: "The presiding judge seems to have proceeded upon the theory that this obligation to restore the highway to such state as not unnecessarily to have impaired its usefulness was in the nature of a condition precedent to the exercise of the right to cross the highway at all, and therefore he instructed the jury as follows: 'The main question is, — whether the mode of crossing the highway, to wit, by means of the embankment and bridge, by which the highway is taken above its former level and is carried over the railroad track at a height of several feet, — whether that, in and of itself, is a nuisance, by reason of the obstruction it presents to travel. . . . I submit to you in the first place this proposition: If the question as to the most expedient mode of crossing the highway at this particular place is simply a question in respect to which different engineers, of ordinary capacity, skill, and experience in the business of laying out railroads would honestly differ in opinion, having regard as well to the effect of the proposed crossing upon the condition and usefulness of the highway as to the interests of the railroad company, then the mode adopted cannot be regarded as a nuisance, in and of itself, although the jury should be of opinion that it was not the most expedient one. . . . The statute to which I have adverted says to them in

has been completed under the first location, if the necessity for the change is manifest, and no detriment ensues therefrom to the public; and may condemn private property needed for such relocation. *Mississippi, &c. R. Co. v. Devaney*, 42 Miss. 555. See *Easton, &c. R. Co. v. Greenwich*, 25 N. J. Eq. 565. Where a railway company was authorized to locate its road by the most direct and least expensive route, it was held that after the location and construction had become complete, the exercise of the discretion of the company in the location

could not be reviewed by the courts. If the act of location is voidable, none but the commonwealth can call the company to account. *Cleveland, &c. R. Co. v. Speer*, 56 Penn. St. 325. Where a railway company has divided a road, *ultra vires*, but with a *bonâ fide* view to the convenience of the public, a court of equity will not compel it to replace the road so as to make the work *intra vires*, if the result will be to cause greater inconvenience to the public, or the complaining section of the public. *Attorney-General v. Ely, &c. Ry. Co.*, L. R. 6 Eq. 106.

express terms : You can cross the highway over or under as is most expedient ; you can cross it in any way, provided you do not unnecessarily impair the usefulness of the highway. That condition you must observe. . . . On the other hand, I submit to you, as a proposition of law, that if it appears by the evidence that in deciding upon the mode of crossing the point in question the interests of the company alone were consulted, and due attention was not paid to the condition of the highway or the rights of the public in the use of the highway, and that the mode adopted had and continues to have the effect to unnecessarily impair the former condition and usefulness of the highway, then the jury will be warranted in finding the defendant generally guilty under the indictment, guilty of maintaining a nuisance in that mode of crossing under such circumstances.' To this instruction the plaintiffs in error excepted, and this exception presents the main question in the case.

"The indictment is for carrying the highway over the tracks instead of under it or at grade, that is, upon a level with the highway. The statute, as we have seen, gives the railroad company the power to carry the highway over or under the track, 'as may be found most expedient.' Found by whom? *There is no tribunal named in the act for determining the question of expediency, or which course will be the most expedient, and clearly — as it seems to me — the railroad company is to determine that question ; and when it has determined it in good faith, though it may, in the opinion of the jury, have erroneously determined the question as to the relative expediency of the mode of crossing, its judgment cannot be reversed by a jury.* The legislature of the State, whether wisely or unwisely, have conferred upon the railroad company the power of determining the question, and no appeal from the determination of the company is provided by the law, either to a court or jury. If left to be determined by a jury, after the company has deliberately determined the mode of crossing the highway, by adopting one of the alternatives authorized by the statute, one jury might determine that the manner of crossing which would least impair the former usefulness of the highway would be by crossing under the grade of the highway ; another, by having the highway cross above the track ; and still another might conclude that the most expedient method of crossing the highway would be at grade. It seems to me that the legislature has seen fit to confer the exclusive power to determine the question as to the relative

expediency of the mode of crossing upon the railway company, deeming the provision requiring the railway company to restore the highway so as not to have *unnecessarily* impaired its usefulness a sufficient protection to that portion of the public which has occasion to use the highway for purposes of ordinary travel.

"That the usefulness of the highway as such may, to some extent, be impaired by a railroad crossing, the statute impliedly concedes. If the railroad company fail as far as possible to restore the highway to its former condition, a *mandamus*, which shall direct the company what shall be done to complete such restoration,¹ may be issued to compel the performance of the omitted duty, or perhaps the railroad company may be subjected to an indictment, distinctly charging the acts which it might and ought to have done for the purpose of restoring the highway. But I do not think the remedy is to be found in an indictment for a nuisance, founded on the manner of crossing, when, as I construe the statute, the railroad company has the exclusive power of determining that manner; and when it has been by it determined that the particular mode selected is the 'most expedient,' it has the warrant of the legislature for crossing the highway in that particular manner."

Of course, the legislature may define the route, may even fix the location,² but where it neglects to do so, but leaves the company to

¹ *People v. Dutchess, &c. R. Co.*, 58 N. Y. 152.

² *In re Coney Island, &c. R. Co.*, 12 Hun (N. Y.), 451. In this case a railroad company was organized by an act of the legislature and authorized to construct its road between two points, and over certain streets and roads therein named. It was held that this constituted a practical location of its route by the legislature and dispensed with the notice of the location of its route, and of the filing of the map required by the general railroad act.

Any material departure from the route designated for the proposed road in the charter is a violation of the charter for which a forfeiture of the company's franchises may be claimed, though only the State has a right to institute proceedings to have such forfeiture declared, and it may waive its right. *Mississippi, &c. R. Co. v. Cross*, 20 Ark. 448. Under the general railroad act of New York, any person aggrieved by the proposed location

over his land may apply to a justice of the Supreme Court for the appointment of commissioners. These commissioners act in each county, and their duty is to examine the proposed route and to confirm or alter it as seems best for the interests of the party concerned and the public. Their power extends over any portion of the route within the county, and is not restricted to the lands of the party securing their appointment. Their alterations must not so disturb the continuity of the proposed route as to leave it disconnected, thereby interrupting the road. There is only one board of commissioners in each county, and when their work is done the route through the county is settled. No person can call for the appointment of these commissioners except one whose land is about to be taken, and who, feeling himself aggrieved, sets out his objections in his petition. *People v. Tubbs*, 59 Barb. (N. Y.) 401, *affirmed*, 49 N. Y. 356; *Norton v. Wallkill Valley R. Co.*, 61 Barb.

exercise its discretion in the matter between the termini named, it seems to us that the rule laid down by TALCOTT, J., *supra*, is the true one, and that where it acts in good faith, and within the limit of its powers, its action cannot be reviewed by the courts.¹ But if it acts in this respect in excess of its powers, or if it abuses the discretion with which it is invested, — as, if it departs from the purpose of its charter by building a road different from that intended by the legislature, — its acts will be unauthorized, and its charter will afford it no protection.² Thus, in a Massachusetts case,³ the charter of a railway company required the road from Northboro to Southboro to be laid out as far north as a certain point, and in the location a curve was made in order to reach that point, and the road was thence continued towards Southboro by an acute angle. It was held that the subsequent continuation of the road for about a mile and a half northerly from the point of the angle to the village of Marlboro was unauthorized.⁴ A grant of authority to “extend” the road contemplates that one terminus shall remain unchanged and does not authorize the construction of a new and independent road.⁵

A railroad company about to build its road, and proceeding to condemn the land under its charter for the use of the road, should, even though the statute makes no provision therefor, define with precision the location and the quantity required, to show the landowner the extent of the claim made; but after the road has been located, a description of the land in the report of the commissioners and an accompanying diagram are sufficiently precise, although no actual survey by courses and distances is made.⁶

If the statute requires that a map of the route shall be filed, it must be complied with; but a map of a railroad professing to be a

470; *In re Hartman*, 9 Abb. Pr. (N. S.) 124.

¹ *Fall River Iron Works v. Old Colony R. Co.*, 5 Allen (Mass.), 221; *Cleveland, &c. R. Co. v. Speer*, 56 Penn. St. 326; 94 Am. Dec. 84.

² And an injunction will lie to prevent an abuse of its discretion by the company. *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; 32 N. J. Eq. 755. The company cannot make use of the discretion vested in it to construct the road in a manner different from that contemplated by its charter. *Boston, &c. R. Co. v. Lowell, &c. R. Co.*, 124 Mass. 368. Nor can it make use of a granted right of way

for a different road than that intended in the grant. *Crosbie v. Chicago, &c. R. Co.*, 62 Iowa, 189; 14 Am. & Eng. R. Cas. 463. See also *Boston, &c. R. Co. v. Midland R. Co.*, 1 Gray (Mass.), 340.

³ *Brigham v. Agricultural R. Co.*, 1 Allen (Mass.), 316.

⁴ See also *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; 32 N. J. Eq. 755; *Com. v. Franklin Canal Co.*, 21 Penn. St. 117.

⁵ *Savannah, &c. R. Co. v. Shiels*, 33 Ga. 601. See also *Belleville R. Co. v. Gregory*, 15 Ill. 20.

⁶ *Strong v. Beloit, &c. R. Co.*, 16 Wis. 635.

map only of a portion of the route, filed by the company in the proper office, cannot restrict the company to the construction of so much of the road only as is marked out upon the map, when the articles of association require it to be extended further. Even if the company has treated the map as a map of the whole road, yet the articles of association are superior to it, and cannot be controlled by it.¹ The fact that a railroad was constructed, and has ever since been used, and that its location is on the town records, is sufficient proof of a location; and a certified copy from the records, of what purports to be a location in that town, is admissible to show that such a paper was on record.² If the line as located interferes with another line previously located, and neither the charter nor general law gives a right to one railroad to use any land previously located and appropriated by another company, the company making the last location has no right to interfere with the first location except for the purpose of crossing, particularly when the second company is proceeding in good faith and with reasonable diligence to construct its road; and this has been held to be the case even though the line lies through a narrow pass through which two roads cannot be built.³

¹ *Mason v. Brooklyn, &c. R. Co.*, 35 Barb. (N. Y.) 373.

² *Hatch v. Vermont Central R. Co.*, 28 Vt. 142.

³ *Contra Costa, &c. R. Co. v. Moss*, 23 Cal. 323. But see opinion of SHAW, C. J., in *Springfield v. Conn. River R. Co.*, 4 Cush. (Mass.) 63, where he says: "Land appropriated to a public walk or training-field may, in case of war, be required for a citadel, when it is the only ground which, in a military point of view, will command all the defences of a place, in case of hostile attack. Chesapeake, &c. Canal Co. v. Baltimore, &c. R. Co., 4 G. & J. (Md.) 1; *Boston Water Power Co. v. Boston, &c. R. Co.* 23 Pick. (Mass.) 360; *Wellington v. Middlesex*, 16 Pick. (Mass.) 87, 100. But when it is the intention of the legislature to grant a power to take land already appropriated to another public use, such intention must be shown by express words, or by necessary implication. There may be such a necessary implication. Every grant of power is intended to be efficacious and beneficial, and to accomplish its declared object; and carries with it such incidental powers as

are requisite to its exercise. If, then, the exercise of the power granted draws after it a necessary consequence, the law contemplates and sanctions that consequence. Take the familiar case of the Notch of the White Mountains, a very narrow gorge, which affords the only practicable passage for many miles through that mountain range. A turnpike road through it has already been granted. Suppose the gorge not wide enough to accommodate another road, but the legislature of New Hampshire, in order to accommodate a great line of public travel, should grant power to lay a railroad on that line; they would, by necessary implication, grant a power, and if they had the power, it must be derived from necessary implication, though no such implication appears on the face of the act. If it exists, it must arise from the application of the act to the subject-matter, so that the railroad could not, by reasonable intentment, be laid in any other line. The grant of a right is, by reasonable construction, a grant of power to do all the acts reasonably necessary to its enjoyment. It is not an absolute or physical necessity, absolutely preventing

The question in such a case is one which the legislature alone can solve, and being established for the same purpose, it cannot reasonably be implied that the legislature intended to destroy the franchise of the company which had already located and established its route.¹

When grants of a definite location are inconsistent, the rule is that the earlier grant must prevail;² this in pursuance of the principle that in all cases of public grants, lands already appropriated to another purpose are excepted from such grants though the exception is not specifically provided for.³ But where the grants are indefinite, leaving the exact location to be selected by the companies, the right to specific lands taken will belong to the company making the prior location.⁴

its being laid elsewhere; but if, to the minds of reasonable men, conversant with the subject, another line could have been adopted between the termini, without taking the highway, reasonably sufficient to accommodate all the interests concerned, and to accomplish the objects for which the grant was made, then there was no such necessity as to warrant the presumption that the legislature intended to authorize the taking of the highway." When a railroad company has acquired a specific right of way, that right cannot be taken away by statutory proceedings at the suit of another railroad company; yet when the right of way as claimed is one hundred feet wide, "which common knowledge teaches is ample space for two or more lateral tracks," and another railroad company can obtain room for its track along this space through a mountain gap without obstructing the free and ample use of the same by the first, the right to do so may be obtained through statutory proceedings in the nature of *ad quod damnum*. A company claiming a road-bed and right of way through a narrow mountain gap cannot enjoin by bill in equity statutory proceedings instituted by another company against the owners of the land seeking to condemn a right of way for its road, and not making the first company a party. *Anniston, &c. R. Co. v. Jacksonville, &c. R. Co.*, 82 Ala. 297.

¹ This matter, so far as it relates to mountain gorges, cañons, passes, and defiles

on government lands, is now regulated by an act of Congress, approved March 2, 1875, providing in effect that all railroads shall occupy such passes, &c., in common. See also *Denver & Rio Grande R. Co. v. Denver, & R. Co.*, 17 Fed. Rep. 867, in which it was held that under this act a company having the prior right of way may enjoin intrusion thereon by another company until facts are shown making it necessary for such other company to come under the right of way; and the defendant road may under a cross bill, by showing the necessary facts, have its right to enter upon such right of way enforced by a final decree. See *Housatonic R. Co. v. Lee, &c. R. Co.*, 118 Mass. 391.

² *Chesapeake, &c. Canal Co. v. Baltimore, &c. R. Co.*, 4 Gill & J. (Md.) 1; *Sioux City, &c. R. Co. v. Chicago, &c. R. Co.*, 27 Fed. Rep. 70; 25 Am. & Eng. R. Cas. 150.

³ *Wilcox v. Jackson*, 13 Pet. (U. S.) 498; *Boston, &c. R. Co. v. Lowell, &c. R. Co.*, 124 Mass. 368.

⁴ *New Jersey So. R. Co. v. Long Branch Com'rs*, 39 N. J. L. 33; *Boston, &c. R. Co. v. Lowell, &c. R. Co.*, 124 Mass. 368; *Sioux City, &c. R. Co. v. Chicago, &c. R. Co.*, 27 Fed. Rep. 770; 25 Am. & Eng. R. Cas. 150; *Atchison, &c. R. Co. v. Meeklin*, 23 Kan. 167; *New Brighton, &c. R. Co. v. Pittsburgh, &c. R. Co.*, 105 Penn. St. 18. Where two railroad companies were incorporated to complete independent lines across the State, only the termini of either

SEC. 271. **Change of Location.** — However it may be with railway companies formed under general laws, when a company established by a special charter has once fixed upon its location, and taken the necessary steps to establish it, its power of election having been exercised, it has no power to recall or change it without the consent of the legislature, even though the change only involves the exercise of a power which they possessed and might have exercised under the charter in the first instance.¹ Thus, a railroad company was incorporated by a charter which authorized it to construct a railroad commencing at an eligible point in the city of Brooklyn and extending to Jamaica. The company fixed the western terminus in Brooklyn, and adhered to the particular location originally selected for that terminus for several years. It was held that this selection concluded the company, and that they had no franchise to extend the road through other streets in Brooklyn which they could assign to another company.² If the railway company is not built under the right of eminent domain, but the company covenants with the owner of the land over which a part of its line extends, that it will change that part of the line upon his lands, upon a certain consideration being given to it, so as to enable the owner to mine under the road, it was held that upon the failure of the company to remove its road upon the requisite notice being given it by the tenant, the ten-

being prescribed, there being no apparent or necessary conflict of the routes, it was held that the company which first surveyed and adopted a route, and filed the survey in the proper office, were entitled to hold it, without reference to the date of the charters, both being granted at the same session of the legislature. But the mere experimental survey of a route does not confer any vested right. *Morris, &c. R. Co. v. Blair*, 9 N. J. Eq. 635. In New York, *&c. R. Co. v. New York, &c. R. Co.*, 11 Abb. N. Cas. (N. Y.) 386, a company being the owner of the land, it was held that another company could not, by merely filing a map of its route, prevent such owner from constructing its road on its own land, although the land was included in the location filed by the second company. See 19 Am. & Eng. Ency. Law, 831.

¹ *Brigham, v. Agricultural, &c. R. Co.*, 1 Allen (Mass.), 316; *Hudson & Del. Canal Co. v. N. Y., &c. R. Co.*, 9 Paige

Ch. (N. Y.) 323; *Mississippi, &c. R. Co. v. Devaney*, 42 Miss. 555; *State v. Norwalk, &c. T. Co.*, 10 Conn. 157; *Moorhead v. Little Miami R. Co.*, 17 Ohio St. 340; *Hastings v. Amherst, &c. R. Co.*, 9 Cush. (Mass.) 596; *Works v. Junction, R. Co.*, 5 McLean (U. S. C. C.), 425; *Little Miami R. Co. v. Naylor*, 2 Ohio St. 235; *Buffalo, &c. R. Co. v. Pottle*, 23 Barb. (N. Y.) 21; *People v. N. Y., &c., R. Co.*, 45 Barb. (N. Y.) 73; *Doughty v. Somerville, &c., R. Co.*, 21 N. J. L. 442; *Morris, &c. R. Co. v. Central R. Co.*, 31 N. J. L. 205; *Mason v. Brooklyn, &c. R. Co.*, 35 Barb. (N. Y.) 37. But in this case it was held that when a map of only a part of the location is filed, the company may treat it as no location at all, and subsequently file a new map of the whole location, changing the location as given in the first map.

² *Brooklyn Central R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358.

ant might maintain an action against it therefor in the name of the landlord, because the removal of the road not involving the exercise of the power of eminent domain, it had authority to change its location, and the contract was valid.¹ If the charter confers authority to

¹ *Mine Hill, &c. R. Co. v. Lippincott*, 86 Penn. St. 468. A railway company having located its road, its powers to relocate, and for that purpose to occupy the land of another or the public street, ceases. *Little Miami R. Co. v. Naylor*, 2 Ohio St. 235. And an authority to change the location of the line, during the work, does not imply power to change it after the road is complete. *Moorhead v. Little Miami R. Co.*, 17 Ohio, 340. The same view is maintained by Lord ELDON, in *Blakemore v. Glamorganshire Canal Co.*, 1 My. & K. 154. But a different rule is intimated in *South Carolina R. Co., ex parte*, 2 Rich. (S. C.) 434. But see *Canal Co. v. Blakemore*, 1 Cl. & Fin. 262; *State v. Norwalk, &c. Tp. Co.*, 10 Conn. 157; *Turnpike Co. v. Hosmer*, 12 Conn. 364; *Louisville, &c. Tp. Co. v. Nashville, &c. Tp. Co.*, 2 Swan (Tenn.), 282, where the proposition of the text is maintained. But in *South Carolina R. Co. v. Blake*, 9 Rich. (S. C.) 229, it is held that a railway company have the same power to acquire land, either by grant or by compulsory proceedings, for the purpose of varying, altering, and repairing their road, as for the original purpose of locating and constructing it; but that the company are not the final arbiters in determining the exigency for taking the land. The petition of the company for taking the land should allege in detail the necessity for taking it, and the land-owner may traverse these allegations, and in that case this is tried as a preliminary question. It has been held that a grant to a railway company to construct their road between two towns gave them implied authority to construct a branch to communicate with a depot and turn-table, on a street in one of the towns (New Orleans) off the direct line. *Knight v. Carrolton R. Co.*, 9 La. An. 284; *New Orleans, &c. R. Co. v. Second Municipality*, 1 La. An. 128.

Deviation.—A slight deviation from the route prescribed in the charter will not release the stockholders from the obliga-

tion of their subscriptions; but any substantial deviation will have that effect. The precise line of distinction between the two classes of cases must be left to the construction of the courts in each particular case. The stockholders may enjoin the company in the course of construction from making an essential deviation, and after the road is completed, the company may, by *scire facias*, be called to account for not building upon the route indicated in their charter. But where all interested acquiesce in the route adopted, until their road is completed, it will require a very clear case to induce the courts to interfere. *Ashtabula, &c. R. Co. v. Smith*, 15 Ohio St. 328; *Champion v. Memphis, &c. R. Co.*, 35 Miss. 692; *Fry v. Lex., &c. R. Co.*, 2 Met. (Ky.) 314; *Aurora v. West*, 22 Ind. 88; *Smith v. Allison*, 23 Ind. 366; *Miss., &c. R. Co. v. Cross*, 20 Ark. 443, 463; *Illinois, &c. R. Co. v. Cook*, 29 Ill. 237; *K. R. Co. v. Marsh*, 17 Wis. 13; *Com. v. Erie, &c. R. Co.*, 27 Penn. St. 339; *Pontchartrain R. Co. v. Lafayette, &c. R. Co.*, 10 La. An. 741; *Hitchcock v. Danbury, &c. R. Co.*, 25 Conn. 516. Deviations are allowed within certain limits, and especially where the consent of the land-owners can be secured. In England, deviations are permitted by statute within certain definite limits not to exceed one hundred yards, to be measured from the line delineated upon the plans to the actual *medium filum* of the railway as constructed; and it is held that the fact that the embankments extend beyond the distance is no violation of the right of deviation allowed by the statute. *Payne v. Bristol Ry. Co.*, 6 M. & W. 326. In this case PARKE, B., stated his opinion to be that a deviation beyond one hundred yards could not be made even with the consent of the land-owners, but that the fact that the cuttings or embankments extended only beyond that distance did not render the acts of the company unlawful. But it has been held that where a tunnel is marked upon the plans, it must be made

change the location for certain specified reasons, it can only be changed for some one of the reasons named in the charter.¹ Thus, a railway company had authority to vary the route and change the location of its route if it should find any obstacle in continuing its first location, either by the difficulty of construction or procuring the right of way, or whenever a better or cheaper route could be had. It was held that this did not authorize the company to relocate its line because a particular town on the selected route would not contribute towards its construction, or to abandon and disregard the points named in the charter, but only to change its route for some of the causes stated.² Nor would such provision in the charter warrant a change in the location after the road is built, even for any or all the causes named therein.³ Such power to relocate may be invoked at any time *before*, but not *after*, the road is constructed.⁴

exactly as there delineated, and that the general right of deviation does not apply in such cases. *Little v. Newport, &c. Ry. Co.*, 12 C. B. 752. Lands within the line of deviation may be taken for branch railways (*Sadd v. Maldon, &c. Ry. Co.*, 6 Exch. 143) or for the general necessary purposes of the road. *Clother v. Midland Ry. Co.*, 2 Phillips, 469. See also *Evensfield v. Middlesex Ry. Co.*, 3 De G. & J. 286; *Dodd v. Salisbury, &c. Ry. Co.*, 5 Jur. (N. S.) 782.

¹ Where the charter or general law authorizes the directors to change the location of the road by either a majority or a two-thirds vote, in order to effect a legal change in location it is not necessary that the new route should be exactly designated in the resolution or vote effecting the change. *Matter of New York, &c. R. Co.*, 88 N. Y. 279.

² *Works v. Junction R. Co.*, 5 McLean (U. S.), 425; *In re New York, &c. R. Co.*, 88 N. Y. 279. See *Mississippi, &c. R. Co. v. Devaney*, 42 Miss. 555.

³ *Moorhead v. Little Miami R. Co.*, 17 Ohio St. 340.

⁴ *Atkinson v. Marietta, &c. R. Co.*, 15 Ohio St. 21. Where a railway company has received from private individuals donations of land, subscriptions of stock, and payments in money, in consideration that it should locate its road at a particular place, and allow private side-track and warehouse privileges in connection there-

with, the company will not be permitted to effectuate a change in fact, though not in name, of the line of its road away from such place, by getting up a new corporation, and constructing a new road parallel with its old one, under a different charter, and permitting its old line to go to decay, without making compensation to the parties with whom it has contracted as aforesaid. *Chapman v. Mad River &c. R. Co.*, 6 Ohio St. 119. In a Louisiana case a railway company in the city of New Orleans, which has been authorized by the city to change the track of its railroad, cannot be enjoined from so doing by an individual property-holder situated on the line of the road, on the ground that such change would likely prove detrimental to the public health, and would therefore work an irreparable injury to him. *Hoyle v. New Orleans City R. Co.*, 23 La. An. 535. A right to change location, "either for the difficulty of construction, or of procuring a right of way at a reasonable cost, or whenever a better and cheaper route can be had," does not authorize a company to relocate, because a particular town on the selected route will not contribute to the route. *Works v. Junction R. Co.*, 5 McLean (U. S.), 425. The act incorporating the Little Miami R. Co. does not confer upon the company the right to relocate its road, after completing it upon the first location, and to condemn other property for its uses. *Moorhead v.*

Under general statutes authorizing the construction of railways, unless the power is expressly given by the statute, companies formed in pursuance thereof have no authority to build any other

Little Miami R. Co., 17 Ohio St. 341; *Atkinson v. Marietta & Cincinnati R. Co.*, 15 Ohio St. 21. Railway companies may make experimental surveys at pleasure, before finally locating their route. But they cannot have experimental suits at law, as a means of chaffering with land-owners for the cheapest route. The power of taking any man's land by such company is exhausted by a location. It cannot be indulged with another choice. *Neal v. Pittsburgh & Connellsville R. Co.*, 2 Grant's Cases (Penn.), 137. Where, by the terms of the charter, much is left to the discretion of the officers of a company in respect to the location and route of the road, their selection should not be disturbed, unless they have clearly erred. *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646. Indeed all railroad charters that do not directly express the contrary must be taken to allow the exercise of such a discretion in the location of the route as is incident to an ordinary practical survey, but not deviating substantially from the course and direction indicated by the charter. *Southern Minnesota R. Co. v. Stoddard*, 6 Minn. 150. In New York under the general railroad law, no person is authorized to apply to a justice of the Supreme Court for the appointment of commissioners to examine the proposed route of a railroad, and affirm or alter the same, except one whose lands the company desires to take for its use, and after proceedings have been commenced for that purpose by the company. And the commissioners thus appointed are to examine the proposed route, and hear the parties before deciding; and the decision must be confined to the rights of the parties heard, and consistent with the rights of the public. *People v. Tubbs*, 59 Barb. (N. Y.) 401. Where, in a proceeding under the general railroad act of 1850, as amended by the act of 1870, on the petition of a land-owner for the appointment of commissioners to change the location of the route of a railroad as surveyed by the company, it appears that he has not given

notice of the application for the appointment of commissioners to an individual whose land will be affected thereby, such proceeding is wholly void. *Norton v. Wallkill Valley R. Co.*, 63 Barb. (N. Y.) 77, 1872. Although the general railroad act does not, in terms, declare that the commissioners shall have jurisdiction of the entire subject of the location of the route through the county in which the land of the person applying for their appointment is situated, still, that is the true intent and construction of the act. In the matter of *Long Island R. Co.*, 45 N. Y. 364. The power of the commissioners over the proposed route is not restricted to that part of it which lies within the bounds of the land of the party procuring their appointment, but they may make any alteration of the proposed route within the county which may be necessary; but they have no power to so change a portion of the proposed route as to leave it disconnected at either end with the other portions. *People ex rel. Erie, &c. R. Co. v. Tubbs*, 49 N. Y. 356; 59 Barb. 401. A road 24 miles long was authorized "from a point on the Pennsylvania railroad, at or near Parkesburg." It was held that a connection one mile and a half east of Parkesburg was not a transgression of the act *per se*. The only question is, has the company exceeded a discretion on the subject apparent on the face of the act of incorporation? *Parke's Appeal*, 64 Penn. St. 137. Where a company is authorized to extend its road to a point named, beyond its original terminus, such authority will not justify the building of such extension from some point upon the original line other than the terminus. Where a company is authorized to build branch roads "in the several counties through which it passes," it will not thereby be permitted to build a branch road commencing in one county and terminating in another. *Works v. Junction R. Co.*, 5 McLean (U. S.), 425. See, generally, 19 Am. & Eng. Ency. Law, pp. 829 *et seq.*

or different railway from that designated in their articles of association, nor upon any other or different route from that designated in the map or description of their location filed under the statute.¹ It would be placing an extraordinary power in the hands of railway companies if, as is sometimes said, "railway companies may relocate their roads at discretion;" and the various legislatures of this country have not yet deemed it wise to invest these companies with such power, and the cases cited to sustain this remarkable proposition will be found rather to defeat than to sustain it.² In a Missouri case,³ the question was whether under an authority to build branches to its road, it might build a line commencing near one of its termini, and which running in the same general direction formed virtually an extension of its main line; and the court held that it might, as such line was a branch of its road, although the effect might also be to extend it. And moreover, the company had secured and owned the right of way before the time limited by its charter, within which the road should be constructed, had expired. In most of the States where general railroad laws exist, provision is made for a change of location if, upon application to the railroad commissioners or other officers or board designated, or a certain court, such change is deemed necessary and desirable; but after a railway is located and constructed, the right of eminent domain cannot be invoked to change the location unless the power to do so is expressly given in the charter or statute, nor otherwise than for the causes and in the manner provided therein;⁴ and generally, after its location has been filed, and the easement in the land involved in its route has thereby become vested in the company,⁵ it cannot, of its own motion and at its own pleasure and discretion, change its location.⁶

¹ See the case of *Buffalo, &c. R. Co. v. Pottle*, 23 Barb. (N. Y.) 21. In this case it was held that such a change of route, even if the company had the power to make it, — which it was held it did not have, — would involve the release of all the subscribers to the stock who had not assented to the change.

² *Mine Hill, &c. R. Co. v. Lippincott*, 86 Penn. St. 468.

³ *Atlantic, &c. R. Co. v. St. Louis*, 66 Mo. 228, reversing 3 Mo. App. 315.

⁴ *Works v. Junction R. Co.*, 5 McLean (U. S.), 425.

⁵ *Boston & Providence R. Co. v.*

Midland R. Co., 1 Gray (Mass.), 340; *San Francisco, &c. R. Co. v. Mahoney*, 29 Cal. 112; *Hazen v. Boston & Maine R. Co.*, 2 Gray (Mass.), 574; *Old Colony R. Co. v. Miller*, 125 Mass. 1; *Charlestown Branch R. Co. v. Commissioners*, 7 Met. (Mass.) 78; *Ham v. Salem*, 100 Mass. 380; *Davidson v. Boston & Maine R. Co.*, 3 Cush. (Mass.) 91; *Whitman v. Boston & Maine R. Co.*, 7 Allen (Mass.), 326; *Boynton v. Peterborough, &c. R.*, 4 Cush. (Mass.) 467.

⁶ *Mississippi, &c. R. Co. v. Devaney*, 42 Miss. 555; 2 Am. Rep. 608; *So. Carolina*

But under special provisions of its charter, or of the general law, it may, *when necessity and the public interest require it*, or for any reason specifically named therein, make such change in the manner provided by statute; and any attempt to make such change of its own motion where such necessity does not exist will be enjoined by a court of equity.¹ But in some of the States it is held that *before* its road is constructed it may, where the statute warrants it, change its location at discretion even after it has been fixed by it,² but in no case, *after the road is constructed, where such change involves the exercise of the right of eminent domain*, and as a rule, *after the location is filed as required by law*.³ Nor even where the statute authorizes a change of location can there be a change of *termini*, but such change must be confined to the change of route between the same termini.⁴ In some cases, a railway is located under a contract between the company and third persons whereby, by reason of some valuable consideration, the company agrees to and does locate its road over a certain route; and where such a contract exists, the company will not be permitted, even when authorized by statute to change its location, to make such a change of location as will essentially change the route or operate as a violation of its contract; and a court of equity will restrain the company from making the change, or will decree a specific performance of the contract, or, if unable to give relief in either of these modes, will decree the payment of such damages as the party ought to have for

R. Co. v. Blake, 9 Rich. (S. C.) L. 228; Knight v. Carrollton R. Co., 9 La. An. 284; So. Carolina R. Co., *ex parte*, 2 id. 434.

¹ So. Carolina R. Co. v. Blake, 9 Rich. (S. C.) L. 228; State v. Norwalk & Danbury T. Co., 10 Conn. 157. The amended charter of the Pacific Railroad Co. gave the right to construct a road "from the Mississippi river, or any point in the city of St. Louis," and its charter required that its roads should be commenced within seven years, and completed within ten years thereafter. The company chose the point at which it would commence, and built its road westward from that point. It was held that having maintained that location for twenty years, it could not then change its terminus; and that, having failed to build its branch roads within the time prescribed, it could not build a

branch road to continue from its terminus eastward to the Mississippi river, nor treat a track laid between these points as a mere switching or spar track. Atlantic, &c. R. Co. v. St. Louis, 3 Mo. App. 315; 66 Mo. 228.

² Mahaska County R. Co. v. Des Moines Valley R. Co., 28 Iowa, 437. In New York a relocation is provided for, upon a petition by the railway company to a justice of the Supreme Court for the appointment of commissioners, which must be served upon all the parties affected by such change in the location. People *ex rel.* v. Lockport, &c. R. Co., 13 Hun (N. Y.), 211.

³ Neal v. Pittsburgh, &c. R. Co., 2 Grant's Cas. (Penn.) 137.

⁴ Atty.-Gen. v. West Wisconsin R. Co., 36 Wis. 466.

the breach.¹ Of course, where the statute locates the road, there can be no change without the express assent of the legislature. But where the statute defines the location of a railway, a reasonable construction will be placed thereon, with reference to the subject matter of the grant and the purposes to be effectuated,² and the

¹ *Chapman v. Mad River, &c. R. Co.*, 6 Ohio St. 119.

² *Cleveland, &c. R. Co. v. Speer*, 56 Penn. St. 325; 94 Am. Dec. 84. The charter of a company required the road from N. to S. to be located as far north as a certain point, and in the location a curve was made in order to reach that point, and the road was thence continued towards S. by an acute angle; it was held that the subsequent continuation of the railroad for about a mile and one-half northerly from the point of the angle to the village of M. was unauthorized. *Brigham v. Agricultural Branch R. Co.*, 1 Allen (Mass.), 316. Where the time of filing the location with the county commissioners was fixed by statute to be February 8, and it was deposited with their clerk on February 6, it was seasonable, although a term of the commissioners' court did not occur until the following April. And where one year was given by statute for the alteration and amendment of the location, and the amended location was filed in the last day of the year, it was held that the filing was seasonable, although there was no session of the commissioners' court for several months after the filing. *Eaton v. European & North American R. Co.*, 59 Me. 520. A location filed by a railroad company with the county commissioners, by which alone the true location upon the ground cannot be fixed and ascertained, is nevertheless sufficient, if the location can be determined by the plan filed therewith. *Grand Junction R. Co. v. Comm'rs of Middlesex*, 14 Gray (Mass.), 553. Equity will not restrain the directors of a railroad company unless it is shown that they wantonly or capriciously disregard the rights of others. *Anspach v. Mahanoy & Broad Mountain R. Co.*, 5 Penn. 491. The Midland R. Co. was authorized to locate and construct a railroad "commencing at some convenient point on the Norfolk County Railroad; thence through the southerly

part of Dedham; thence through or near the westerly part of the towns of Canton and Milton." It was held that a location, commencing at a point on the Norfolk County Railroad in South Dedham, and not departing from that road at once, but running northerly upon it for more than two miles, and then approaching within two hundred rods of the north-westerly corner of Canton, and running near the westerly boundary of Milton, was authorized by the statute. *Boston & Providence R. Co. v. Midland R. Co.*, 1 Gray (Mass.), 340. An unrestricted grant authorizing the building of a railroad from one designated point to another carries with it the authority to cross a navigable stream, if the railroad cannot reasonably be constructed without doing so. *Fall River Iron Works Co. v. Old Colony & Fall River R. Co.*, 5 Allen (Mass.), 221. No person has the right to object to the location of a railway on the ground of damage to his property, unless his title or possession extends back to the time when the land was taken by the company. *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646. A company was authorized to locate its road by the most direct and cheapest route; it was held that after the location and construction had become complete, the exercise of the discretion of the company in the location could not be reviewed. If the act of location had been voidable, none but the commonwealth could call the company to account. *Cleveland, &c. R. Co. v. Speer*, 56 Penn. St. 325; 94 Am. Dec. 84. A railway company, in determining upon its route, acts arbitrarily, and is not required to consult any one; and no one is entitled to any notice, on the subject, until the route has been actually designated. *Norton v. Wallkill Valley R. Co.*, 61 Barb. (N. Y.) 476. Under a charter which fixes one terminus of a railroad at or near a certain point, a large discretion is conferred upon the railroad company in locating its road, the

mere enumeration of the places through which the road is to pass will not be held to require that it shall pass through them in the order named.¹ Thus, in the case last cited, the Lancaster & Sterling Branch Railroad Company was authorized to locate its road commencing at a certain point; "thence running through Acton, Sudbury, Stow, Marlboro, etc." It was held that the company was not obliged by the terms of the act to locate its road through the towns in the order named, but that a location from Acton through Stow to Sudbury, and thence through Stow again to Marlboro, was a sufficient compliance with the requirements of the act. If a railway is located upon a certain line of a municipal corporation, a subsequent change of the lines of such corporation will not change the location of the railway, but it must be located with reference to the lines as they existed when the charter was granted.² From what has been said it will be seen that, until its location is filed according to the statute, a railway company may make experimental surveys, and exercise its discretion as to the location of its line; *but after its location is filed, unless the statute confers upon it the power to do so*, its right of election is gone,³ and it cannot change its location in any essential particular where the right of eminent domain is involved, although slight deviations within the charter limits will not be regarded. Even where the statute confers upon a railway company the right of changing its location at any time before its actual construction, the right to do so only exists where there is necessity for the change, or the public interests are to be served thereby; and the company is subject to the supervision of the courts in respect to the change, and cannot make it at its own discretion. After the road is actually constructed, the location cannot be changed where the exercise of the right of eminent domain must be invoked, except the statute has provided a mode therefor and the statute mode is pursued.⁴

exercise of which will not be revised unless it has clearly exceeded its just limits or acted in bad faith. *Fall River Iron Works Co. v. Old Colony & Fall River R. Co.*, 5 Allen (Mass.), 221.

¹ *Com. v. Fitchburg R. Co.*, 8 Cush. (Mass.) 240.

² *Com. v. Erie, &c. R. Co.*, 27 Penn. St. 389; *People v. Detroit, &c. R. Co.*, 37 Mich. 195.

³ *Neal v. Pittsburgh, &c. R. Co.*, 2 Grant's Cas. (Penn.) 137.

⁴ In 19 Am. & Eng. Ency. Law, p.

880, the authorities are examined at great length, and this conclusion, which is believed to be correct, is there stated. "An examination of these authorities will demonstrate that the right of the company to change its location, *where sufficient reason exists*, cannot be denied. In all the cases denying this right, the decision was based on the ground that there was no necessity for the change, and that a railroad company should not be allowed to condemn land for a relocation merely from caprice or for the benefit of individ-

SEC. 272. **Location: How described: Maps and Plans.** — In all cases where the statute defines the manner in which the route as located shall be described and defined, the statutory method must be strictly pursued; but in any event, the survey or location filed in the offices in which it is required by statute to be filed should describe the particular property taken, — either in itself or by reference to maps and profiles of the route filed therewith, and made a part of the record, — with precision and accuracy;¹ as such description is the permanent record-evidence, not only of the amount, but also of the particular lands taken, and is conclusive thereof; and parol evidence is not admissible to vary or change it,² as the owner of the land has a right to know from such records precisely what portion of his lands are taken, and what are not.³ As previously stated, parol evidence is not admissible to aid the location, but a map or plan filed with the location, and referred to therein, and which does not require the aid of parol evidence to explain and apply it, is admissi-

uals." See the leading case of *Mississippi, &c. R. Co. v. Devaney*, 42 Miss. 555; 2 Am. Rep. 608. "The correct rule therefore seems to be that while a railroad company may not change its location from motives of caprice, or for the sake of private individual convenience, it may do so whenever the interest or the convenience of the public is to be subserved thereby, or it is essential to the accomplishment of the ends for which the road is being built." 19 Am. & Eng. Ency. Law, p. 830, *citing*, among other cases, *Moorhead v. Little Miami R. Co.*, 17 Ohio St. 340; *South Carolina R. Co., ex parte*, 2 Rich. (S. C.), 434; *South Car. R. Co. v. Blake*, 9 Rich. (S. C.), 228; *New Orleans, &c. R. Co. v. New Orleans*, 1 La. An. 128; *Atlantic R. Co. v. St. Louis*, 66 Mo. 228; *Eel River R. Co. v. Field*, 67 Cal. 429; 22 Am. & Eng. R. Cas. 91; *Atkinson v. Marietta, &c. R. Co.*, 15 Ohio St. 21.

¹ *Coe v. N. J. Midland R. Co.*, 84 N. J. Eq. 105; *Baker v. Gee*, 1 Wall. (U. S.) 333; *Morris, &c. R. Co. v. Blair*, 9 N. J. Eq. 635; *Pacific R. Co. v. Lewis*, 41 Cal. 489. In many cases it is provided that the location shall not be complete until the written description or survey is filed or recorded; this requirement is usually made where grants of public land are

made to railroads. See *Baker v. Gee*, 1 Wall. (U. S.) 333; *Western Pac. R. Co. v. Tevis*, 41 Cal. 489; *Hannibal, &c. R. Co. v. Smith*, 41 Mo. 310. But in Kansas it is not required that such description shall be filed before condemnation proceedings can be instituted. *Missouri River R. Co. v. Shepard*, 9 Kan. 647.

Lowell, &c. R. Co. v. Boston, &c. R. Co., 7 Gray (Mass.), 27; *Hazen v. Boston, &c. R. Co.*, 2 Gray (Mass.), 27, 574.

² *Kohlhepp v. West Roxbury*, 120 Mass. 596; *Strong v. Beloit, &c. R. Co.*, 16 Wis. 635; *Housatonic R. Co. v. Lee, &c. R. Co.*, 118 Mass. 391; *State v. Bailey*, 19 Ind. 452; *New York, &c. R. Co. v. New York, &c. R. Co.*, 11 Abb. (N. Y.) N. Cas. 386; *Penn. R. Co. v. Porter*, 29 Penn. St. 165; *Heise v. Pennsylvania R. Co.*, 62 id. 67; *Prather v. Jeffersonville, &c. R. Co.*, 52 Ind. 16; *Anderson, &c. R. Co. v. Kernodle*, 54 Ind. 314; *State v. Armell*, 8 Kan. 288; *Vail v. Morris, &c. R. Co.*, 9 N. J. Eq. 189; *Callendar v. Painesville, &c. R. Co.*, 11 Ohio St. 516. The description is sufficient, if by the aid of maps or plans of the route filed with the location the location can be determined with reasonable certainty. *Grand Junction R. Co. v. Middlesex Com'rs*, 14 Gray (Mass.), 555; *Drury v. Midland R. Co.*, 127 Mass. 571.

ble to aid, but not to modify or control, a defective location.¹ In New York, where by statute a map of the route is required to be filed, it was held that a map showing but a single line, and giving no information as to whether it was the centre or an exterior line, not showing the width of the road, and from which the line could not generally be accurately located by engineers on the ground, was insufficient.²

If a court of equity can under any circumstances order a definite location of a railroad, filed by the corporation with the county commissioners as required by statute, to be reformed, upon evidence of a previous parol agreement between the corporation and the landowner, and of a mistake by which the location filed does not conform to such agreement, it can only be done on satisfactory evidence that the railroad corporation made such an agreement or such a mistake; and evidence of an agreement made by the attorney of the corporation, authorized to settle land damages, and ratified by the managing officers of the corporation, but of which the attorney by mistake omitted to inform the president and directors, is not sufficient.³ Although the location may be defective, yet if the company has taken possession of the land, and the owner has acquiesced therein, this will cure the defect and give certainty to the description as to that land.⁴ And it seems that a defective or illegal location may be

¹ *Hazen v. Boston, &c. R. Co.*, 2 Gray (Mass.), 574; *Pinkerton v. Boston, &c. R. Co.*, 109 Mass. 527; *Grand Junction, &c. R. Co. v. County Com'rs*, 14 Gray (Mass.), 553; *Hunt v. Smith*, 9 Kan. 137; *Vail v. Morris, &c. R. Co.*, 9 N. J. Eq. 189; *Andover v. County Com'rs*, 5 Gray (Mass.), 593; *Mason v. Brooklyn City, &c. R. Co.*, 35 Barb. (N. Y.), 373; *Quincy, &c. R. Co.*, 54 Mo. 334; *Portland, &c. R. Co. v. County Com'rs*, 65 Me. 292; *Wilson v. Lynn*, 119 Mass. 174; *Penn. R. Co. v. Brewer*, 55 Penn. St. 318; *In re Washington Park Com'rs*, 52 N. Y. 131.

² *Albany R. Co. v. New York, &c. R. Co.*, 11 Abb. (N. Y.) N. C. 386. See also *Converse v. Grand Rapids, &c. R. Co.*, 18 Mich. 459; *In re New York, &c. R. Co.*, 62 Barb. (N. Y.) 85. As to technical definition of a "survey" such as is required to be filed, see *Attorney-General v. Stevens*, 1 N. J. Eq. 369; 22 Am. Dec. 526.

The location by a railroad company of a

part of its road closed thus: to a certain point, and thence "about 600 feet into depot No. 1" (a parcel of land belonging to the company). "The above-described line is the centre line of the railroad, and is traced in blue on the accompanying plan." The plan was filed with the location. The blue line on the plan extended across the street on which depot No. 1 was situated, and into depot No. 1; but a measurement of 600 feet according to the plan from the said point extended into said street, but not quite across to depot No. 1. The location defined its width as far as the street, but neither the location nor the plan defined it any farther. It was held that the location did not cover any part of depot No. 1. *Pinkerton v. Boston, &c. R. Co.*, 109 Mass. 527.

³ *Central Mills v. New York, &c. R. Co.*, 127 Mass. 537.

⁴ *Duck River, &c. R. Co. v. Cochrane*, 3 Lea (Tenn.), 478; *Drury v. Midland R. Co.*, 127 Mass. 571; *Atchison, &c. R. Co.*

perfected by legislative confirmation.¹ But a statute which ratifies and confirms the location of a railroad illegally made, and the railroad as actually laid out and constructed, does not have the effect of exempting the company from liability for injuries caused either to private or public rights by the manner in which they have constructed or are maintaining part of the road at the time of its enactment.² But where a railway is located across a person's land by license, such license carries with it as full authority to do all necessary acts for the construction of the railway as would have been derived from a condemnation of the land.³ After the road is located, the company may maintain actions of tort against any person for an unlawful entry thereon.⁴ But the company has no power or right to grant an easement of a footway for persons to walk along or by the side of its tracks. Therefore there can be no prescriptive right or presumption of such a grant, though the appellants and others, owning houses along the line of the appellee's railway for twenty-five years, had used a private footway for some considerable distance over the lands of the appellee, alongside of, or between the tracks of, the road, from the houses to a public highway.⁵ And a parol license granted by the company to persons or to another corporation to pass over the location or to otherwise use it is revocable at any time.⁶

In all cases where a railway company is called upon to justify its entry upon lands, the burden is upon it to show that the road is constructed, and the acts complained of were done within its location.⁷ After the lands have been condemned, the records of the court before which proceedings are required to be brought cannot be impeached collaterally, and are conclusive as to the company's

v. Mecklim, 23 Kan. 167; *Denver, &c. R. Co. v. Cañon City, &c. R. Co.*, 99 U. S. 463. See also *Brock v. Old Colony R. Co.*, 146 Mass. 194; 33 Am. & Eng. R. Cas. 196.

¹ *Com. v. Old Colony R. Co.*, 14 Gray (Mass.), 93; *Salem v. Eastern R. Co.*, 98 Mass. 431; 96 Am. Dec. 650.

² *Salem v. Eastern R. Co.*, 98 Mass. 431; 96 Am. Dec. 650; *Com. v. Old Colony, &c. R. Co.*, 14 Gray (Mass.), 93.

³ *Babcock v. Western R. Co.*, 9 Met. (Mass.) 553; 43 Am. Dec. 411. See *ante*, Chapter XI.

⁴ *Greenville, &c. R. Co. v. Parttow*, 14 Rich. (S. C.) 237; *Conn., &c. R. Co. v.*

Hatton, 32 Vt. 43; *Morrison v. Bucksport, &c. R. Co.*, 67 Me. 353; *Bangor, &c. R. Co. v. Smith*, 47 id. 34; *Troy, &c. R. Co. v. Potter*, 42 Vt. 265.

⁵ *Sapp v. Northern Central R. Co.*, 51 Md. 115.

⁶ *Illinois Central R. Co. v. Godfrey*, 71 Ill. 500; *Pennsylvania R. Co. v. Jones*, 50 Penn. St. 417; *Heyl v. Philadelphia, &c. R. Co.*, 51 Penn. St. 469.

⁷ *In re New York, &c. R. Co.*, 62 Barb. (N. Y.) 85; *Crawfordsville, &c. R. Co. v. Wright*, 5 Ind. 252; *Hazen v. Boston, &c. R. Co.*, 2 Gray (Mass.), 574; *Atlantic, &c. R. Co. v. Sullivant*, 5 Ohio St. 276.

rights.¹ But a land-owner may question the validity of a location upon his own land, or he may dispute a location which is void under the statute.²

SEC. 273. **How Location may be lost.** — Mere non-user will not defeat or impair the location³ unless it be permanent and entire; but it may be defeated by permitting another company to take the land and actually to construct its road thereon.⁴ So, too, the owner of the fee may regain the title by an adverse use and occupancy thereof for the requisite statutory period, where its conduct has been such as to indicate its intention to abandon the whole or a part of the location.⁵ The company loses all its rights in its location or in its right of way by an abandonment.⁶ But it is not always easy to determine what amounts to an abandonment; the determination of the question must depend upon all the facts and circumstances of the case as has already been observed.⁷ But a company's property in its location is, as we have seen, different from that possessed in a right of way; and an abandonment of a location is more easily presumed than of a right of way. In the one case the company has perfected its right to hold and occupy the land within its right of way, while in the other case (that of a location) it merely has an inchoate right to acquire the land, a failure to exercise which within a reasonable time will operate as an abandonment.⁸

¹ Galena, &c. R. Co. v. Pound, 22 Ill. 399; Cleveland, &c. R. Co. v. Speer, 56 Penn. St. 325; 94 Am. Dec. 84; Western Maryland R. Co. v. Patterson, 37 Md. 125; Cleveland, &c. R. Co. v. Erie, 27 Penn. St. 380.

² Newton v. Agricul. Branch R. Co., 13 Gray (Mass.), 27; N. Y., Housatonic, &c. R. Co. v. Boston, &c. R. Co., 36 Conn. 196.

³ Hestonville, &c. R. Co. v. Philadelphia, 89 Penn. St. 210; Barlow v. Chicago, &c. R. Co., 29 Iowa, 276 (non-user for thirteen years owing to delay in construction of road); Noll v. Dubuque, &c. R. Co., 32 Iowa, 66; People v. Albany, &c. R. Co., 37 Barb. 216; Ball v. Keokuk, &c. R. Co., 62 Iowa, 751; 20 Am. & Eng. R. Cas. 375. A misuser of the location is a ground for which the owner of the fee may claim a forfeiture, but it does not, of itself, operate as a forfeiture. Proprietors v. Nashua, &c. R. Co., 104 Mass. 1; 6 Am. Rep. 181.

⁴ Chesapeake, &c. Canal Co. v. Baltimore, &c. R. Co., 4 G. & J. (Md.) 1; Coe v. N. J. Midland R. Co., 31 N. J. Eq. 105.

⁵ Norton v. London, &c. Ry. Co., 13 Ch. Div. 268.

⁶ Hastings v. Burlington, &c. R. Co., 38 Iowa, 316; Troy, &c. R. Co. v. Boston, &c. R. Co., 86 N. Y. 107; 7 Am. & Eng. R. Cas. 49; ante, § 233.

⁷ Central Iowa, &c. R. Co. v. Moulton, &c. R. Co., 57 Iowa, 249; Atty-Gen. v. Eastern R. Co., 137 Mass. 48. As to what constitutes an abandonment, see ante, § 233. See also 40 Am. Dec. 464 n.

The failure for eleven years to exercise a grant in the charter of a passenger railway company of an optional circuit over another road, is such proof of an abandonment of the franchise as will defeat the right as against other companies. Girard College, &c. R. Co. v. Thirteenth, &c. R. Co., 7 Phila. (Penn.) 620.

⁸ See Lafferty v. Schuylkill, &c. R.

SEC. 274. **Description of Termini: Construction of Words relating to.** — The charter or the general law usually requires that a description of the termini of the road shall be given in the articles of association of the company which are filed upon incorporation, or that such a description shall be contained in the map or plan filed with the articles. A substantial compliance with this is sufficient, and the articles are not affected by slight defects in the statements or descriptions.¹ Thus, it is sufficient where one terminus is given and the other is described as "at or near B."² or as "some eligible and convenient point in the county of S., there to connect" with a named railroad.³ But it has been held that a petition for a highway and the report of the viewers thereon is too uncertain and indefinite to be acted upon where the proposed highway as beginning "at or near the residence of B."⁴ Where the words "commencing *at* or *near* the city of Schenectady, and running thence on the north side of the Mohawk river," etc., were used in the charter of a company, it was held that it was thereby authorized to commence its railroad at some point on the north side of the river, *near* the city, or at some suitable point on the south side *at* or *within* the city, and then to cross the river to the north side thereof, at its election, — the middle of the river forming the north boundary of the city. The right to build a bridge, for the purpose of crossing the river with their railways, was therefore granted to the company by the act for its incorporation.⁵ So where a railway was chartered, "to commence at some convenient point in the city of Brooklyn, and to terminate at Newtown, Queen's county, to be located in King's and Queen's counties, and its length to be about twenty-five miles," there being both a town and village of the name of Newtown, and the boundary of the town being also the boundary of the city of Brooklyn, it was held that the natural and only consistent construction was, to regard Newtown as the village of that name, and thus extend the railway through a portion

Co., 124 Penn. St. 297; 36 Am. & Eng. R. Cas. 575; 19 Am. & Eng. Ency. Law, pp. 834-835; Henderson v. Central Pass. R. Co., 21 Fed. Rep. 358; 20 Am. & Eng. R. Cas. 542.

¹ Cayuga Lake R. Co. v. Kyle, 5 Th. & Cook, (N. Y.) 659; 64 N. Y. 185; Warner v. Callender, 20 Ohio St. 190; Atty-Gen. v. West Wisconsin R. Co., 36 Wis. 466.

² Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475; 32 N. J. Eq. 755;

Warner v. Callender, 20 Ohio St. 190 ("in or near X" sufficient). See also Fall River Iron Works v. Old Colony R. Co., 5 Allen (Mass.), 221.

³ Chicago, &c. R. Co. v. Chamberlain, 84 Ill. 333.

⁴ DeLong v. Schimmel, 58 Ind. 64. See also Indianapolis, &c. R. Co. v. Newsum, 54 Ind. 121; Griscom v. Gilmore, 16 N. J. L. 105.

⁵ Mohawk Bridge Co. v. Utica, &c. R. Co., 6 Paige (N. Y.), 554.

of both counties named, and not restrict it to the limits of the city of Brooklyn. It was also held that where the charter, as applied to the route indicated, defines a precise line, that line becomes as binding upon the company as if it formed a portion of the charter itself; and that where a map is filed in conformity with the charter, which does not embrace the entire route indicated by the charter as applied to the subject-matter, in order to reconcile the apparent conflict the map may be regarded as intended to give only a portion of the route; or in case of irreconcilable conflict, the map must yield to the express provisions of the charter.¹ Under a charter which fixes the terminus of a railway "at or near" a certain point, a large discretion is conferred upon the company in locating their road, which will not be controlled by the courts, unless for very clear excess, or where bad faith is shown. Thus where a company is empowered to extend its line "from a point at or near the present terminus of its tracks in Fall River, in a southerly direction to the line of Rhode Island," a location starting from a point on the line twenty-five hundred feet by the line of the railroad, northerly from the termination of the old tracks, was held authorized.² The words "beginning from and running to," and the words "beginning or ending at," in a charter are held to be inclusive; and if no contrary intent is shown in the statute, they authorize a location *within* such place.³ So also of the

¹ *Mason v. Brooklyn, &c. R. Co.*, 35 Barb. (N. Y.) 373. The extension of the boundaries of a city or town named as a terminus does not increase the powers of the company correspondingly; the location must be confined to the old limits. *Com. v. Erie, &c. R. Co.*, 27 Penn. St. 339; *Chope v. Detroit, &c. Plank R. Co.*, 37 Mich. 195.

² *Fall River Iron Works v. Old Colony, &c. R. Co.*, 5 Allen (Mass.), 221. But see *Indianapolis, &c. R. Co. v. Newson*, 54 Ind. 121, where the word "near" in a location was held so indefinite as to render the location void.

³ Thus authority to construct a road from Chicago to any point in the town of E., authorizes the construction of the road from any point within Chicago. *Chicago, &c. R. Co. v. Chicago, &c. R. Co.*, 112 Ill. 589; 25 Am. & Eng. R. Cas. 158; *McCartney v. Chicago, &c. R. Co.*, 112 Ill. 611; 29 Am. & Eng. R. Cas. 326. There are other numerous cases affirming

the principle of the text both as to the words "to" and "from." *Hazelhurst v. Freeman*, 52 Ga. 244; *Moses v. Pittsburgh, &c. R. Co.*, 21 Ill. 516 ("to" equivalent to "into"); *Mason v. Brooklyn, &c. R. Co.*, 35 Barb. (N. Y.) 373; *Smith v. Helmer*, 7 Barb. 417; *Farmers' Transp. Co. v. Coventry*, 10 Johns. (N. Y.) 389; *Com. v. Erie, &c. R. Co.*, 27 Penn. St. 339; *Western Penn. R. Co.'s Appeal*, 99 Penn. St. 155; *Tennessee, &c. R. Co. v. Adams*, 3 Head (Tenn.), 596 ("from"); *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88. In South Carolina, however, where by the charter of a railway they were authorized to construct their road "from Charleston" to certain other points, it was held that this gave them no authority to enter the city, but that the boundary of the city was the *terminus a quo*. *North-east R. Co. v. Payne*, 8 Rich. (S. C.) 177. See *Union Pacific R. Co. v. Hall*, 91 U. S. 342. In this last case the initial point of the Iowa branch of the Union

word "between" where authority is given to construct the road between two designated places.¹ The word "along" is restrictive; consequently a charter for a railway "along" a certain river or highway authorizes it to be built by the side of the river or highway, but not in or upon its bed.²

SEC. 274 a. **Contracts to influence Location of Road.** — For reasons of public policy, the force of which are obvious, the company is not to be governed in the location of the railroad solely or principally by considerations of private advantage; it owes a duty to the public and to its stockholders to make the location so as best to assure its public utility and promote the interest of the shareholders.³ Therefore, contracts to influence the location of the road are void whenever they tend to prevent the discharge of this duty,⁴ particularly when they partake of the nature of a bribe to the officers of the company.⁵ But subscriptions to stock or grants of land made in consideration of the location of the road through or near certain

Pacific Railroad was fixed by the act of Congress of July 1, 1862 (12 Stat. 489), on the Iowa bank of the Missouri river. The order of the president of the United States, bearing date March 7, 1864, established and designated, in strict conformity to law, the eastern terminus of said branch at a point on the western boundary of Iowa, east of and opposite a certain point in the territory of Nebraska. The bridge constructed by the Union Pacific Company, over the Missouri river, between Omaha and Council Bluffs, in Iowa, is a part of the railroad. The company was authorized to build it only for the uses of the road, and is bound to operate and run the whole road, including the bridge, as one connected and continuous line. See also *Peavey v. Calais R. Co.*, 30 Me. 408.

¹ *Morris, & c. R. Co. v. Central R. Co.*, 31 N. J. L. 205.

² *Stevens v. Erie R. Co.*, 21 N. J. Eq. 259.

³ See also *ante*, § 184.

⁴ *Bestor v. Wathen*, 60 Ill. 138; *Cook v. Sherman*, 20 Fed. Rep. 167; 16 Am. & Eng. R. Cas. 561. In the first of these cases, two persons owning a tract of land on the line of a railroad, contracted with the president of another road then being constructed and a firm of individuals who

had contracted to build that road, to lay off the land in town lots, and, after selling lots to the amount of \$4,800, to convey to the president of the road and to the construction company an undivided half of the remaining lots. The president and the members of the construction company were to pay no money, but agreed to "aid, assist, and contribute to the building up of a town on said land." It was held that if this contract was made to secure the location of the road at a place where it would not be of the greatest benefit to the stockholders of the road, then it was in the nature of a bribe and could not be enforced; or if the place where the parties agreed the road should be located, which was afterwards done, was the route best calculated to promote the interests of the stockholders and the public, and the officers of the company were professing to hesitate between it and another line in order to procure the agreement, that was a fraud, and the contract could not be enforced in equity. The court therefore refused to enforce the performance of the contract.

⁵ *Berryman v. Cincinnati, & c. R. Co.*, 14 Bush (Ky.), 755; *Bestor v. Wathen*, 60 Ill. 138, *ante*; *Marshall v. Baltimore, & c. R. Co.*, 16 How. (U. S.) 314.

places are not objectionable except where it can be made to appear that they necessitate a sacrifice of the interests of the public.¹

SEC. 275. Construction of the Road : Consequential Damages. — The charter of a railway company is granted upon the implied condition that its road shall be constructed, maintained, and operated in a careful and prudent manner, and so as to produce as little damage as possible to adjacent owners, and an action lies against it for injuries resulting from a breach of this condition.² We have

¹ *Missouri Pac. R. Co. v. Tygard*, 84 Mo. 263; 22 Am. & Eng. R. Cas. 54; *McClure v. Missouri River R. Co.*, 9 Kan. 373; *Stowell v. Stowell*, 45 Mich. 364; 9 Am. & Eng. R. Cas. 598; *Cumberland, &c. R. Co. v. Babb*, 9 Watts (Penn.), 458; *Sagman, &c. R. Co. v. Chappell*, 56 Mich. 190; 22 Am. & Eng. R. Cas. 16. In every municipal subscription that is made in aid of a railroad, it is a part of the agreement that the road shall be located through or near the town. Such agreements have never been objected to. See *ante*, Chapter VII., "MUNICIPAL SUBSCRIPTIONS."

In the case of *Hoard v. Chesapeake, &c. R. Co.*, 123 U. S. 222, H. executed with the C. & O. Road an agreement in writing, professing to convey for valuable consideration certain lots through which the company's road was expected to be built, and containing a clause that such grant was on the condition that the property should revert to the grantor, his heirs or assigns, in case it should ever cease to be used for railroad purposes; containing also a covenant that A. should have leave to connect a single branch with the railroad at a point near his hotel, and that the company should erect lawful fences, etc. It was held that such an agreement did not constitute a contract on the part of the company to build its road through such lots which could be enforced by a decree for specific performance. Such a contract as well as the law contemplates the right of a company to change its route before being built, and to abandon it afterwards; and if complainant is injured thereby, his only remedy is in an action at law. *Morrill v. Wabash, &c. R. Co.*, 96 Mo. 174; 36 Am. & Eng. R. Cas. 425.

² Thus where the declaration alleged that the plaintiff was possessed of a certain house, situate, etc., and that the defendants (a railway company) were making a railway and excavations, etc., near thereto and to a certain other house, whereupon it was their duty to take proper precaution in making the said railway, etc., but that the defendants, not regarding their duty, did not take, etc., but so carelessly, etc., proceeded in the works, without taking proper precautions to prevent the house near the house of the plaintiff from falling against the plaintiff's, that for want of due and proper precautions on the occasions aforesaid, the said house near the house of the plaintiff gave way and fell against it, whereby the plaintiff's house was greatly injured, etc., — it was held, on general demurrer, that the breach contained a sufficient allegation of the injury to the plaintiff having been caused by the neglect, carelessness, and unskilful conduct of the defendants. The word "precaution" is equivalent to *care and skill*. *Davis v. London, &c. Ry. Co.*, 2 Ry. Cas. 308; *Warburton v. London, &c. Ry. Co.*, 1 Ry. Cas. 558; *Matthews v. West London Waterworks Co.*, 3 Campb. 403; *Wild v. Gas-light Co.*, 1 Stark. 189; *Thickness v. Lancaster Canal Co.*, 4 M. & W. 172; *Vaughn v. Taff Vale Ry. Co.*, 5 H. & N. 679; *Eyre's Case*, 3 N. & M. 622; *Turner v. Sheffield, &c. Ry. Co.*, 10 M. & W. 425; *Davis v. London, &c. Ry. Co.*, 1 M. & G. 799; *Sutton v. Clark*, 7 Taunt. 29; *Rex v. Nottingham Waterworks Co.*, 6 Ad. & El. 355.

See also as asserting this duty, *Biscoe v. Great Eastern Ry. Co.*, L. R. 16 Eq. 636; 7 Moak's Rep. 630; *Lafayette Plank R. Co. v. New Albany, &c. R. Co.*, 13 Ind.

seen, however, that there are many cases in which legislative authority operates to shield the company from liability for injuries which would otherwise be actionable.¹ Applying the same principle in this connection, the rule may be stated to be that authority to construct a railroad carries with it authority to do whatever is necessary for the proper execution of this authority and for the carrying out of the contemplated undertaking. Therefore, so long as the railroad company exercises proper care in the construction of its road and keeps carefully within the bounds of the authority granted, it cannot be held liable for injuries which are a necessary consequence of its acts; the rightful and proper exercise of a lawful authority can never afford a ground of action.² Injuries which are the result of such an exercise of authority are *damnum absque injuria*; and the injured party cannot recover unless he can establish one of three propositions of fact: either that the company exceeded the authority granted, or

90; *Worster v. Forty-second St. R. Co.*, 50 N. Y. 203; *Rathburn v. Burlington, &c. R. Co.*, 16 Neb. 441; 19 Am. & Eng. R. Cas. 137; *Gudger v. Western, &c. R. Co.*, 87 N. C. 325; 19 Am. & Eng. R. Cas. 144.

¹ See *ante*, §§ 212-222.

² *Slatten v. Des Moines Valley R. Co.*, 29 Iowa, 150; 4 Am. Rep. 205; *Hatch v. Vermont Cent. R. Co.*, 25 Vt. 49; *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465; 60 Am. Dec. 283; *Boston Gas-light Co. v. Old Colony R. Co.*, 14 Allen (Mass.), 444; *Carson v. Western R. Co.*, 3 Gray (Mass.), 423; *Stone v. Fairbury, &c. R. Co.*, 68 Ill. 394; *Lynn, &c. R. Co. v. Boston, &c. R. Co.*, 114 Mass. 88; *Sweetser v. Boston, &c. R. Co.*, 66 Me. 583; *Lessee v. Buchanan*, 51 N. Y. 476; 10 Am. Rep. 623, *reversing* 61 Barb. (N. Y.) 86; *Conklin v. New York, &c. R. Co.*, 102 N. Y. 107; 26 Am. & Eng. R. Cas. 365; *Thomas v. Androscooggin Co.*, 54 N. H. 556; *Fowle v. Eastern R. Co.*, 17 N. H. 519; 18 N. H. 547; 47 Am. Dec. 153. Compare, however, *Baltimore, &c. R. Co. v. Reaney*, 42 Md. 117; *Evansville, &c. R. Co. v. Dick*, 9 Ind. 433. See the subject examined in 19 Am. & Eng. Ency. Law, pp. 862 *et seq.* In *Hortsmann v. Lexington, &c. R. Co.*, 18 B. Mon. (Ky.) 218, where a right of way was granted to a railway company, and it was necessary

to make deep cuts through the land granted, and the railway company left the banks of the cut without side-walls or other protection, the court say: "Although it devolved upon the company, in the use of the way for the purpose contemplated, to observe proper care and precaution, so as to avoid unnecessary injury to plaintiff's property, and although a failure to do this would furnish a just ground of complaint for injury resulting from such failure, we are of opinion that it did not devolve upon the company to construct a wall, or erect any defences, for the protection of the adjoining property from the consequences resulting from a proper and reasonable use of the way for the railroad, although such consequences would be injurious, and inevitably so, to the plaintiff. It is for injury resulting to a man from the careless and negligent use by another of his property that the law affords redress to the former. The latter is not responsible for the lawful use of his own property, although such use may result in damage to his neighbor. It is obvious that the plaintiff knew to what use the way would be applied, and the presumption is that he estimated the damage that would necessarily result from the use of the way for a railway track." *Cracknell v. Thetford*, L. R. 4 C. P. 629.

that it was guilty of a negligent exercise of such authority,¹ or that the act complained of amounted to a taking of property, compensation for which was not included in the condemnation of the right of way.² If either of these propositions can be proven, the company is clearly liable, but in all other instances, the legislative authority is a complete protection. The cases holding railroad companies liable for such damages all rest upon the ground that there was an unlawful or an excessive exercise of the authority granted.³ In a Pennsylvania case, the rule was laid down that "consequential damages are never recoverable from a corporation of this nature except when they are expressly and on the terms on which they are allowed."⁴ The corporation in that case was authorized by an act of the legislature to improve a stream, and an action brought to recover, dam-

¹ In the following cases recovery was allowed on the ground that the authority was exceeded or wrongfully exercised. *State v. Ohio, &c. R. Co.*, 7 Ind. 749 (recovery allowed where road was constructed along a street on an *unauthorized* grade; *Haynes v. Thomas*, 7 Ind. 38; *Protzman v. Indianapolis, &c. R. Co.*, 9 Ind. 467; *Lawrence v. Great Northern Ry. Co.*, 16 Ad. & El. 643; *Proprietors v. Nashua, &c. R. Co.*, 10 Cush. (Mass.) 385; *Hazen v. Boston, &c. R. Co.*, 2 Gray (Mass.), 574; *Cairo, &c. R. Co. v. Worsley*, 85 Ill. 370; *St. Louis, &c. R. Co. v. Capps*, 72 Ill. 188; *Eaton v. European, &c. R. Co.*, 59 Me. 537; *Parson v. Howe*, 41 Me. 218; *Lake Shore, &c. R. Co. v. Hutchins*, 37 Ohio St. 282; 4 Am. & Eng. R. Cas. 219; *Woodburn v. Metropolitan, &c. R. Co.*, 149 Mass. 335; 38 Am. & Eng. R. Cas. 484; *Brewer v. Boston, &c. R. Co.*, 113 Mass. 52; *Shaw v. New York, &c. R. Co.*, 150 Mass. 182; 41 Am. & Eng. R. Cas. 547. In the case of *Brown v. Cayuga, &c. R. Co.*, 12 N. Y. 486, the act of incorporation left the company liable for consequential injuries to persons, resulting from the construction of the road over streams. In *Gudger v. Western, &c. R. Co.*, 87 N. C. 325; 19 Am. & Eng. R. Cas. 144, the company was held liable for an injury to a person, caused from his tripping over a stake which an engineer had negligently left in the street.

² In the assessment of damages, it is presumed that the company will exercise

its authority lawfully and properly; for the recovery of such damages the statutory method must be pursued. If the company exceeds its authority, thereby causing injury, the remedy is by an ordinary action for a tort. In the case of *Dodge v. Essex Co.*, 3 Met. (Mass.) 380, *SHAW, C. J.*, speaking for the court, said: "It is a reasonable and now well-settled principle that when the legislature under the right of eminent domain and for the prosecution of works for public use authorizes an act or series of acts, the natural and necessary consequence of doing which will be damage to the property of another, and provides a mode for the assessment and payment of the damages occasioned by such work, the party authorized, acting within the scope of his authority, is not a wrong-doer; an action will not lie as for a tort, and the remedy is by the statute and not the common law." A conspicuous example of the application of the last proposition in the text is seen where the legislature grants to a railroad company the right to occupy a street with its road. Such authority whether rightfully exercised or not cannot relieve the company from its obligation to compensate abutting owners.

³ See 19 Am. & Eng. Ency. Law, pp. 862-865, and *Slatten v. Des Moines, &c. R. Co.*, 29 Iowa, 152; 4 Am. Rep. 206, where the cases are reviewed.

⁴ *Woodward v. Webb*, 65 Penn. St. 254.

ages resulting from a proper exercise of the authority was denied. The Iowa court, in commenting on this case, observes: "This, it seems to us, is sound doctrine; and, indeed, it must be true, as a general proposition, that the rightful and *bona fide* exercise of a lawful authority cannot afford a basis for an action. If the power or right is exercised carelessly, negligently, wrongfully, improperly, or, it may be, maliciously, the party so exercising it may be liable to respond in damages for any injury, direct or consequential, resulting to another from thus exercising the right or power; but such liability can only arise upon and for the manner of doing the act and not for the act itself.¹

In England, where railway companies are, by statute, made liable to the owner of all lands "injuriously affected" by their railways, it has been held that if the company does any act which would be an actionable injury without the protection of their special act, they are liable under the general statute.² Where the defendants' railway passed across low lands adjoining a river, over which the flood-waters used to spread themselves, and the low lands were separated from the plaintiff's land by a bank constructed under certain drainage acts, and which protected the plaintiff's lands from the floods, and by the construction of the defendant's railway without sufficient openings, the floods could not spread themselves as formerly, and were penned up and flowed over the bank on the plaintiff's land, — it was held that though the defendants had constructed their line according to the provisions of their act, they were liable for an unforeseen injury arising from the mode in which its railway was constructed.³

The fact that the construction of a railway upon adjacent property will impair the value of premises as a water-cure establishment,⁴ or that it will diminish the value of a mill by making it unsafe to drive horses there, or inconvenient for customers, does not constitute an actionable injury, as such damages are too remote, and result only

¹ Slatten v. Des Moines, &c. R. Co., 29 Iowa, 153; 4 Am. Rep. 206.

² Glover v. North Staffordshire Ry. Co., 15 Jur. 673; Queen v. Eastern Counties Ry. Co., 2 Q. B. 347. The words "injuriously affected" comprehend cases of injury independent of taking land, and are not limited to damage sustained by persons whose lands or a part of whose lands are taken, used, or directly inter-

fered with; and the right to compensation extends to, and may be asserted in respect of, consequential damage. East, &c. Ry. Co. v. Gattke, 15 Jur. 261; London & Northwestern Ry. Co. v. Bradley, 15 Jur. 639.

³ Lawrence v. Gt. Northern Ry. Co., 20 L. J. Q. B. 293; 16 Q. B. 643.

⁴ Thompson v. Milwaukee, &c. R. Co., 27 Wis. 93.

from a lawful use of property.¹ Nor can damages be recovered because the company have cut off the owner of adjoining land from convenient access to the river, in consequence of which, upon the occasion of his house being on fire, the fire department were unable to obtain access to the river, by reason of the use of the street and embankment by the company.²

But where an injury results from an act of the company which is unauthorized,³ or which amounts to a taking of property by the destruction of an easement, as where a person's access to his premises or to a lake or stream is cut off, or where the act is unwarranted, — as where the road is so constructed between premises and a lake as to create a stagnant pool of water near a person's premises, — damages are recoverable.⁴ For compensation is presumed to have been awarded only for such injuries as will necessarily result from a careful and proper execution of the power granted, and the award of damages does not preclude an action for injuries resulting from the company exceeding its authority, or from a negligent or unskilful execution of its work, so as to produce unnecessary damages.⁵ And even though compensation for such unlawful or unauthorized act should be included in an award of the tribunal appointed to appraise the damages, it would not preclude an action therefor, because it would be an exercise of a power not possessed by the

¹ *Western Pennsylvania R. Co. v. Hill*, 56 Penn. St. 460.

² *Bosch v. Burlington, &c. R. Co.*, 44 Iowa, 402.

³ In *Fenwick v. East London Ry. Co.*, L. R. 20 Eq. 544, the company erected a mortar-mill close to the plaintiff's place of business, creating great noise and vibration. An injunction was granted upon a bill brought by him, upon the ground that the mortar-mill was not necessary for the construction of the road, and was not authorized by its charter.

⁴ *Delaplaine v. Chicago, &c. R. Co.*, 42 Wis. 214.

⁵ *Spencer v. Hartford, &c. R. Co.*, 10 R. I. 14; *Dearborn v. Boston, &c. R. Co.*, 24 N. H. 175; *Perley v. Boston, &c. R. Co.*, 57 N. H. 212; *Eaton v. Boston, &c. R. Co.*, 51 N. H. 504; *Colcough v. Nashville, &c. R. Co.*, 2 Head (Tenn.), 171; *Schuylkill Navigation Co. v. McDonough*, 33 Penn. St. 73; *Fehr v. Schuylkill Nav. Co.*, 69 Penn. St. 161; *Pittsburgh, Fort*

Wayne, &c. R. Co. v. Gilleland, 56 Penn. St. 445; *Pennsylvania, &c. Canal Co. v. Graham*, 63 Penn. St. 290; *Winchester, &c. R. Co. v. Washington*, 1 Rob. (Va.) 67; *Southside R. Co. v. Daniel*, 20 Gratt. (Va.) 344; *Vermont Central R. Co. v. Baxter*, 25 Vt. 49; *Waterman v. Conn. &c. R. Co.*, 30 Vt. 610; *Clark v. Vt. Central R. Co.*, 28 Vt. 103; *Sabin v. Vt. Central R. Co.*, 25 Vt. 363; *McCormick v. Kansas City, &c. R. Co.*, 57 Mo. 433; *Oregon, &c. R. Co. v. Barlow*, 3 Oregon, 311; *Baltimore, &c. R. Co. v. Reaney*, 42 Md. 117; *Lyon v. Green Bay, &c. R. Co.*, 42 Wis. 538; *Mellin v. Western R. Co.*, 4 Gray (Mass.), 301; *Hooker v. New Haven, &c. Co.*, 15 Conn. 312; *Fleming v. Chicago, &c. R. Co.*, 34 Iowa, 353; *Terre Haute, &c. R. Co. v. McKinley*, 33 Ind. 274; *Rose v. Minnesota Valley R. Co.*, 13 Minn. 442; *King v. Iowa Midland R. Co.*, 34 Iowa, 458; *Spencer v. Hartford, &c. R. Co.*, 10 R. I. 14.

appraisers, even though the act was done before the damages were appraised.¹

While a railway company may erect bridges across streams upon the line of its road, yet it is bound to do so in such a manner as not unnecessarily to obstruct the stream; and where it can be done, and is necessary to prevent undue obstruction, it must supply suitable sluices or culverts to carry off the water,² even in times of extraordinary floods, which by the exercise of the highest circumspection may be anticipated;³ and if the water of a stream is diverted, it must be restored to its original course as nearly as practicable; and the company is bound to preserve the stream in its former state of usefulness as nearly as possible, and failing to do so, is liable for the resulting damages.⁴ But the recovery of prospective damages

¹ *Oregon, &c. R. Co. v. Barlow*, 3 Oregon, 311; *Praetz v. St. Paul Water Co.*, 17 Minn. 163; *Blodgett v. Utica, &c. R. Co.*, 64 Barb. (N. Y.) 580; *Lafayette, &c. R. Co. v. Murdock*, 68 Ind. 177; *Pierce v. Worcester, &c. R. Co.*, 105 Mass. 199; *Selma, &c. R. Co. v. Keith*, 53 Ga. 178; *Harrington v. St. Paul, &c. R. Co.*, 17 Minn. 215.

² *Tinsman v. Belvidere, &c. R. Co.*, 25 N. J. L. 255. In *Spencer v. Hartford, &c. R. Co.*, 10 R. I. 14, a railway company was held liable for so building a bridge-pier as to turn the current in time of freshets upon one's grass-land, causing gullies and silt deposits,—it appearing that, by additional expense, the bridge could have been erected without doing such injury; and the fact that the land-owner had conveyed a part of the land to the company, and in consideration of the purchase-money had released all claims for damages which might be awarded by commissioners, was held not to preclude a recovery, as the award applies only to damages arising from the construction of the road in a proper manner. The right of a railway company to enjoy the use of its road-bed as an easement carries with it a correlative obligation to use reasonable care and diligence to keep a culvert unobstructed, so that detriment to the owners of the land may be avoided so far as practicable, considering the size and structure of the culvert. *West v. Louisville, &c. R. Co.*, 8 Bush (Ky.), 404.

³ *Kansas Pacific R. Co. v. Miller*, 2 Col. 442.

⁴ *Cott v. Lewiston*, 36 N. Y. 214; *Robinson v. N. Y., &c. R. Co.*, 27 Barb. (N. Y.) 512. And this duty is transferred to its successor. *Young v. Chicago, &c. R. Co.*, 28 Wis. 171. But see *Norris v. Vt. Central R. Co.*, 28 Vt. 99, where it is held that where a railway company has rightfully diverted the water of a stream, and in a proper manner, it is not bound to observe the action of the water and so protect the banks or take other timely measures as to prevent the encroachment of the stream upon neighboring lands. But an action does not lie unless a riparian proprietor has been actually damaged by the diversion. *Elliott v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191. The rule is that a person, who without legislative authority interferes with the current of a running stream, is responsible, absolutely and without regard to actual negligence for the damages sustained in consequence of his interposition by those who are entitled to have the water flow in its natural channel. But where such act is done under legislative authority for a public purpose, the party constructing the work is only liable for want of skill and care. *Bellinger v. New York Central R. Co.*, 23 N. Y. 42. In an action to recover damages for injuries done to the plaintiff's land by water, in consequence of the diversion of a stream from its channel by the defendant in constructing a culvert, the legal

in an action for unnecessarily constructing a railway so as to cause the plaintiff's land to be washed away bars an action for subsequent damages.¹

The right to lay a railway track in a public street or highway carries with it the obligation, not only to lay it in a proper manner, but also to keep it in repair; and if an injury occurs from a neglect in either respect, it is liable for the consequences;² and generally, in the construction and operation of its road, it is bound so to exercise its powers as to produce no unnecessary damages to the property of others; but for injuries resulting from the proper and necessary execution of its works, it is not liable.³

SEC. 276. Bridges: Over Navigable Waters and as a Part of the Highway over its Road.— Authority to build a railroad between certain termini carries with it authority to build bridges across all intervening streams, even though they are navigable.⁴ Where the power is not expressly given, the right must be fairly implied from the location of the road as defined in the charter, or from the circumstance that they intervene in the route selected by the company, in the exercise of the discretion reposed in it by the charter, and in any event, must be exercised in the building of such structures as do not unnecessarily obstruct navigation.⁵ And if a bridge is built with-

rule of damages has no reference to the cost of removing a bar of gravel carried there by the flood. The measure of damages in that class of cases is the depreciation in the value of the plaintiff's premises occasioned by the injury resulting from the defendant's acts. *Easterbrook v. Erie R. Co.*, 51 Barb. (N. Y.) 94.

¹ *Fowle v. New Haven, &c. R. Co.*, 112 Mass. 344.

² *Worster v. Forty-second Street R. Co.*, 50 N. Y. 203; *Kellinger v. Forty-second Street R. Co.*, 50 N. Y. 206.

³ *Ante*, Chapter XII.

⁴ *Fall River Iron Works v. Old Colony, &c. R. Co.*, 5 Allen (Mass.), 221; *Hamilton v. Vicksburgh, &c. R. Co.*, 34 La. An. 970; *Hughes v. Northern Pacific R. Co.*, 18 Fed. Rep. 106; *Miller v. Prairie, &c. R. Co.*, 34 Wis. 533; *Blood v. Nashua, &c. R. Co.*, 2 Gray (Mass.), 137; *Jarvis v. Santa Clara Valley R. Co.*, 52 Cal. 438; *Tinsman v. Belvidere, &c. R. Co.*, 26 N. J. L. 148; *Harvard College*

v. Stearns, 15 Gray (Mass.), 1; *Blackwell v. Old Colony R. Co.*, 122 Mass. 1; *South Carolina R. Co. v. Moore*, 28 Ga. 398; *Bell v. Quebec, L. R.* 5 App. Cas. 84. And the company will not be liable for the temporary obstruction of the stream while prosecuting the work with reasonable diligence and in a proper manner. *Hamilton v. Vicksburgh, &c. R. Co.*, 34 La. An. 970. *Contra*, *Memphis, &c. R. Co. v. Hicks*, 2 Sneed (Tenn.), 427.

⁵ *Attorney-General v. Stevens*, 1 N. J. Eq. 369; *Attorney-General v. New York, &c. R. Co.*, 24 N. J. Eq. 49; *Hickok v. Hine*, 23 Ohio St. 523; *Whitaker v. Del. & Hud. Canal Co.*, 87 Penn. St. 34; *Union Pacific R. Co. v. Hall*, 91 U. S. 343; *Newark Plank-Road v. Elmer*, 9 N. J. Eq. 754; *Stevens v. Erie R. Co.*, 21 N. J. Eq. 49; *Memphis, &c. R. Co. v. Hicks*, 5 Sneed (Tenn.), 427; *Attorney-General v. Hudson River R. Co.*, 9 N. J. Eq. 526. In *Little Rock, &c. R. Co. v. Brooks*, 39 Ark. 403, it was held that a

out authority,¹ or if it is not provided with suitable draws, or if the requirements of its charter as to the mode of its construction are not complied with, it is a public nuisance;² and any person specially injured thereby may maintain an action against the company for the damages sustained by him.³ In the case of interstate navigable streams, or those which form the division line between two States, while in the absence of any action by Congress taking control of such streams, the States may undoubtedly confer authority to bridge them,⁴ yet this is subject to the superior right of Congress to

railroad has no right to build a bridge over a navigable stream merely because such stream intervenes on its route, which will interfere with navigation, but must obtain express authority.

¹ *Hickok v. Hine*, 23 Ohio St. 523.

² *Healy v. Chicago, & c. R. Co.*, 2 Ill. App. 435. But in this case it was held that "Healy Slough," which empties into the south branch of the Chicago river, is not a navigable stream, and consequently that the building of a permanent railroad bridge across it is not a public nuisance. *Healy v. Chicago, & c. R. Co.*, 94 Ill. 416.

³ *Hickok v. Hine*, 23 Ohio St. 523.

⁴ *United States v. Milwaukee, & c. R. Co.*, 5 Biss. (U. S.) 410; *Pennsylvania v. Wheeling, & c. Bridge Co.*, 13 How. (U. S.) 518; 18 id. 421; *South Carolina v. Georgia*, 93 U. S. 4; *Green, & c. Nav. Co. v. Chesapeake, & c. R. Co. (Ky.)*, 10 S. W. Rep. 6; 37 Am. & Eng. R. Cas. 238; *Sweeny v. Chicago, & c. R. Co.*, 60 Wis. 60; 20 Am. & Eng. R. Cas. 268. In this country each State has exclusive jurisdiction and control over its inland streams that are not avenues of commercial intercourse with other States, and may deal with them as it pleases. It may authorize the erection of wharves, piers, docks, or dams thereon, or the erection of bridges over them, or even divert the water thereof, and entirely destroy their navigability; and upon such streams, whatever is done by individuals strictly within the scope of the power given is lawful, and cannot be regarded either as a public or private nuisance. In *Bailey v. Philadelphia R. Co.*, 4 Harr. (Del.) 389, it was held that the State has the right of a proprietor over navigable streams entirely within its borders, and may obstruct, or entirely close up such streams at its pleasure. In *Glover v. Powell*, 10 N. J. Eq. 211, it was held that as to small arms of the sea stretching back into the country, the legislature is the judge of their navigability for useful purposes, and may keep them open for that purpose, or deal with them at its pleasure. *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165; *Renwick v. Morris*, 7 Hill (N. Y.), 575; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *The Daniel Bell*, 10 Wall. (U. S.) 557; *The Montello*, 11 id. 411; *The Wharf Case*, 3 Bland's Ch. (Md.) 383; *Grant v. Davenport*, 18 Iowa, 178; *Dutton v. Strong*, 1 Black (U. S.), 23. But it must be understood that the State cannot do any act that will entirely destroy the navigability of an arm of the sea, or an interstate stream. *Cox v. The State*, 3 Blackf. (Ind.) 193; *Bennett v. Baggs*, 1 Bald. (U. S. C. C.), 60; *Corfield v. Coryell*, 4 Wash. (U. S. C. C.) 371; *Pollard's Lessee v. Hagan*, 3 How. (U. S.) 229. The States have the right to legislate upon all subjects affecting the police regulations of the stream. *Corfield v. Coryell*, *ante*. In *Wilson v. Blackbird Creek Marsh Co.*, 2 Peters (U. S.), 245, the legislature of Delaware authorized the Marsh Company to erect a dam across a small salt-water creek, an arm of the Delaware river. The defendants, *Wilson, et al.*, who were the owners of a sloop duly licensed and enrolled by the government, broke and injured the dam. The plaintiffs had a judgment in the State courts, and upon appeal to the United States court the judgment was sustained, upon the ground that no essential right of navigation was abridged; and as the dam had the effect of enhancing the

interpose at any time to defeat such authority; and as a matter of prudence, the assent of that body should be procured in all cases

value of property, and really wrought a public benefit, and as the State law authorizing the dam conflicted with no law of the general government, it could not be held invalid as being repugnant to the power to regulate commerce. See also *State v. Wilson*, 3 N. H. 321. But if the general government should see fit to assert its jurisdiction over such streams, there can be no question that all State laws affecting the same would have to yield to the superior jurisdiction. *Devoe v. Penrose Ferry Bridge Co.*, 3 Am. Law Reg. (U. S.) 79; *Works v. Junction R. Co.*, 5 McLean (U. S.), 425; *The Passaic Bridges*, 3 Wall. (U. S.) 782. The right of the State government to partially obstruct the navigation of its tide-waters has repeatedly been recognized by the Federal courts by authorizing the erection of bridges. *United States v. New Bedford Bridge Co.*, 1 W. & M. (U. S.) 402; *Silliman v. Hudson River Bridge Co.*, 2 Wall. (U. S.) 403; *Works v. Junction R. Co.*, 5 McLean (U. S.), 425; *Columbus Ins. Co. v. Peoria Bridge Assn.*, 6 id. 70; *Jolly v. Terre Haute Drawbridge Co.*, id. 237. But that right is subject to the control of Federal courts. *Devoe v. Penrose Ferry Co.*, 3 Am. Law Reg. 79. And to the rule that it shall interfere as little as possible with navigation. *Columbus Ins. Co. v. Bridge Assn.*, 6 McLean (U. S.), 70. And to the further qualification that it cannot authorize any material obstruction to be placed in or over even a tributary of an interstate or tidal stream. *Columbus Ins. Co. v. Curtienius*, 6 McLean (U. S.), 209; *Jolly v. Terre Haute*, etc., id. 237. In furtherance of public improvement it may authorize a partial diversion of the surplus water. *Woodman v. Kilburn Manufacturing Co.*, 15 Am. Law Reg. 238. But the public use must not be thereby impaired, or private rights injured. *Lonsdale Co. v. Moies*, 21 L. T. (N. S.) 648. And all erections in or over such streams must be of the most approved description, and supplied with the best appliances to prevent obstruction. *Packet Co. v. Peoria Bridge Assn.*, 38 Ill. 467; *United States v. Railroad Bridge Co.*, 6 McLean (U. S.), 517. But

if the powers of the act are exceeded or are exercised in a manner different from that provided in the grant of authority, or if the act can be done so as not to be a nuisance, and the creation of a nuisance by the exercise of the power given is not fairly the result of the exercise of the power conferred, the grant will be no protection, and the party doing the acts will be chargeable for a nuisance either by indictment or at the suit of persons injured thereby, the same as though there had been no color of authority given for their exercise. *Com. v. R. Co.*, 2 Gray (Mass.), 54; *Com. v. New Bedford Bridge Co.*, id. 339; *Com. v. Vt. & Mass. R. Co.* 4 id. 22; *Renwick v. Morris*, 7 Hill (N. Y.), 575; *Lawrence v. R. Co.*, 16 Q. B. 643; *Brown v. Cayuga R. Co.*, 12 N. Y. 487; *Navigation Co. v. Coon*, 6 Penn. St. 379; *Harris v. Thompson*, 9 Barb. (N. Y.) 350; *Clark v. Syracuse*, 13 id. 32; *Hopkins v. Birmingham & Staffordshire R. Co.*, 1 L. T. (N. S.) 303; *Attorney-General v. Bradford Canal, &c. Co.*, 15 id. 9; *Davis v. Mayor, &c.*, 14 N. Y. 526; *Rex v. Pease*, 4 B. & Ad. 30. But over tidal streams and in fresh-water navigable streams that are avenues of commercial intercourse with other States, the States through which they pass have only a limited jurisdiction. The general government, under the power delegated to it to regulate commerce between the States, has the ultimate and superior jurisdiction over such streams, and the State cannot authorize any act to be done thereon that will materially interfere with their navigability. The strict doctrine that no obstruction can be made therein under State authority that in any measure interferes with navigation is not observed, because the State is treated as having a *quasi* jurisdiction over the streams. In *Jolly v. Terre Haute Drawbridge Co.*, 6 McLean (U. S.), 237, the defendants erected a bridge under authority given by the legislature of Indiana. The act provided that the bridge should be provided with a "convenient draw." The complaint was that it was not provided with such a draw, in consequence of which the

where the streams come within the denomination of interstate streams; and when such authority is obtained, it must be exercised in

plaintiff's boat was injured. *DRUMMOND, J.*, upon this point, said: "The language 'convenient draw,' imports a draw which can be passed without vexation, delay, or risks. If it meets the requirements of the act of incorporation, and is not such a one, the charter is violated. If it meets the act of incorporation and is yet a *material* obstruction to navigation, the act is a nullity for want of power in the State to authorize it." In *Columbus Ins. Co. v. Peoria Bridge Assn.*, 6 McLean (U. S.), 70, the court said: "The State may authorize an erection that does not *materially* obstruct navigation. Every bridge may in a certain sense be said to be an obstruction, but that delay and risk which is inseparable from the thing which the State has the power to create does not make it a nuisance." In *Columbus Ins. Co. v. Curtenius*, 6 McLean (U. S.); 209, it was held that a State cannot authorize a *material* obstruction to navigation in a stream over which the general government has jurisdiction. But that a plea in bar of an action for damages arising from injuries received from such an obstruction, that merely alleges that the obstruction was erected under State authority, is bad. It should also allege that the erection is not a *material* obstruction. The fact that the obstruction will result in real advantage to the public does not rob it of the character of a nuisance, if it really obstructs navigation. *Works v. Junction R. Co.*, 5 McLean (U. S.), 424. Advantages and disadvantages cannot be balanced in such a case. *Pennsylvania v. Wheeling Bridge Co.*, 9 West. Law Jour. 535; 13 How. (U. S.) 519; *Butler v. State*, 6 Ind. 165. A wharf is not necessarily a nuisance; whether it is or not is a question of fact. *Laughlin v. Lamasco*, 6 Ind. 223. Hence, when an act is done therein under State authority, as the erection of a bridge, dam, or other erection in or over the stream, although operating as a slight obstruction to navigation, it will not be regarded as a nuisance if the public benefit therefrom is equal to the inconvenience created thereby to navigation. *Devoe v. Penrose Ferry Bridge Co.*, 3 Am. L. R. 79;

Griffing v. Gibb, 1 McAl. (U. S.), 212; *Columbus Ins. Co. v. Peoria Co.*, 6 McLean (U. S.), 70; *United States v. Bedford Bridge Co.*, 1 W. & M. (U. S.) 402; *Silliman v. Hudson R. R. Co.*, 4 Bl. (U. S.) 66, 395; *Works v. Junction R. Co.*, 5 McLean (U. S.) 425; *Jolly v. Terre Haute Bridge Co.*, 6 id. 237; *Atkinson v. Phila. &c. R. Co.*, 4 Haz. Penn. Reg. 10; *Woodman v. Kilburn Mfg. Co.*, 15 Am. Law Reg. 288; *Penn. v. Wheeling Bridge Co.*, 13 How. (U. S.) 519. The common-law rule is not observed by the United States courts in dealing with obstructions to navigation created under State authority, for the reason that such acts are regarded as having been done under *quasi* authority. *Griffing v. Gibb, ante*. And if they are really of public benefit, and aids to commerce, they will not be regarded as nuisances unless the public injury overbalances the public benefit. *Columbus Ins. Co. v. Curtenius*, 6 McLean (U. S.), 207; *Jolly v. Terre Haute Bridge Co.*, id. 237; *Columbus Ins. Co. v. Peoria Bridge Co.*, id. 70. But this is subject to the restriction that the State may not authorize a *material* obstruction to navigation. *Pennsylvania v. Bridge Co.*, 13 How. (U. S.) 519. And when such an obstruction, that *materially* interferes with the use of the stream for the purposes of public passage, is erected, even under authority from the State, it is a nuisance, and the party erecting it is liable for all damages resulting therefrom to individuals, and to indictment in behalf of the public, and the authority conferred by the State is no protection or defence. *Id.*; *R. Co. v. Ward*, 2 Black (U. S.), 485; *Works v. Junction R. Co.*, 5 McLean (U. S.), 428; *Georgetown v. Canal Co.*, 12 Pet. (U. S.) 91. Neither is it any defence that the structure is useful to the public and an essential aid to commerce,—as a bridge, a wharf, or other encroachment in or over the stream. *Pennsylvania v. Bridge Co.*, 13 How. (U. S.) 519; *The Passaic Bridges*, 3 Wall. (U. S.) 782; *Baird v. Shore Line R. Co.*, 6 Blatchf. (U. S. C. C.) 276. The State occupies to such streams the same relation that a riparian owner on a fresh-water stream,

the manner provided in the act conferring the authority.¹ Of course, authority to build a bridge carries with it authority to build the

whose title extends to the centre thereof, occupies to it. It may make or authorize any use of the stream that does not essentially interfere with its proper and free use for the purposes of navigation, but beyond that it cannot go, or authorize others to go; and any wharf, bridge, dam, or other erection made under State authority, that is in any essential degree an interference with the free navigation of the stream, is a nuisance, and liable to be redressed as such in the Federal courts. *Packet Co. v. Atlee*, 7 Am. L. R. 752; *reversed* by the United States Supreme Court, March 4, 1875. See Albany Law Journal of March 5th; *Woodman v. Kilburn Mfg. Co.*, 1 Abb. (U. S. C. C.) 158; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713. Therefore it will be seen that the decisions of the United States court, involving questions of nuisance, by obstructions erected under State authority, are not authorities upon the question of *unauthorized* obstructions. As to those, the United States courts follow the common-law rule, and hold such obstructions unlawful and a nuisance, irrespective of the question of benefits, public or private, resulting therefrom. But encroachments upon the sea that do not amount to an appropriation of it, or an obstruction to navigation, or an injury to a port, are not treated as nuisances, and, being *purprestures* merely, are tolerated where individual convenience demands it, and no public inconvenience or injury results therefrom. *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. (U. S.) 245. But when a real obstruction to navigation results, the authority of the State is no protection. *Gibbons v. Ogden*, 9 Wheat.

(U. S.) 1; *Works v. Junction R. R. Co.*, 5 McLean (U. S.), 425; *Columbus Ins. Co. v. Curtenius*, 6 id. 209; *Jolly v. Terre Haute Drawbridge Co.*, id. 237. The State may authorize improvements to be made in any navigable stream, tidal or non-tidal, by clearing out its bed, deepening its channel, or otherwise; but these changes must be improvements, or at least must not operate to impair navigation. *Avery v. Fox*, 1 Abb. (U. S. C. C.) 246; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *Palmer v. Cuyahoga Co.*, 3 McLean (U. S.), 226; *Williams v. Beardsley*, 2 Ind. 391; *Spooner v. McConnell*, 1 McLean (U. S.), 387. So, too, it may authorize the erection of wharves below low-water mark to render access to the port more easy and convenient, and authorize the erection of piers, slips, and docks, in a reasonable manner, and being in *aid* of navigation and commerce by furnishing facilities for the approach and safety of vessels, and for lading and unlading them, these erections will not be regarded as nuisances, unless they *materially* interfere with free navigation to the stream or port. *Devoe v. Penrose Ferry Co.*, 3 Am. Law Reg. (U. S.) 79. But all such erections below low-water mark are made at the peril of having them declared nuisances by the Federal courts, if they unreasonably or essentially impair the convenience or safety of navigation, unless Congress has conferred the power upon the State or corporation to make the erections, — *Pennsylvania v. Wheeling Bridge Co.*, 13 How. (U. S.) 578, — or unless the title to the bed of the sea, bay, or stream, below low-water mark, is vested in the corporation erecting them

¹ *Pennsylvania v. Wheeling Bridge Co.*, 13 How. (U. S.) 518; 18 How. 421. The defendants built a bridge across the Missouri river, under the act of Congress of July 25, 1866, requiring that the passageway for vessels between the piers of any drawbridge shall be 160 feet wide in the clear. It was held that the proper measurement is by a line running directly across the channel, and at right angles to the piers, and that the bridge in question

being built diagonally across the river, a measurement along its line is not the proper measurement. *Missouri River Packet Co. v. Hannibal, &c. R. Co.*, 1 McCrary (U. S.), 281. If the statutory requirements are not complied with, the bridge to that extent is a nuisance. *Dugan v. Bridge Co.*, 27 Penn. St. 303; *Rogers v. Kennebec, &c. R. Co.*, 33 Me. 319; *Memphis, &c. R. Co. v. Hicks*, 5 Sneed (Tenn.), 427.

necessary abutments, piers, and other usual or necessary appurtenances to secure its safety and permanence.¹ So, too, it may occur

or authorizing their erection, by grant, prior to the revolution, with authority to erect wharves, piers, etc. In New York City, the corporation under their original charter on Manhattan Island owns the lands under the East river to a point 400 feet beyond low-water mark. The ownership of the land between high and low water mark is regarded as vesting a franchise in the owner, which authorizes the erection of public or private wharves; not impeding navigation, and to charge tolls for the use of the same. *Dickinson v. Codwise*, 1 Sandf. Ch. (N. Y.) 214; *Verplanck v. New York*, 2 Edw. Ch. (N. Y.) 220; *Mayor, &c. v. Scott*, 1 Caines (N. Y.), 543; *Klingensmith v. Ground*, 5 Watts (Penn.), 459; *Com. v. Shaw*, 14 S. & R. (Penn.) 13; *Ball v. Slack*, 2 Whart. (Penn.) 530. The State, being the owner of the *shore* of tidal streams, that is, of the space between high and low water mark, may grant the same to individuals or corporations; and such grant vests in the grantee a *quasi* franchise, for the use of the portion of the stream so conveyed in any way that the State could use it. The title being derived from the State carries with it all the rights incident to the property in the State. If the State had the right to erect a wharf on the portion of the stream covered by the grant, the grantee takes the same right as incident to the estate granted, and the estate is estopped from pursuing him for a *purpresture*, unless he extends his erections beyond the limits of his grant, and can only pursue him for a nuisance when his erections amount to an actual material obstruction to navigation. *Delaware & Hudson Canal Co. v. Lawrence*, 9 N. Y. Sup. Ct. 163; *Williams v. Wilcox*, 8 Ad. & El. 314; *Abraham v. The Great Northern Ry. Co.*, 16 Q. B. 586; *Attorney-General v. Southampton Ry. Co.*, 9 Simons, 78. See *Lord Darcy v. Askwith*, Hob. 234. Any unauthorized obstruction of a navigable stream, whether an actual hindrance to navigation or not, is a nuisance, and is

indictable as such, even though it is really of public advantage and a great convenience to those navigating the stream. In *Rex v. Ward*, 4 Ad. & El. 384, the defendant was indicted for erecting a causeway and wharf projecting into the harbor, and raised on a kind of platform. The causeway was originally of gravel, shingle, and stone, called a hard, and sloping into the water. Subsequently the wharf was considerably lengthened, extending up the harbor. It was then raised on piles and considerably heightened, and instead of sloping down into the water, as it had formerly done at the extremity, it was five feet and four inches higher than the shore. It appeared that small vessels were obstructed in their tacking, by the causeway, when pursuing their way up the harbor with the tide; also that square-rigged vessels, lightermen, and row-boats were exposed to some inconvenience thereby, both as to navigation and landing. On the other hand, it appeared that the causeway and wharf were a great public benefit in launching and landing boats more readily, and that steamboats and other vessels could approach that wharf when they could not at others, and that vessels obtained shelter from the quay. The jury found that an impediment had been created by the causeway and wharf, but that the inconvenience was counterbalanced by the public benefit. Upon this verdict the court held that the defendants were guilty of a nuisance, and directly, and in terms, overruled the doctrine of *Rex v. Russell*, 6 B. & C. 566, in which it was held that if the public benefit arising from an obstruction is equal to the public inconvenience, no nuisance could be predicated of it. Lord DENMAN, J., said: "I must say that if the violation of rights which belong to any part of the public is to be vindicated by the benefit which is to arise in another part of the public elsewhere, we are introducing inquiries of a most vague and unsatisfactory nature, and entering into speculations upon which no judge can be expected to

¹ *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; *Clarke v. Birmingham, &c. Bridge Co.*, 41 id. 112.

that the company is invested with a discretion to cross a navigable stream, either by the establishment of a bridge or a ferry;¹ but

decide." In *People v. St. Louis*, 10 Ill. 351, it was said: "While the State may partially obstruct navigable streams for the public benefit, yet individuals have no such right; and where such an obstruction is made by an individual as amounts to a nuisance, though sufficient room for passage is left, the fact that the public is *really benefited* by the obstruction will not be considered." The following acts have been held to be nuisances: In *Dobson v. Blackmore*, 9 Ad. & El. (Q. B.) 991, a floating-dock cutting off access from the river. In *Rose v. Groves*, 5 M. & G. 613, placing timbers in the river so as to prevent approach to the plaintiff's premises. In *Rex v. Ward*, 4 Ad. & El. 384, an embankment extending into a navigable river, although of great advantage to navigation, was held a nuisance, because it actually obstructed navigation. In *Anonymous*, Russ. Cr. 379, a floating-dock was held a nuisance, although beneficial for repairing ships. To the same effect, *Hecker v. N. Y. Balance Co.*, 13 How. Pr. (N. Y.) 549; *Penniman v. same*, id. 40; *Hawkins' P. C.*, chap. 75, § 11. In *Rose v. Miles*, 4 M. & S. 101, barges moored across a public river in a manner to obstruct navigation or prevent access to the shore. The *C. D., Jr.*, *Newb. Adm.* 501; *King v. Sanders*, 2 Brevard (S. C.), 111. See also *Hart v. Mayor of Albany*, 3 Paige (N. Y.), 213. In *Brucklesbank v. Smith*, 2 Burr. 656, throwing ballast into the sea in a port. In *Regina v. Stephens*, L. R. 1 Q. B. 702, throwing rubbish from a quarry into a river. In *Gerrish v. Brown*, 51 Me. 256, and *Davis v. Winslow*, id. 289, throwing edgings from logs and boards into a public river. In *Manhattan Gas Co. v. Barker*, 7 Robt. (N. Y.) 523; *H. R. Co. v. Loeb*, id. 418; *Mayor, etc. v. Baumberger*, id. 219, — discharging refuse from breweries into a stream, or any refuse calculated to fill up the stream or impede navigation or render the port unpleasant. In *Rex v. Medley*, 6 C. & P. 292, sending into a public river the refuse from gas-works. In *Attorney-General v. Brittain*,

6 B. & C. 579, cited as MS. case, a quay in a river that impedes or obstructs the navigation of small craft. *Rex v. Grosvenor*, 2 Starkie, 448. *Atlee v. Packet Co.*, 21 Wall. (U. S.) 389, wharves erected below low-water mark impeding navigation. *Com. v. Crowninshield*, 2 Dane's Abr. 297; *Com. v. Wright*, Thac. Cr. Ca. 211; *Gray v. Bartlett*, 20 Pick. (Mass.) 186, — piles driven in channel of river. *Jones v. Pettibone*, 2 Wis. 308; *Walker v. Shepardson*, 4 id. 486, — a pier in a tidal stream. *People v. Vanderbilt*, 28 N. Y. 287; *Attorney-General v. Richards*, 2 Anstr. 603; *Attorney-General v. Burridge*, 10 Price, 350; *Newcastle v. Johnson*, 2 Anstr. 608, — houses erected so as to straighten a river. *Rex v. Tindall*, 6 Ad. & El. 143. Obstructions only created by erections, in extreme and exceptional cases, will not be regarded as nuisances. See *Nicholas v. Boston*, 98 Mass. 39, where a wharf below low-water mark was held not necessarily a nuisance. See *Wetmore v. Atlantic White Lead Co.*, 37 Barb. (N. Y.) 70, where it was held that whether a building below low-water mark is a nuisance, is a question of fact, and though *prima facie* a nuisance, is not in fact so, unless it obstructs navigation or injures the port. See *Naglee v. Ingersoll*, 7 Barr (Penn.), 135, where it was held that a wharf below low-water mark was a nuisance. In *Rochester v. Erickson*, 46 Barb. (N. Y.) 92, an erection on the banks of a river flowing through a populous city, that sets back the water in an appreciable degree, so as to contribute to the overflow of its banks, was held to be a nuisance. In *Renwick v. Morris*, 7 Hill (N. Y.), 575, a dam erected on a navigable stream or a bridge over it, under authority of the legislature, is held to be a nuisance if the power is exceeded. See *Clark v. Syracuse*, 13 Barb. (N. Y.) 32; *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165; *Packet Co. v. Bridge Assn.*, 36 Ill. 467; *United States v. R. R. Bridge Co.*, 6 McLean (U. S.), 517; *Garey v. Ellis*, 1 Cush. (Mass.) 306. A wharf ex-

¹ *State v. Wilmington, &c. R. Co.*, *Busbec* (N. C.), 234.

unless the charter expressly provides otherwise, the ferry can be used only for the purposes of travel upon its road, and not for general purposes.¹

tending below low-water mark and beyond dock lines is a nuisance, even though erected before the dock lines were established; so is a bridge erected so as to obstruct navigation. *Com. v. New Bedford Bridge Co.*, 2 Gray (Mass.), 339. Authority to do an act which may or may not be a nuisance, does not authorize it to be done so as to be a nuisance. *Com. v. Charlestown*, 1 Pick. (Mass.) 185. A highway cannot be laid out in or over a navigable stream without legislative authority. *Arundel v. McCulloch*, 10 Mass. 70. Nor a bridge. *Kean v. Stetson*, 5 Pick. (Mass.) 492; *Barnes v. Racine*, 4 Wis. 454. Nor can a highway be laid out between high and low water mark without authority. *Com. v. Chapin*, 5 Pick. 199; *Cox v. State*, 3 Blackf. (Ind.) 193; *Bainbridge v. Sherlock*, 29 Ind. 364; *Martin v. Bliss*, 5 Blackf. (Ind.) 35; *Depew v. Canal Co.*, 5 Ind. 8; *Harbor Co. v. City of Munroe*, Walk. (Mich.) 155; *Drawbridge Co. v. Halliday*, 4 Ind. 36; *Rice v. Ruddiman*, 10 Mich. 124. Diverting the water of a stream navigable in fact

creates both an actionable and indictable nuisance. *Yolo v. Sacramento*, 36 Cal. 193; *Gunter v. Geary*, 1 id. 462; *Regina v. Betts*, 22 Eng. Law & Eq. 240. Driving piles in a navigable river, without lawful authority, is a public nuisance. *Potter v. Menasha*, 30 Wis. 492. So is a dam sending water back on another person's lands; and the owner of the lands may sue for damages, or proceed for an abatement of the nuisance. *Newell v. Smith*. In *Rex v. Grosvenor*, 2 Starkie, 448, the defendants were indicted for erecting a wharf on the River Thames, to the injury of the navigation of the river. It appeared that the wharf was erected between high and low water mark, and extended for a considerable distance along the river; and that before the wharf was erected the recess afforded a place of refuge in time of storm, and that the eddy-water which it had used afforded greater convenience for the passage of watermen. It appeared on the part of the defendants that they had rented the portion of the river occu-

¹ *Fitch v. New Haven, &c. R. Co.*, 30 Conn. 38. The right to set up a ferry is a franchise which no one can exercise without a license from the State, *Blissett v. Hart*, Willes, 512, n., or by prescription. 2 Rolle's Abr. 140; *Lansing v. Smith*, 4 Wend. (N. Y.) 21; *Benson v. Majorie*, 10 Barb. (N. Y.) 223; *Young v. Harrison*, 6 Ga. 139; *Dyer v. Bridge Co.*, 2 Porter (Ala.), 296; *Stark v. McGowen*, 1 N. & McC. (S. C.) 387; *Nashville v. Shelby*, 10 Yerger (Tenn.), 280; *Somerville v. Wambish*, 7 Gratt. (Va.) 205. A riparian owner may set up a ferry for his own use, but not for the use of others. *Young v. Harrison*, 6 Ga. 139; *People v. Mayor, &c.*, 32 Barb. (N. Y.) 102; *Norris v. Farmers' Co.*, 6 Cal. 590; *Johnson v. Erskine*, 9 Tex. 1; *Sparks v. White*, 7 Humph. (Tenn.) 86; *De Jure Maris*, 73; *Milton v. Haddon*, 32 Ala. 30; *Taylor v. Railroad Co.*, 4 Jones (N. C.), 277; *Mills v. St. Clair Co.*, 7 Ill. 177; *Cooper v. Smith*, 9 S. & R. (Penn.) 26; *Trustees v. Talman*, 13 Ill. 27; *Murray v. Murfee*, 30 Ark. 560. A ferry franchise is not an incident of riparian ownership. *Patrick v. Ruffners*, 2 Rob. (Va.) 209; *Young v. Harrison*, 6 Ga. 130; *Stanford v. Mangin*, 30 id. 475. All unlicensed ferries are nuisances. 3 Kent's Com. 458, 459; 3 Blackstone's Com. 219. But the State may license as many ferries to and from the same point as it chooses. *Dyer v. Tuscaloosa Bridge Co.*, 2 Porter (Ala.), 296; *R. R. Co. v. Douglass*, 9 N. Y. 444; *Charles River Bridge v. Warren Bridge*, 11 Peters (U. S.), 420; *Bridge Co. v. Railroad Co.*, 17 Conn. 454; *Thompson v. Railroad Co.*, 2 Sandf. Ch. (N. Y.) 625; *Bridge Co. v. Fish*, 1 Barbour's Ch. (N. Y.) 547; *Toledo Bank v. Bard*, 10 Ohio (N. s.), 622; *Canal Co. v. Railroad Co.*, 11 Leigh (Va.), 42; *Benson v. Mayor, &c.*, 10 Barb. (N. Y.) 223; *Railroad Co. v. Railroad Co.*, 2 Gray (Mass.), 5; *East Hartford v. Bridge Co.*, 13 How. (U. S.) 71; *Shorts v. Smith*, 9 Ga. 517.

The repair of a bridge having become necessary, the railroad company gave notice to the navigation company, which operated a line of steamers on the river, of its intention to make the repairs. The repairing was done at a time of the year when navigation would be least interfered with, and no unnecessary delay took place. In an action by the navigation for the obstruction of the stream, the court held that the railroad company was not liable. It was not bound to adopt an unusual and expensive course in making the repairs in order to leave navigation entirely free, and the loss sustained by the navigation company was *damnum absque injuria*.¹

In the construction of bridges over which its passenger trains are to pass, the company is bound to the exercise of the highest possible

pieced by their wharf from the corporation of London, who were the conservators of the river, and had a right to make or authorize such erections between high and low water mark, and that their wharf was a public benefit; that the projection which had existed previously had occasioned an eddy which had caused a deposit of mud in the river, and a diversion of the stream, and that the embankment would tend to remove it, and thereby be of material benefit to the navigation by removing any collection of mud. ABBOTT, Ld. C. J., held that the city of London could not authorize a nuisance in the river, and in passing upon the main question in the case, he said: "The question here is, whether a public right has been infringed. An embankment of considerable extent has been constructed for the purpose of building a wharf; much evidence has been adduced on the part of the defendant for the purpose of showing that the alteration affords greater facilities and conveniences for loading and unloading; but the question is not whether any private advantage has resulted from the alteration to any particular individuals, but whether the conveniences of the public at large, or of that portion of it which is interested in the navigation of the River Thames, has been affected or diminished by the alteration. . . . The question is, whether if this wharf be suffered to remain, the public convenience will suffer." Lord Grosvenor was acquitted, and the rest of the defendants were convicted. In an early case in the United

States courts, — *Republica v. Caldwell*, 1 Dall. (U. S.) 150, decided in 1783, — the defendant was indicted for erecting a wharf upon public property in Philadelphia, and upon the trial the defendant offered to prove that the wharf was a public benefit, and furnished conveniences indispensable to commerce for the easy lading and unlading of vessels, and therefore was not a nuisance; but the court held that public benefits were no defence against a nuisance in a navigable stream. Wood on Nuisances, pp. 548-556.

¹ *Green, &c. Nav. Co. v. Chesapeake, &c. R. Co.* (Ky., 1888), 10 S. W. Rep. 6; 37 Am. & Eng. R. Cas. 238. See also *Central Trust Co. v. Wabash, &c. R. Co.*, 32 Fed. Rep. 566; *Hamilton v. Vicksburg, &c. R. Co.*, 119 U. S. 280; 29 Am. & Eng. R. Cas. 490. The case of *Silver v. Missouri Pac. R. Co.*, 101 Mo. 79; 44 Am. & Eng. R. Cas. 467, was an action for damages by the owner of a steamboat which was injured by running against a pier of the railroad company's bridge. It appearing that the company had properly constructed the bridge under lawful authority, judgment for the plaintiff rendered by the lower court was reversed. The same principle is upheld in *Ward v. Louisville, &c. R. Co.* (Tenn. 1882), 3 Am. & Eng. R. Cas. 506. But the company owning the bridge for injuries resulting from its failure to prevent the collection of drift around its piers, *St. Louis, &c. R. Co. v. Meese*, 44 Ark. 414.

care to have them safe and secure, so as to prevent the occurrence of injury or accident from their giving way. This is a part of the company's duty as a carrier of passengers.¹ But the company is clearly not bound to exercise such a high degree of care where its capacity as carrier is not involved. Thus where the overflow of water and ice caused from the faulty plan and construction of the bridge destroyed plaintiff's mill, it was held that in planning and constructing its bridge the company was bound to bring to its aid the engineering knowledge and skill ordinarily known and employed for such works, and see to the practical application of such knowledge and skill to the work in hand; but it was not bound to do more.²

As a railway company takes by inference the right to bridge streams intervening upon its route, so, too, it takes the right to cross highways, and where necessary because of the difference in grade, to cross them by bridges; but this right is generally conferred in express terms, and when it is so conferred the privilege is a part of the franchise of the company. The necessary approaches constructed for the purpose of restoring the streets or highways to their former condition of usefulness under, and as a condition to, the exercise of the privilege are a part of the railroad structure authorized by its charter; and in their erection, a party incidentally injured has as complete and perfect a remedy against the company for consequential damages as he has for a direct injury caused by the original construction of the railroad. The obligation to make compensation is as strong in the one case as in the other, and to the discharge of that obligation in the manner prescribed it impliedly bound itself

¹ *Pershing v. Chicago, &c. R. Co.*, 71 Iowa, 56; 34 Am. & Eng. R. Cas. 405; *Bedford, &c. R. Co. v. Rainboat*, 99 Ind. 551; 21 Am. & Eng. R. Cas. 466. Where a railroad corporation purchased the line of another company of which an existing bridge formed a part, which bridge at the time of the purchase was unsafe and dangerous by reason of defects in its original plan and construction, and such defects were obvious to the eye of a skilled inspector, and could have been easily and surely ascertained by proper examination, it was held that it was negligence on the part of the corporation to continue its use without such an inspection and a correction of the

defects; that it was liable to an employé upon one of its trains for injuries received by a fall of the bridge; and this although the bridge had been in use for several years before the purchase. *It seems* that the prior use might have justified a continuance of the use until a competent inspection could reasonably have been made, but did not justify a neglect to observe and remedy the defects when an inspection was made. *Vosburgh v. Lake Shore, &c. R. Co.*, 94 N. Y. 374.

² See *Omaha, &c. R. Co. v. Brown*, 14 Neb. 170; 11 Am. & Eng. R. Cas. 501; *approving Pittsburgh, &c. R. Co. v. Gilleland*, 56 Penn. St. 445.

by the acceptance of its charter.¹ The company's obligation to restore the highway by the erection of a bridge over its right of way, together with suitable approaches thereto, is not discharged by a mere construction of the bridge and its approaches; they must be continually maintained in good repair, and this duty of repair is as binding as that to construct.² Indeed, the duty is not only continuous but may, it seems, require the enlargement of the bridge if the increase of public travel make it necessary.³ These duties are declared by statute in many of the States, but these are merely affirmative of the common law on the subject.⁴ The approaches to the bridge which are necessary to connect it with the highway,⁵ the abutments and lateral embankments, and indeed everything essential to the construction of the bridge and which was built as a part of it, and are essential for its maintenance as it is required to be maintained, are a part of the bridge which the company is bound to keep in repair;⁶ and this although part of the structure may extend

¹ PHILPES, J., in *Burritt v. New Haven*, 42 Conn. 199; *Parker v. Boston, &c. R. Co.*, 3 Cush. (Mass.) 116; *Com. v. Deerfield*, 6 Allen (Mass.), 449. It is the duty of a railway company, when constructing a bridge over a river, and making lateral embankments adjoining the highway leading to such bridge, so to construct the latter as not to make the approach to the bridge along the highway dangerous for foot-passengers. A failure to perform this duty renders the company liable in damages to a person injured in consequence of such failure, provided such person used reasonable and ordinary care to avoid the danger. *Baltimore, &c. R. Co. v. Botler*, 38 Md. 568.

² *Chesapeake, &c. R. Co. v. Dyer Co.*, 87 Tenn. 712; 38 Am. & Eng. R. Cas. 680 (authorities reviewed), *overruling Chesapeake, &c. R. Co. v. State*, 16 Lea (Tenn.), 300; *Vosburgh v. Lake Shore, &c. R. Co.*, 94 N. Y. 374; 15 Am. & Eng. R. Cas. 249; *St. Louis, &c. R. Co. v. Springfield, &c. R. Co.*, 96 Ill. 274; 1 Redfield on Rys. (3d ed.), p. 404, § 110. Compare, however, *Missouri, &c. R. Co. v. Long*, 27 Kan. 684; 6 Am. & Eng. R. Cas. 254; *Pittsburgh, &c. R. Co. v. Maurier*, 21 Ohio St. 421; *Brookins v. Central, &c. R. Co.*, 48 Ga. 523.

³ *Cooke v. Boston, &c. R. Co.*, 133

Mass. 185; 10 Am. & Eng. R. Cas. 328; *English v. New Haven, &c. Co.*, 32 Conn. 241; *Burritt v. New Haven*, 42 Conn. 174; *Manley v. St. Helena, &c. R. Co.*, 2 H. & N. 840.

⁴ *Chesapeake, &c. R. Co. v. Dyer Co.*, 87 Tenn. 712.

⁵ *Hayes v. N. Y. Central R. Co.*, 9 Hun (N. Y.), 63; *Newcastle v. North Staffordshire Ry. Co.*, 5 H. & N. 160.

⁶ *Sussex v. Strader*, 18 N. J. L. 108; *New York, &c. R. Co. v. State*, 50 N. J. L. 313; 32 Am. & Eng. R. Cas. 186; *Montclair v. New York, &c. R. Co.*, 45 N. J. Eq. 436; *Watson v. Lisbon Bridge*, 14 Me. 201; *Titcomb v. Fitchburg R. Co.*, 12 Allen (Mass.), 254; *White v. Quincy*, 97 Mass. 430 (company bound to keep approach in repair, though it may lie beyond the line of its location or right of way); *Newton v. Chicago, &c. R. Co.*, 66 Iowa, 422; 23 Am. & Eng. R. Cas. 298; *State v. Minneapolis, &c. R. Co.*, 39 Minn. 219; *Caldwell v. Vicksburg, &c. R. Co.*, 41 La. An. 624; 39 Am. & Eng. R. Cas. 245; *Mayor, etc. v. Lancashire, c. Ry. Co.*, 20 Q. B. Div. 485; 14 App. Cas. 417; 42 Am. & Eng. R. Cas. 56; *North Staffordshire Ry. Co. v. Dale*, 8 E. & B. 836; *Rex v. Lindsey*, 14 East, 317; *Rex v. Kent*, 13 East, 220; *Vosburgh v. Lake Shore, &c. R. Co.*, 94 N. Y. 374; 15 Am.

beyond the bounds of its location.¹ If a railroad company neglects or refuses to build a suitable bridge over a river, street, or highway, which it is bound by law to build, or if it refuses or neglects to keep the same in repair, it may be compelled to discharge its duty in these respects by *mandamus* brought by the town or city interested therein;² or the municipality may have the construction or repairing

& Eng. R. Cas. 249 (purchasing company bound to maintain bridges established by old company); *People v. New York, &c. R. Co.*, 89 N. Y. 266; *People v. Troy, &c. R. Co.*, 37 How. (Pr. N. Y.) 427; *People v. N. Y. Central R. Co.*, 74 N. Y. 302, reversing 12 Hun. (N. Y.), 193. The following appendages have been held to constitute a part of a bridge: abutments, — *Bardwell v. Jamaica*, 15 Vt. 438, — embankments, — *Hayes v. N. Y. Central R. Co.*, 9 Hun. (N. Y.), 63; *Watson v. Lisbon Bridge Co.*, 14 Me. 201; *Sussex v. Strader*, 18 N. J. L. 108, — and the approaches to a bridge, — *New Haven v. N. Haven, &c. R. Co.*, 39 Conn. 128; *Burrett v. New Haven*, 42 Conn. 199; *White v. Quincy*, 37 Mass. 430, — are a part thereof. *Farley v. Chicago, &c. R. Co.*, 42 Iowa, 234. In *Nicholson v. New York, &c. R. Co.*, 22 Conn. 74, the charter of a railroad company provided that the company might enter upon and use all such real estate as should be necessary for them; that they should be holden to pay all damages that should arise to any person or persons thereby, and prescribed the manner of assessing the damages, if the person or persons to whom such damages should arise and the company could not agree as to the amount. It also contained the following provision: "Whenever for the construction of their said railroad it shall become necessary to intersect or cross any stream of water, or water-course, or any road or highway, it shall be lawful for said company to construct said railroad across or upon the same, but said company shall restore the said stream or water-course, or road or highway, thus intersected, to its former state, or in sufficient manner not to impair its usefulness." A public street in a city, where it was intersected by the road, was carried over it on a bridge, and raised on each side of the bridge by embankments, so as to accom-

modate its height to the height of the bridge. It appeared that the public safety required that the railroad should pass under the street, and that the change made in the street by the bridge and embankments was one of the alterations provided for in the charter of the company. B., owning land with buildings thereon, lying upon each side of said street where it was so raised, and no compensation having been made to him, and no damages assessed therefor, brought his action against the company for the injury caused by the erection of such embankments. It was held, 1. That the power to regulate, alter, and repair highways might be delegated by the legislature to subordinate corporations, subject to the liability of making compensation for the property taken and injury occasioned. 2. That the acts of the defendants in question, being for the purpose of making one of the alterations in a highway contemplated in the defendant's charter, were authorized thereby. 3. That although the plaintiff might recover on a count in trespass for any appreciable incidental damages occasioned by the acts complained of, the defendants were not liable therefor, of course, and as *prima facie* trespassers, and that it was a question for the jury to decide, whether the plaintiff had sustained any such damages thereby or had not, and that trespass is a proper remedy for such damages. It is not necessary that the company should have had knowledge of the defect. It is its duty to keep it in repair, and it must exercise watchfulness to discover its defects at its peril. *South, &c. R. Co. v. McLendon*, 63 Ala. 266.

¹ *White v. Quincy*, 97 Mass. 430; *Titcomb v. Fitchburg R. Co.*, 12 Allen (Mass.), 254.

² *Cambridge v. Charlestown Branch R. Co.*, 7 Met. (Mass.) 70. Where a navigation company, under its charter, destroyed

done, and recover its cost of the company.¹ And any person sustaining a personal injury through the negligence of the company in the discharge of this duty is entitled to recover damages. This principle goes without authority; the inquiry is always as to the duty of the company, and as to whether it exercised ordinary care in order to discharge it properly. In one case while the plaintiff was driving across a bridge which formed the highway over defendant's road, his horse became frightened by the noise and escaping steam of the engine, and dashed against the iron railing of the bridge. This railing was defective, and horse and driver together were precipitated to the road-bed below, a distance of fourteen feet. The court held that plaintiff should recover; that it was the duty of the company to keep the railing on such bridges in good order, and that having failed it must be held liable, although the frightening of the horse was not attributable to it.² The court further held that it was as much the duty of the company to take care of the approaches to the bridge as of the bridge itself, and was bound to construct and maintain them in a proper state.³ Numerous other cases sustain the injured party's right of action under similar circumstances.⁴ A

a ford and substituted a bridge, it was held that they were liable to keep the bridge in repair. *Rex v. Inhabitants of Kent*, 13 East, 220; *Rex v. Inhabitants of Lindsey*, 14 East, 317. So, too, where such company cut through a highway, rendering a bridge necessary to carry the highway over the cut, the company are bound to keep such bridge in repair. *Rex v. Kerrison*, 3 M. & S. 526. This duty may be enforced by indictment. *Regina v. Ely*, 19 L. J. (M. C.) 223. And the same obligation rests upon the assignees of the company. *Pennsylvania R. Co. v. Duquesne*, 46 Penn. St. 223. So, where a navigation company had power to use a public drain, upon substituting another, or others, it was held that the company were bound to keep in repairs the substituted drains, as well as to make them. *Priestly v. Foulds*, 2 M. & G. 175. Under the English statute (8 and 9 Vict. c. 20), where a company carries a highway, by means of a bridge, over the railway, it is bound to maintain the bridge and all the approaches thereto in repair; and such repair includes not only the structure of the bridge and the approaches, but the metaling of the road on both. *Newcastle, &c.*

Turnpike Co. v. North Staf. Ry. Co., 5 H. & N. 160. But this will not include the road beyond, where it may properly be regarded as forming an approach to the bridge. *W. & L. Ry. Co. v. Kearney*, 12 Ir. Com. L. 224; *Fosberry v. Waterford, &c. Ry. Co.*, 13 Ir. Com. Law, 494; *London, &c. Ry. Co. v. Skerton*, 5 B. & S. 559.

¹ *Chesapeake, &c. R. Co. v. Dyer Co.*, 37 Tenn. 712; 38 Am. & Eng. R. Cas. 676.

² *Titecomb v. Fitchburg R. Co.*, 12 Allen (Mass.), 259.

³ *Titecomb v. Fitchburg R. Co.*, 12 Allen (Mass.), 259; *Com. v. Deerfield*, 6 Allen, 449; *Parker v. Boston, &c. R. Co.*, 3 Cush. (Mass.) 107.

⁴ *Rembert v. So. Car. R. Co.*, 31 S. C. 309; 39 Am. & Eng. R. Cas. 252; *Mayor, &c. v. Lancashire, &c. R. Co.*, 20 Q. B. Div. 485; 14 App. Cas. 467; 42 Am. & Eng. R. Cas. 56; *Quimby v. Boston, &c. R. Co.*, 69 Me. 340 (party injured by defective foot bridge leading to station); *Vicksburg, &c. R. Co. v. State*, 64 Miss. 5; *Baltimore, &c. R. Co. v. Botter*, 38 Md. 568. In *Gulf, &c. R. Co. v. Gascamp*, 69 Tex. 545; 34 Am. & Eng. R. Cas. 6, it

provision in the charter of the company that if the company fails or refuses to construct and repair bridges the land-owner may do so and recover their value, is a mere cumulative remedy, and does not affect the right of action for an injury resulting from a defective construction.¹ The company is not bound, however, to anticipate that foot passengers will attempt to use its bridges which are constructed solely for the passage of its trains, and it is, therefore, not liable for injuries occurring to persons so using the bridge.²

It is an important duty incumbent upon the company in constructing bridges over its roadway, so to construct them, when practicable, that they will not be the cause of injury to its servants while riding on top of its cars. If such a construction is impracticable, proper provision must be made to prevent injury as far as possible, by having guards which will warn train hands of the proximity of a bridge.³ The risk of being struck by a low overhead bridge is not one of the risks assumed by the servant upon entering the employment of the company as a brakeman or train hand, and he is entitled to recover for such an injury,⁴ unless he has had abundant notice of the existence and danger of the bridge, or is aware of it.⁵ This subject is discussed further on.⁶

was held that a person on horseback who attempts to cross a bridge maintained by the company as a part of the crossing over its right of way, such bridge being the only practicable crossing for the direction he wishes to travel, he is not guilty of contributory negligence which will bar his action for injuries sustained by reasons of defects in the bridge, although he knew of such defects. *Citing, Erie v. Magill*, 101 Penn. St. 616; *Schaeffer v. Sandusky*, 33 Ohio St. 246; *Centralia v. Krouse*, 64 Ill. 19; *Parkhill v. Brighton*, 61 Iowa, 101; *Wilson v. Charlestown*, 8 Allen (Mass.), 137. See also *Gordon v. Belleville*, 15 Ont. Rep. 26; 20 Am. & Eng. Corp. Cas. 341. The railroad company is entitled, however, to the same notice of defects, which is required under the Massachusetts law, as municipalities, and if such notice has not been given recovery cannot be had. See *Dickie v. Boston*, &c. R. Co., 131 Mass. 516.

¹ *Green v. Morris*, &c. R. Co., 24 N. J. L. 486.

² *Krouty v. Chicago*, &c. R. Co., 65 Iowa, 224; 18 Am. & Eng. R. Cas. 85; *State v. Philadelphia*, &c. R. Co., 60 Md.

555; 15 Am. & Eng. R. Cas. 481. But it has been held liable for a horse killed by its train on one of its bridges which abutted on a highway, on the ground that the road was not properly "fenced." *Cincinnati, &c. R. Co. v. Jones*, 111 Ind. 259; 31 Am. & Eng. R. Cas. 491.

³ *Louisville, &c. R. Co. v. Wright*, 115 Ind. 378; 33 Am. & Eng. R. Cas. 370; *Baltimore, &c. R. Co. v. Rowan*, 104 Ind. 88; 23 Am. & Eng. R. Cas. 390; *Warden v. Old Colony R. Co.*, 137 Mass. 204; 21 Am. & Eng. R. Cas. 612. In this last case the injury resulted from a defective bridge guard. The first of these cases considers the law on this subject at length. See the law also very clearly stated in *Louisville, &c. R. Co. v. Hall*, 87 Ala. 708; 39 Am. & Eng. R. Cas. 298. See *post*, Chapter XXIII.

⁴ *Louisville, &c. R. Co. v. Wright*, 115 Ind. 378; 33 Am. & Eng. R. Cas. 370.

⁵ *Carbine v. Bennington*, &c. R. Co., 61 Vt. 348; 38 Am. & Eng. R. Cas. 45; *Hooper v. Columbia*, &c. R. Co., 21 S. C. 541; 28 Am. & Eng. R. Cas. 433.

⁶ See Chapter XXIII., *post*.

SEC. 277. Contracts for Construction of the Road. — Contracts for the building of railways are subject to the same rules of construction as other contracts, and would require no notice in this work except for their peculiar character. The work is usually let out to contractors, and the bids therefor are predicated upon the estimates of the engineers, and the acceptance thereof dependent upon the determination of the engineers. The time within which the road shall be built is often fixed in the charter, and the *manner* in which the work shall be done is a matter of great public concern, as the safety of travellers over it depends upon the stability and excellence of the work. For this reason, the law tolerates and enforces provisions in such contracts which might not be regarded as binding in the case of ordinary contracts. Thus, it is not unusual for the contract to impose penalties upon the contractor for slight deviations from the terms of the contract, or to reserve to the company the right to terminate it for slight causes. It is also generally provided that the quality and quantity of the work done shall be determined by the company's engineer, and that his certificate shall be the only evidence of performance, and of amounts upon which payments shall be made;¹ and in the absence of fraud or such gross error as to indicate bad faith, such provisions are binding,² and no recovery can be had except in accordance with such estimates unless it can be shown that the engineer acted fraudulently, or his estimates are so grossly

¹ *In re Wansbeck Ry. Co.*, L. R. 1 C. P. 269; *Ranger v. Great Western Ry. Co.*, 5 H. L. Cas. 72; *Herrick v. Belknap*, 27 Vt. 673; *O'Reilly v. Keans*, 52 Penn. St. 214; *Howard v. Allegheny Valley R. Co.*, 69 Penn. St. 489.

² *McMahon v. New York, &c. R. Co.*, 20 N. Y. 463; *Martinsburg, &c. R. Co. v. March*, 114 U. S. 549; *Chicago, &c. R. Co. v. Price*, 138 U. S. 135; 47 Am. & Eng. R. Cas. 298; *Ross v. McArthur* (Iowa), 52 Am. & Eng. R. Cas. 1; *Lewis v. Chicago, &c. R. Co.*, 49 Fed. Rep. 708; 52 Am. & Eng. R. Cas. 8 n. See also as to construction contracts, *Guilbalt v. McCreevy*, 18 Sup. Ct. of Can. 609; 52 Am. & Eng. R. Cas. 11 n (estimates of contractor's engineer as condition precedent to subcontractor's right to recover compensation); *Battle v. McArthur*, 49 Fed. Rep. 715; *Johnson v. St. Louis, &c. R. Co.*, 141 U. S. 602; *Quackenbush*

v. Chicago, &c. R. Co. (Mich.), 51 N. W. Rep. 883; 19 Am. & Eng. Ency. Law, 874. In the case of *Lauman v. Young*, 31 Penn. St. 306, the court, quoting from the case of *Fox v. Hempfield R. Co.*, 2 Abb. (U. S.) 151 (before GRIER, J.), laid down the rule that a stipulation in such contracts that "the decision of the chief engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement relating to, or touching the same, and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy in law, or otherwise by virtue of such covenant, so that the decision of the engineer shall be final and conclusive on the rights and claims of the said parties," is valid and binding, and will preclude an action at law in reference to matters embraced in the submission. And this is the general doctrine in this country.

erroneous as to indicate a want of good faith.¹ So, too, it is often provided in these contracts that the engineer shall determine the amount of penalties which shall be imposed for breaches of the contract by the contractors, and it is held that such penalties, whether specifically fixed in the contract or determined by the engineer as

¹ In a late case in one of the Federal Courts, *Lewis v. Chicago, &c. R. Co.*, 49 Fed. Rep. 708, the court, in upholding the validity of a contract in which it was agreed that the engineer's measurements and calculations of the quantity and amount of the several kinds of work, and also his classification of the material contained in excavations should be final and conclusive, went on to say: "This clause (as to the engineer's estimates, etc.) is a valid provision, and is binding upon the parties to the agreement. Therefore, there can be no recovery in excess of the engineer's final estimates, unless such estimate is successfully assailed for fraud, gross errors, or mistake. *Martinsburg, &c. R. Co. v. March*, 114 U. S. 549; *Wood v. Chicago, &c. R. Co.*, 39 Fed. Rep. 52, and cases cited; *Sweet v. Morrison*, 116 N. Y. 19; *Brush v. Fisher*, 70 Mich. 469. The estimate may be impeached for fraud; that is to say, it may be shown that the engineers in charge intentionally underestimated or overestimated the work. It may also be impeached by proof of gross errors in the measurements or calculations. If the evidence shows such errors, it either creates the presumption of fraud, or warrants the conclusion that the engineers did not exercise the degree of care, skill, and good faith in the discharge of their duty which the law exacts; and in either event, the court will disregard the estimate so far as is necessary to do substantial justice. The meaning of the word 'mistake,' as above employed, must be carefully defined:

"(a) The court will relieve against mistakes in measurements and calculations that are apparent on the face of the estimate, or that are clearly proven, though not so apparent.

"(b) If it is satisfactorily shown that the engineers failed, through oversight, to measure or estimate any particular part of the work, the court will grant relief as to such mistakes.

"(c) If it appears that the engineer in charge put a wrong construction on any provision of the contract, the court will correct any substantial errors resulting from such mistake, for the reason that the parties did not make the decision of the engineer as to the proper interpretation of the contract final and conclusive. It is the province of the court to construe the agreement. *Bridge Co. v. St. Louis*, 43 Fed. Rep. 768.

"(d) But in determining the kind of material found in the several cuts, the engineers were called upon to exercise their judgment. That was a matter, as the contract in substance recites, which involved the exercise of special skill and attention as the work progressed, and for that reason the parties selected an umpire, by whose judgment they agreed to be bound. *Ranger v. Railway Co.*, 1 Eng. Ry. Cas. 1; 13 Sim. 368. The court will not undertake to revise the decision of the engineer on questions of that character, if it appears that he acted in good faith. The utmost it can do is to correct errors of classification that may have resulted from an erroneous interpretation of the contract.

"(e) Slight discrepancies in measurements made by the respective parties must also be disregarded; and even when there are discrepancies of some magnitude, the court must accept measurements made by the engineers of the railway company, unless the proof clearly shows that they are erroneous. The presumption is that all measurements made by such engineers are correct, and the burden is on the plaintiffs to overcome that presumption. *Torrence v. Amsden*, 3 McLean (U. S.), 509; *Bumpass v. Webb*, 4 Port. (Ala.) 65; *Pleasants v. Ross*, 1 Wash. (Va.) 156." *Lewis v. Chicago, &c. R. Co.*, 49 Fed. Rep. 708; 52 Am. & Eng. R. Cas. 9 n.

stated, are in the nature of liquidated damages.¹ But where the prices at which work shall be done are specifically fixed in the contract, the engineer, who is by the terms of the contract made an umpire as to all disputes between the parties, has no power to fix another or different price or measure of compensation.² And if payments are to be made according to the estimates and certificate of the engineer, if he refuses to make such estimates, or if he make *erroneous* estimates, it has been held that an action lies to recover for the work actually done, although the contract provides that all disputes between the parties shall be referred to the engineer, and that his decision shall be final.³ But in England the rule is that an action cannot be maintained at law until the engineer's certificate is obtained;⁴ and it is held that relief in such cases should be sought in a court of equity,⁵ and such also seems to be the rule in most of the States of this country;⁶ and if fairly made, such contracts will be enforced.⁷ But an unreasonable delay on the part of the engineer to make his estimates, if arising from the fault of the company or of the engineer, will entitle the contractor to bring an action at law, as in ordinary cases.⁸

If the contractor might have refused to abide by the final estimate of the engineer, yet having submitted to him his charges for

¹ *Ranger v. Great Western Ry. Co.*, 5 H. L. Cas. 72; *Philadelphia, &c. R. Co. v. Howard*, 13 How. (U. S.) 307.

² *Starkey v. De Graff*, 22 Minn. 431.

³ In *Kestler v. Indianapolis, &c. R. Co.*, 88 Ind. 460, it was held that such provisions in a contract are opposed to public policy, and are void. And this view has been adhered to in a later case, *Louisville, &c. R. Co. v. Donegan*, 111 Ind. 179; 34 Am. & Eng. R. Cas. 116; *Bauer v. Sampson Lodge*, 102 Ind. 262. See also *Starkey v. De Graff*, 22 Minn. 431.

⁴ *Parkes v. Great Western Ry. Co.*, 3 Ry. Cas. 17. For a breach of the construction contract the injured party has a right of action against the party guilty of the breach, just as in case of other contracts. For cases involving such actions, see *Brantford, &c. R. Co. v. Huffman*, 19 Sup. Ct. of Can. 336; 52 Am. & Eng. R. Cas. 12; *Mobile, &c. R. Co. v. Worthington (Ala.)*, 10 So. Rep. 839; 52 Am. & Eng. R. Cas. 12; *Middleton Furniture Co. v. Philadelphia, &c. R. Co.*, 145 Penn. St. 187; 52 Am. & Eng. R. Cas. 15.

⁵ *In re Wansbeck Ry. Co.*, L. R. 1 C. P. 269; *Nixon v. Taff Vale Ry. Co.*, 7

Hare, 136; *Waring v. Manchester Ry. Co.*, 7 Hare, 482.

⁶ *Herrick v. Vt. Central R. Co.*, 27 Vt. 673; *Vanderwerker v. Vt. Central R. Co.*, 27 Vt. 130; *Alton, &c. R. Co. v. Northcutt*, 15 Ill. 49; *Kidwell v. Baltimore, &c. R. Co.*, 11 Gratt. (Va.) 676; *Lauman v. Young*, 31 Penn. St. 306; *McMahon v. New York, &c. R. Co.*, 20 N. Y. 463; *Delaware, &c. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Mitchell v. Kavanaugh*, 38 Iowa, 286; *Eaton v. Penn., &c. Canal Co.*, 13 Ohio St. 81; *Keller v. McCauley*, 130 Penn. St. 53; 40 Am. & Eng. R. Cas. 509; *Fox v. Railroad Co.*, 3 Wall. (U. S.) 243; *Martinsburgh &c. R. Co. v. March*, 114 U. S. 549.

⁷ *Phelan v. Albany, &c. R. Co.*, 1 Lans. (N. Y.) 258; *Howard v. Allegheny Valley R. Co.*, 69 Penn. St. 489; *Condon v. South Side R. Co.*, 14 Gratt. (Va.) 302; *Faunce v. Burke*, 16 Penn. St. 478; *Hennessey v. Farrell*, 4 Cush. (Mass.) 267; *Mansfield, &c. R. Co. v. Vieder*, 17 Ohio St. 385; *Reynolds v. Caldwell*, 51 Penn. St. 298.

⁸ *Grant v. Savannah, &c. R. Co.*, 51 Ga. 348; *Atlanta, &c. R. Co. v. Mangham*, 49 Ga. 266.

the work done, and not having objected to his proceeding to make up the final estimate, the contractor is concluded by the action of the engineer;¹ but his estimates and decisions are conclusive in disputes with contractors only where such is the positive stipulation in the contract.² The provisions of a contract between a railway company and a contractor, for building a portion of its road, that the "engineer shall be the sole judge of the quality and quantity of all work herein specified, and from his decision there shall be no appeal," and that in case of alterations, "such allowances and deductions shall be made therefor as the engineer may judge fair and equitable to both parties," constitute the engineer sole umpire; and if the company furnish a suitable engineer, no recovery can be had for work done under such contract without or beyond his estimate, without the most irrefragable proof of mistake in fact, or corruption on the part of the engineer, or positive fraud in the opposite party in procuring the under-estimate. Such a stipulation does not require the estimates to be made or verified by the chief-engineer, but has reference as well to the assistant-engineer. A contract providing for monthly estimates imports an accurate measurement and final estimate for each month, and not such a one as is merely approximate or conjectural; and a court of equity has jurisdiction of a claim to be paid for a larger amount of work done under such a contract than was estimated by the engineer, where the under-estimate was occasioned either by fraud or mistake. Thus, the defendant contracted with B. to build its road, and B. sublet a portion of the work to H. Both contracts contained a provision as to the conclusiveness of the engineer's estimates. It was held that there was no privity of contract between the defendant and H., and that he could not recover against the defendant for work not estimated by the engineer, by reason only of a mistake which defendant had not connived at; and that the indebtedness of the company to B. did not constitute a fund against which the plaintiff had a claim. But it was held that had there been any connivance on the part of the company or its agents, in bringing about the under-estimates, a different rule would prevail.³ In a contract for the construction of a railroad, it was provided that the decision of a chief-engineer should be final

¹ *Kidwell v. Baltimore & Ohio R. R. Co.*, 11 Gratt. (Va.) 676.

² *Memphis, Clarksville, & Louisville R. R. Co. v. Wilcox*, 48 Penn. St. 161.

³ *Vanderwerker v. Vt. Central R. R. Co.*, 27 Vt. 130; *Herrick v. Vt. Central R. R. Co.*, 27 id. 673; *Palmer v. Clark*, 106 Mass. 376.

and conclusive, in any dispute that might arise between the parties to the agreement, relative to or touching the same: it was held that the individual who filled the office of chief-engineer when the adjudication was called for, was the proper person to decide disputes between the parties; and that one who had held the office at the time the contract was made, but who had resigned, was not empowered to adjudicate between them.¹

Where parties agree that a third person shall measure certain work, and that his measurement shall be conclusive, *such person cannot delegate his authority to some one else, and adopt the measurement as his own*; the parties will not be bound by such measurement.² Where the plaintiff agreed to perform certain work in moving the track of a railroad, "under the direction" and "to the satisfaction" of L, the city surveyor, whose certificate that the work had been so performed was to entitle the plaintiff to payment, and the plaintiff, having completed the greater part of the work, was stopped at a certain point by L, it was held that L. had power, under the contract, to give that direction, and that the plaintiff had a sufficient excuse for non-performance of the remainder of the labor; and that, therefore, it was unnecessary to procure the certificate of L. that the contract had been entirely performed, as a prerequisite to his recovery.³ In such contracts there is an implied agreement that a suitable engineer shall be employed, and the party who neglects to furnish such engineer is liable to an action, and can take no advantage of his failure.⁴ A contractor for the construction of a bridge on a railroad, having received the monthly estimates based upon a particular construction of his contract without objection, will be held to have acquiesced in that construction, and to be bound by it.⁵

¹ If the company failed to appoint a chief engineer, the parties would be at liberty to resort to the courts of law. *North Lebanon R. R. Co. v. McGrann*, 33 Penn. St. 530. Whether a stipulation in the original agreement to refer all matters of controversy that may arise connected with the contract, to an engineer of one of the parties, would be binding, is doubted in New Hampshire. *Smith v. Boston, Concord, & Montreal R. R. Co.*, 36 N. H. 458. The contract provided that alterations directed by the engineer should "be made as directed." Such alterations are within the jurisdiction of the engineer. Alterations directed did not

abrogate the contract or substitute a new one; they were within the original contract. But work done after the job had been taken off the contractor's hands by the company, was held not to have been done under the contract, and payment for it might be recovered in assumption. *O'Reilly v. Kerns*, 52 Penn. St. 214.

² *Wilson v. York, &c. R. Co.*, 11 G. & J. (Md.) 58; *Snell v. Brown*, 71 Ill. 133.

³ *Devlin v. Second Avenue R. Co.*, 44 Barb. (N. Y.) 81.

⁴ *Smith v. Boston, &c. R. Co.*, 36 N. H. 458.

⁵ *Kidwell v. Baltimore, &c. R. Co.*, 11 Gratt. (Va.) 676.

The parties are not bound by the fraudulent estimates of an engineer.¹ Under a contract by which all measurements are to be made, and the amount of labor determined, by the company's engineer, whose decision is final, the contractor is entitled to notice and the opportunity to be present; he is not concluded by measurements made *ex parte*.² A court of chancery has power to correct the mistakes of the engineer, and in construing the contract the court will use the terms employed by the parties according to their popular signification, if to apply them according to technical or scientific rules would defeat the manifest intention of the parties.³ A contract providing that the engineer of the railway company should be arbiter of all disputes under the contract will be disregarded in equity, when it appears that the engineer is a stockholder in the company, which fact was unknown to the plaintiff when the contract was made; and the award of such engineer will be set aside.⁴

SEC. 278. Abandonment of Contract: new Agreement.—Where a contract has been partly performed and has been abandoned by mutual consent, the plaintiff may recover for what has been already done under the special contract.⁵ Where, during the progress of the work, a new agreement was made, releasing the contractor from finishing his contract, and stipulating for what matters compensation should be made, but not providing for any damages for the suspension of work during the existence of the original contract, it was not error, after affirming the point of the defendants, that no such damages could be claimed, to add that the question was not material, because of the supplemental agreement, which provided for

¹ *Baltimore & Ohio R. R. Co. v. Polly*, 14 Gratt. (Va.) 447; *Same v. Laffertys*, ib. 478.

² *McMahon v. New York & Erie R. R. Co.*, 20 N. Y. 463. In this case it was held that a final estimate made by the engineer being a condition precedent to payment, and his employer having refused to have a measurement made, or those already made received by him, the contractor is not bound to call upon the engineer to make such estimate, but may recover upon other evidence of the amount of work. And the defendant having neglected to cause its engineer to make a final measurement and estimate of the work, when requested by the contractor, interest was held to be allowable from the time of such default, though the amount was not liquidated nor capable of

being ascertained by calculation merely, or by reference to ordinary market rates.

³ *Mansfield & Sandusky R. R. Co. v. Veeder & Co.*, 17 Ohio, 385.

⁴ *Milnor v. Georgia R. R. Co.*, 4 Ga. 385.

⁵ *Baltimore & Ohio R. R. Co. v. Lafferty*, 2 W. Va. 104. In an action to recover for services in building a railroad, entries in the contractor's books of prices paid to his workmen are not evidence against him of the prices he was to receive. If the question was as to the reasonable value of his services, they are admissible, because tending to show the worth of one item of his claim, that is, of the muscular power employed. *Currier v. Boston & Maine R. R. Co.*, 31 N. H. 209.

no such compensation. Though the plaintiff has been dismissed, and the work taken off his hands, the company is not released from paying for the work already done, as stipulated in the supplemental agreement, what it was fairly worth; nor can this claim be restricted to what is coming to him under the final estimates of the engineer; nor after the agreement to pay, can the company set off the expense and loss incurred in completing the unfinished work.¹

SEC. 279. **Extra Work.** — Where, under a contract to build a railway at a certain price per mile, nothing is said about side tracks and turn-outs, and the contractor has received monthly payments on monthly estimates, and has made no claim to payment for such side tracks, etc., such fact is a practical construction of the contract against the right of the contractors to claim pay for such work.² B. contracted with defendant to build its road, and plaintiff sub-contracted, in writing, with B. to build particular portions of it. By both contracts, the work was to be done to the satisfaction and acceptance of the company's engineer, and no claim was to be allowed for extra work, unless it was performed under written contracts, or orders signed by the engineer. The plaintiffs, in the execution of their contract with B., made an excavation for a bridge, agreeably to the directions of the engineer, and had left it as finished; the engineer found it necessary to have the excavation enlarged, and ordered it done. The plaintiffs made the enlargement, but no contract was made between them and the defendant with reference to it. It was held that there was no ground for implying or presuming a contract, and that the plaintiffs could not recover of the defendant therefor, as the engineer had not ordered it in writing;³ and that the fact that the company had paid similar claims to others would not affect its liability, unless such fact was known to plaintiffs, and influenced them to perform the work. The rule is not varied by the fact that, previous to doing the extra work, the contractors were assured by the local or assistant engineer, who communicated the order from his chief, that they should receive extra compensation

¹ *Memphis, Clarksville, & Louisville R. R. Co. v. Wilcox*, 48 Penn. St. 161.

² *Barker v. Troy & Rutland R. R. Co.*, 27 Vt. 766. Where a contract is silent as to the time of payment, and the parties have put a construction upon it by their acts, such construction is binding upon the parties. *Boody v. Rutland & Burlington R. R. Co.*, 3 Blatch. (U. S. C. C.) 25. Where

a contract for building an embankment was silent as to where the contractor was to get the earth, and the parties themselves gave a construction of it, they will be bound by it. *Chicago & Great Eastern R. R. Co. v. Vosburgh*, 45 Ill. 311.

³ *Vanderwerker v. Vt. Central R. R. Co.*, 27 Vt. 125; *Barker v. Troy & Rutland R. R. Co.*, 27 id. 766.

therefor, — it appearing that the assistant had no authority to make the promise for the company.¹ In a Connecticut case certain detailed estimates of the cost of the work were annexed to a contract for the construction of a railway. Shortly before the contract was made, many persons, and among them B., C., & Co., were assembled to make proposals to the railroad company for the work. These estimates were exhibited to them by the engineer of the company, who stated that they were made according to his best judgment, but were only approximate estimates; that they were given them that they might have the benefit of his judgment, and that they could go over the ground and examine for themselves. B., C., & Co. went over the ground, and were experienced and competent to judge for themselves, but did not make a thorough examination. The contract was made fairly, without fraud or mistake, and was an entire contract to do the whole work for the sum of two hundred and ninety thousand dollars. A portion of the work proved to be much more expensive than was estimated, from a large excess of rock excavation above the quantity estimated. It was held that B., C., & Co. understandingly took the risk of the work, and were not entitled to any allowance beyond the contract price. By the terms of a contract, certain depot buildings were to be erected by the contractors “after such plans and of such dimensions as might be adopted by the engineer.” The engineer required certain of them to be built of somewhat larger dimensions than he had stated at the time of the signing of the contract that he should require, and the expense of their erection was thereby increased above the sum named in the estimates. It was held that the contractors were not entitled to an allowance beyond the contract price for the increased expense.² Where a contract for the excavation and preparation of a road-bed provided that the contractor should be paid a certain price per yard for every cubic yard of earth, and extra compensation for rock excavations, it was held that he was not entitled to extra compensation for excavating hardpan. Where extra compensation is claimed in a *quantum meruit*, where there is a written contract, the party claiming it must show that the work was more than was required under the contract;³ and a promise by the president of the company, conceding the company to be bound by it, to compensate a

¹ *Vanderwerker v. Vt. Central R. R. Co.*, id. 125.

² *Cannon v. Wildman*, 28 Conn. 472.

³ *Nesbitt v. Louisville, Cincinnati, & Charleston R. R. Co.*, 2 Spears (S. C.), 697.

contractor for excavating hardpan, is not binding as a legal contract, where the contractor is bound by his written contract to excavate that substance.¹ In another case the plaintiff having contracted to procure the right of way, and build the defendant's road at an agreed price per mile, and not having paid the land-owner's damages in all cases, it was held that the defendant, being liable directly to the land-owners, might retain the amount of that liability from the sum which by the contract would be due to the plaintiff.² So where it was stipulated, in a contract for building a railroad, that if the aggregate amount of all material encountered in constructing it was increased by the definite location over the preliminary estimate, an allowance should be made, it was held that an averment that the amount of material encountered was increased, etc., was in effect the same as the amount of all material, and that the stipulation did not apply to an increase of the aggregate of each kind of material, but that the aggregate of all kinds must be increased; and where the company agrees to furnish the materials, there is an implied contract that the materials shall be seasonably furnished.³

SEC. 280. Entire Contract — If a contractor agrees with a railroad company to grade a section of its road, and do all work necessary to make the road ready for the cross-ties and iron, and to receive a fixed sum for the work, to be paid from time to time as the work progresses, at the prices fixed and estimates of work done made by an engineer, — the contract is entire, and the provision for payments from time to time as the work progresses does not make it severable;⁴ and even where the by-laws of the defendant provided that interest should be allowed on all instalments for work until the road

¹ Where a builder undertakes to construct a building according to a plan, which is afterward changed by agreement of the parties, so as to require extra work and materials, and no agreement was made in reference to the price of extra work, it would be inferred that the price agreed in the original contract would govern in determining the compensation. *Chicago & Gt. Eastern R. R. Co. v. Vosburgh*, 45 Ill. 311.

² *Barker v. Troy & Rutland R. R. Co.*, 27 Vt. 766.

³ *Smith v. Boston, Concord, & Montreal R. R. Co.*, 36 N. H. 453. Plaintiffs

contracted to build certain abutments, and the contract specified that a certain kind of stone might be used. The stone agreed upon was used, and after the completion of the work, a defect was discovered in it, but it did not appear whether the defect was owing to the quality of the stone or to the badness of the workmanship. It was held that the plaintiffs were entitled to recover the contract price, unless it was shown that the defect was in the workmanship. *Vanderwerker v. Vt. Central R. R. Co.*, 27 Vt. 130.

⁴ *Cox v. Western Pacific R. R. Co.*, 44 Cal. 18.

was completed and in running order, it was held that the defendant could not recover of the plaintiffs, who had contracted to construct and complete the road by a specified time, the interest which accrued upon the instalments between that time and the time when the road was actually completed.¹

SEC. 281. **Modification of Contract.** — A written contract under seal may be so changed and modified by the parties as to reduce the whole to parol. Thus, a written contract for the grading and masonry of a railroad between designated *termini* is not so altered and modified by a change of route between such *termini*, as to enable the contractors to recover for the work done, upon a *quantum meruit*, irrespective of the prices designated in the agreement. But where payments were made in such a case upon monthly estimates, upon the prices specified in the contract, and were receipted for as under the contract, the parties were held to have waived the consequences of a previous change. So where there have been considerable changes and modifications, without any intention to abandon or rescind the written agreement, *assumpsit* may be sustained for the work performed, making the sealed agreement the basis of compensation.² Where A. entered into a contract with the defendants to do certain work in excavating for a railway, and after commencing work, unexpectedly encountered very difficult material, and gave notice to the defendants that he could not do the work under the contract, and quit work, and afterwards the defendants agreed to pay him a reasonable compensation for his labor, — it was held that defendants were liable under the new contract.³ Where the contract provides that upon receiving the full amount of the final estimate, made out agreeably to the terms of the contract, the contractor shall give a release under seal from all claims or demands growing out of such contract, the giving of such a release is a condition precedent to a recovery, if the final estimate is not fraudulent.⁴

SEC. 282. **Payments in Stock.** — When a contract is entered into for work at a certain price, with a stipulation that the same is to be paid for in specific articles at a certain rate or price, the debtor has an election to deliver the articles, or pay the specified amount of money, if such right of election is expressed or fairly to be implied.

¹ *Barker v. Troy & Rutland R. R. Co.*, 27 Vt. 766.

³ *Hart v. Lăuman*, 29 Barb. (N.Y.) 410.

² *McGrann v. North Lebanon R. R. Co.*, 29 Penn. St. 82.

⁴ *Baltimore & Ohio R. R. Co. v. Lafertys*, 14 Gratt. (Va.) 478, 1858; *Baltimore, &c. R. R. Co. v. Polly*, id. 447.

If such election is not expressed, and the subject matter of the contract or *res gestæ* indicate that no such right of election was contemplated by the parties, then the general rules of law relating to executory sales are applicable, and the contract is a single and imperative promise to deliver the specific articles.¹ Thus, a railroad contractor agreed with the company to construct and equip its entire road for one million dollars, of which two hundred and fifty thousand dollars was to be paid in cash and cash assets, and the balance in the bonds and stock of the company, the price named being more than twice the cash value of the work. The contract provided that payments should be made on monthly estimates, and in such of the said descriptions of payment as the contractor deemed would best subserve his purpose in doing the work; but the contract fixed no time for the completion of the work. It also provided that both the parties should aid in converting said assets, bonds, and stock into means for carrying on the work, and that the contractor need not carry it on faster than such means would serve. The contractor performed work under the contract to the nominal amount of one hundred and seventeen thousand dollars, which, at his request, was mostly paid him in the cash assets, and then, the charter of the company having expired by its own limitation, the work was suspended by mutual consent, and the road abandoned, its bonds and stock thus becoming worthless. It was held that the contractor was bound to account to the company for all actual profits realized from the work.²

¹ *Cleveland & Pittsburgh R. R. Co. v. Kelley*, 5 Ohio St. 180.

² *Four Mile Valley R. R. Co. v. Bailey*, 18 Ohio St. 208. If the contractor performs extra work, he is entitled to recover for that, in money, upon an implied promise, notwithstanding by his contract he was to accept part of his pay in stock for all work done under the contract. In the case of *Cleveland, &c. R. R. Co. v. Kelley*, 5 Ohio St. 180, it is held that where one-fourth of the amount due the contractors is to be taken in the stock of the company, and the company refuses to deliver the stock on request, they are only liable for the market value of the stock at the time it should have been delivered. The court profess to base their opinion upon the ground that in contracts of this character there is not understood to be any election

reserved by the company to pay either in their stock, or in money, but that it is an absolute undertaking to deliver so much stock as shall, at its par value, be equal to one-fourth the amount due the contractor. It does not readily occur to us how this relieves the question from the apparent violation of principle, in allowing the company to refuse to give certificates of their own stock which they have contracted to do, and at the same time pay less than its par value. It is, in ordinary cases, equitable, no doubt, and always where the refusal is upon the ground that nothing is due the contractor. The point of the decision is thus summed up by SWAN, J. "For these reasons we are of the opinion that no such election was contemplated by either of the parties when the contract was entered into; that the law

In a Vermont case the plaintiffs, for constructing a railway, were to receive in payment a certain portion of the defendant's stock. Upon finishing the work, they demanded their pay, but the defendant disputed the performance of the contract, and refused to deliver the stock. At that time, the market price of the stock was 33 per cent

relating to trade notes and contracts of a like kind, has no application to the agreement between these parties; that it was an exchange of work for stock, in which monetary terms were necessarily used, not for the purpose of expressing real values, but as the only mode of expressing quantities and proportions; that the fourth to be taken in stock was not a money indebtedness, but a stock indebtedness; and, consequently, that the company could derive no benefit from the increased value of the stock, and could suffer no loss by its depreciation; the damages which the contractors suffered from the non-delivery of the stock being its market value." See also *Boody v. Rut. & Bur. R. R. Co.*, 24 Vt. 660. In this case it was held that the defendants having given their creditors a mortgage upon their road, after the contract with the plaintiff, did not excuse him from accepting the stipulated proportion of the payments in stock. Nor can the contractors, in such case, refuse to receive the stock because the legislature, in the mean time, altered the charter of the company, by which the capital stock and debt of the company were increased; nor because the company voted not to pay interest on the stock, it not appearing that the value of the stock had been affected by either. *Moore v. Hudson River R. R. Co.*, 12 Barb. (N. Y.) 156. Where no time of payment is specified in terms in the written contract between the parties for the construction of a portion of a railway, it was held that looking to the contract alone the contractor could not call for payment either of the cash or stock portion of the contract, until a complete performance of the contract on his part. Or, upon the most favorable construction, until some distinct portion of the work, for which the contract fixed a specific price, was accomplished. In regard to the stock portion of the payments, a special demand was necessary before the contractor could maintain an action for it. *Boody*

v. Rut. & Bur. R. R. Co., 24 Vt. 660. And where a company, in settlement with a contractor, agreed to pay him a certain amount in stock, or the bonds of the company, at his election, the company retaining the same as security for certain liabilities on account of the contractor, and gave the contractor a certificate of such stock, with an agreement indorsed to exchange it for bonds at his election, and the certificates were then returned to them as their indemnity, — it was held that the company were bound to deliver the bonds, notwithstanding the treasurer had entered the shares in the books of the company as the property of the contractor, and they had in consequence been sold upon execution against him. *Jones v. Portsmouth, &c. R. R. Co.*, 32 N. H. 544. A contractor who agrees to take a portion of his pay in the bonds of the company, has no such interest in any question, in regard to their validity, as will prevent a court of equity from enjoining those of a county which had been delivered to the company without a proper compliance with the conditions of the statute under which the subscription was made, the contractor having had knowledge of the facts from the first. *Mercer County v. Pittsburgh, &c. R. R. Co.*, 27 Penn. St. 389. But where it appeared that the company were accustomed to make monthly payments to their contractors, upon the estimates of the engineer, at the end of each month, and that they had so dealt with the plaintiff, it was held that this must be considered the rule of payment under the contract, established by mutual consent and binding upon the parties. *Merrill v. Ithaca, &c. R. R. Co.*, 16 Wend. (N. Y.) 586. A contract to build "riprap" wall for fifty cents a cubic yard, in the absence of proof of any general usage or uniform custom which could control the mode of measurement, was held to imply payment by the cubic yard after the wall was constructed. *Wood v. Vt. Central R. R. Co.*, 24 Vt. 608.

of its par value. It being determined that the plaintiffs were entitled to recover a sum less than the whole stipulated price, not upon a strict and literal performance of their contract, but on equitable grounds, it was held that, upon similar grounds, the amount of their recovery upon that portion of their contract payable in stock should be limited to the market value of the stock at the time of their demand.¹ A provision that the contractor should subscribe for and take an amount of the capital stock of the railroad corporation equal to one-fourth of the amount received for work under the contract is construed as an independent covenant, and as not requiring the contractor to receive payment in stock.² Where a contract provided that a railway contractor should be paid for his work in monthly instalments, twenty-five per cent being payable in stock, and he was, by the wrongful act of the railway company, prevented from completing his work, it was held that the contract for stock was executory, and that the contractor was entitled to its value, he having no title to the stock.³ Where it was stipulated that payment should be made for building a railroad, partly in money and partly in stock, the payment for extra work may be recovered in money.⁴

SEC. 283. **Subcontractors.** — Where a person contracts with a railroad company to grade and construct a division of the road, the company to retain a certain percentage as a security for the completion of the entire work, and the contractor sublets a portion of the division to another, and it is agreed between them that the contractor shall retain a certain percentage as a security for the completion of the subcontract, and the subcontractor completes his portion, and it is received, — he may recover the sum agreed upon, including the percentage of the contractor, although the latter may have failed to entitle himself to his percentage as against the railroad company.⁵ But a subcontractor cannot pass by his immediate employer, and sue the principal or proprietor of the work.⁶ Where a complaint charged that a railroad company promised to pay for goods which should be furnished to a subcontractor, an answer that the railroad company was not indebted to the subcontractor was

¹ *Barker v. Troy & Rutland R. R. Co.*, 27 Vt. 766

² *McMahon v. New York & Erie R. R. Co.*, 20 N. Y. 463.

³ *Myers v. New York & Cumberland R. R. Co.*, 2 Curt. (U. S. C. C.) 28.

⁴ *Smith v. Boston, Concord, & Montreal R. R. Co.*, 36 N. H. 458.

⁵ *Blair v. Corby*, 29 Mo. 480.

⁶ *Lake Erie, Wabash, & St. Louis R. R. Co. v. Eckler*, 13 Ind. 67.

held no defence on demurrer.¹ A railroad company is not liable to one employed by a subcontractor for work done in the construction of its road.²

The company is not liable for the negligence of subcontractors in building its road. Thus, the defendant contracted with F. & Co., for grading its railway. With the consent of the company, F. & Co. sublet the contract for excavating rock to S. Before the contract was made with F. & Co., it was understood that the blasting was to be done with nitroglycerine; and a magazine for storing the nitroglycerine was erected on the land of the company under the direction of its engineer. S., without the knowledge or consent of the railway company, stored also the nitroglycerine of a third party in the magazine, where it was kept for sale. One of S.'s employes, in taking out some of the nitroglycerine, belonging to the third person, negligently caused it to explode, whereby one C. was killed. It was held that the railway company was not liable for the injury, it not being at fault.³

In a Vermont case, the defendant contracted with P. & E. to construct certain sections of its railway; and they sub-contracted with C. to erect certain abutments thereon. A servant of C., in drawing stone for such abutments, left one in the highway, by reason of which one P. was injured, and recovered of the plaintiff for the damage sustained by him. In an action by the town to recover of the defendant the damages to which the plaintiff was subjected, it was held that the defendant had no control over the servant of C., and that no privity existed between them and that therefore the defendant was not liable.⁴ But where the injury arises from an act which must have been contemplated, the company is liable. Thus, a railroad corporation made a contract with certain persons that the latter should build a certain portion of the railroad. While the contractors were at work upon the road, in pursuance of the contract, some rocks were blasted and a stone was thrown upon the plaintiff, causing him serious injury. It was held that the plaintiff might maintain an action against the corporation to recover damages for the injury he had sustained.⁵

¹ Chicago, Cincinnati, & Louisville R. R. Co. v. West, 37 Ind. 211.

² Indianapolis, &c. R. R. Co. v. O'Reilly, 38 Ind. 140; Marks v. Indianapolis, &c. R. R. Co., 38 id. 440.

³ Cuff v. Newark & New York R. R. Co., 35 N. J. L. 17.

⁴ Pawlet v. Rutland, &c. R. R. Co., 28 Vt. 297.

⁵ Stone v. Cheshire R. R. Co., 19 N. H. 427.

SEC. 284. Liability of Company for Acts of Contractors and their Servants. — Where work is let out to be performed by a person upon his own responsibility, and who is not subject to the control of the person with whom the contract is made as to the manner in which the work shall be performed, the employer is not responsible for injuries inflicted by such contractor in performing the work,¹ unless the injury is one which might have been anticipated as a probable consequence of the work contracted for if peculiar care is not observed and the injury results from the lack of such care;² or unless

¹ *Carter v. Berlin Mills Co.*, 58 N. H. 52; *Wright v. Holbrook*, 52 N. H. 120; *Forsyth v. Hooper*, 11 Allen (Mass.), 419; *Brackett v. Lubke*, 4 id. 138; *Hilliard v. Richardson*, 3 Gray (Mass.), 349; *Linton v. Smith*, 8 id. 147; *Lowell v. Boston, &c. R. Co.*, 23 Pick. (Mass.) 24; *Miller v. Minnesota, &c. R. Co.*, 76 Iowa, 665; 38 Am. & Eng. R. Cas. 234; *Vt. Central R. Co. v. Baxter*, 22 Vt. 366; *Blake v. Ferris*, 5 N. Y. 48; *Young v. Railroad Co.*, 30 Barb. (N. Y.) 229; *Gaudier v. Carmack*, 2 E. D. S. (N. Y.) 254; *Slater v. Mersereau*, 64 N. Y. 138; *West v. St. Louis, &c. R. Co.*, 63 Ill. 545; *Camp v. Church Wardens*, 7 La. An. 321; *Cunningham v. Internat. R. Co.*, 51 Tex. 503; *Eaton v. European, &c. R. Co.*, 59 Me. 520; *Kansas Cent. R. Co. v. Fitzsimmons*, 18 Kan. 34; *Painter v. Pittsburgh*, 46 Penn. St. 213; *Carman v. Steubenville, &c. R. Co.*, 4 Ohio St. 399; *Morgan v. Bowman*, 22 Mo. 538; *Hilliard v. Richardson*, 3 Gray (Mass.), 349; *Hunt v. Penn. R. Co.*, 51 Penn. St. 475; *Schular v. Hudson River R. Co.*, 38 Barb. (N. Y.) 653; *Burke v. Norwich, &c. R. Co.*, 34 Conn. 474; *Weynant v. New York, &c. R. Co.*, 3 Duer (N. Y.), 360; *Hughes v. Cincinnati, &c. R. Co.*, 39 Ohio St. 461; 15 Am. & Eng. R. Cas. 100; *Hobbit v. London, &c. Ry. Co.*, 4 Exchq. 256; *Wood's Law of Master and Servant*, 602 *et seq.* And it is immaterial that the defendant lends some of his own men to the contractor, if they are acting substantially as the contractor's servants at the time of the injury. *Murray v. Currie*, L. R. 6 C. P. 24. But where the defendants, who

were occupiers of a bonded warehouse, employed a master-porter for the purpose of removing some barrels of flour from their warehouse and lowering them into a cart, and the master-porter used his own tackle, and brought and paid his own men, and, through the negligence, of the men or the insufficiency of the tackle, one of the barrels slipped from the tackle whilst it was being lowered into the cart, and fell upon the plaintiff, it was held that the defendants were responsible for the injury. *Randleson v. Murray*, 8 Ad. & E. 109. Here the work, it has been observed, was in effect done by the defendants themselves at their own warehouse; the workmen, though engaged by the master-porter, being under the control of the defendants, and acting substantially as their servants. — *DENMAN, C. J.*, in *Milligan v. Wedge*, 12 Ad. & E. 741, — and it is upon this ground alone, it seems, that the above case can be supported. *Murphy v. Caralli*, 34 Law J. Exch. 14. After the contract has been properly completed, and the works handed over to the commissioners or persons who have employed the contractor, the liability of the contractor ceases, and for any subsequent injury caused by the natural result of the work the contractor has completed, the commissioners and not the contractor will be responsible; as, where the defendant under a contract with the Metropolitan Board of Works opened a highway for the purpose of constructing a sewer thereunder, and, after finishing the sewer, properly filled in and made good the road, which, however, subsequently

² *Ohio Southern R. Co. v. Morey*, 47 Ohio St. 207; 43 Am. & Eng. R. Cas. 97 (excavation in highway). See also *Storrs*

v. Utica, 17 N. Y. 108; *Robbins v. Chicago*, 4 Wall. (U. S.) 657.

the work is of such a character as must necessarily result in a nuisance.¹ And the fact that the person for whom the work is done, himself or by an agent, superintends the work, or directs as to *what* shall be done, provided he does not retain control over the *method* and *means* of its accomplishment, does not render the former liable. Thus, where a person, in erecting a building upon a public street, lets out the stone work to be done by a contractor, *under the direction and to the satisfaction of a superintendent employed by him*, this reservation is not such a reservation of control over the *method* and *instruments* of accomplishing the work as renders him liable for an injury resulting from the negligent execution of the work by the contractor.² Nor does the circumstance that the employer reserves the right to discharge an incompetent workman,³ or to terminate the

subsidized, which is the natural result of such opening the road and loosening the materials of which it is composed, and the plaintiff's horse stumbled into one of the holes so caused and was injured. *Hyams v. Webster*, L. R. 2 Q. B. 264; 4 id. 138; *Bartlett v. Baker*, 84 Law J. Exch. 8. Where work which can lawfully be done without injury to others is placed in the hands of a builder or contractor, who selects his own workmen and servants for the performance of the work, and directs the manner of doing it, exercising his own judgment in the matter, and having the immediate control over the workmen, such contractor, and not the person who employs him, is the person responsible for injuries to strangers from the negligent execution of the work. *Steel v. S. E. Ry. Co.*, 16 C. B. 550; *Gray v. Pullen*, 5 B. & S. 790, 981. If a person orders his wall or his house to be pulled down, he is not responsible for the negligence of the workmen employed by the builders for the purpose. *Butler v. Hunter*, 7 H. & N. 826. And if the work is done under the immediate control and superintendence of a sub-contractor, then the latter is the party responsible for any wrong done by the workmen he employs in the execution of the work. It must not be understood, however, that a contractor cannot become liable for the negligence of his sub-contractor. If the contractor personally interferes and gives directions to the latter or to the workmen employed by him he

would be responsible for the orders given, but he cannot be charged simply on the ground of his filling the character of contractor. *Overton v. Freeman*, 11 C. B. 873; 21 Law J. C. P. 52. *Blake v. Thirst*, *ante*. Where a builder had contracted with the committee of a club to make alterations and improvements in the club-house, and prepare and fix the necessary gas-fittings, and the builder made a sub-contract with a gas-fitter to do this latter portion of the work, and the gas-fitter's workmen allowed the gas to escape and cause an explosion, the gas-fitter and not the builder was held liable for the injury. *Rapson v. Cubitt*, 9 M. & W. 710.

¹ *Clark v. Fry*, 8 Ohio St. 358; *Carman v. Steubenville, &c. R. R. Co.*, 4 id. 399; *Dygert v. Schenck*, 23 Wend. (N. Y.) 446; *Callahan v. Burlington, &c. R. R. Co.*, 23 Iowa, 562; *Gilbert v. Halpin*, 3 Ir. Jur. (N. s.) 306.

² *Chambers v. Ohio Life Ins. & Trust Co.*, 1 Dis. (Ohio) 327; *Forsyth v. Hooper*, 11 Allen (Mass.), 419; *Hunt v. Penn. R. R. Co.*, 51 Penn. St. 475. But see *Carman v. Steubenville, &c. R. R. Co.*, 4 Ohio St. 399; *Lerandat v. Saisse*, L. R. 1 C. P. 152; *New Orleans, &c. R. R. Co. v. Hanning*, 15 Wall. (U. S.) 649; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492.

³ *Hobbitt v. London, &c. Ry. Co.*, 4 Exchq. 254; *Cuff v. Newark, &c. R. R. Co.*, 35 N. J. L. 17.

contract if not satisfactorily performed,¹ render the employer liable for the contractor's acts, nor the circumstance that he is by the contract authorized to withhold payments on account of such acts.² If, however, the employer reserves control or supervision over the mode and instrumentalities for doing the work, — as, if it is to be done according to the direction of a person named, or according to the direction of the employer himself,³ — or if he, in any manner, reserves such control over the work, by himself or his agents, as gives him authority to direct *how* the work shall be done, during its progress, so that the contractor and his workmen can be said to stand in the relation of servants to him, he is liable for their negligence.⁴ In a late case before the Supreme Court of Maine,⁵ the defendant company employed a contractor to construct, under the general supervision of the chief engineer of the company, a portion of its road; and the subcontractors and their employes committed various trespasses and injuries on the lands of the plaintiff. It was held that the company not having directed the acts complained of, nor having any control over the persons who committed them, and the injuries not being the natural result of the work contracted to be done, the plaintiff could not recover of the company, — notwithstanding the statute provided that the company should be liable "for trespasses and injuries to lands and buildings adjoining or in the vicinity of its road, committed by a person in its employ or occasioned by its order." The statutory provision does not embrace the acts of contractors.

The fact that the employer reserves the right to change the plan of doing the work⁶; or to discharge any of the contractor's men⁷; or stipulates that the work shall be done to his satisfaction, or to that of an agent employed by him,⁸ — does not affect the question.

¹ *Wray v. Evans*, 80 Penn. St. 102; *Schular v. Hudson River R. R. Co.*, 38 Barb. (N. Y.) 653.

² *Tibbett v. Knox, &c. R. R. Co.*, 62 Me. 437.

³ *Lowell v. Boston & Lowell R. R. Co.*, 23 Pick. (Mass.) 24. It is proper to say that the general doctrine of this case, to the extent that an employer is equally liable whether the acts were done by a contractor or his own servants, predicated upon the doctrine of *Bush v. Steinman*, 1 B. & P. 404, has, like the doctrine of the case upon which it is predicated, ceased to

be regarded as good law either in Massachusetts or elsewhere. *Water Co. v. Ware*, 16 Wall. (U. S.) 566; *Schwartz v. Gilmore*, 45 Ill. 455.

⁴ *Allen v. Hayward*, 7 Q. B. 960; *St. Paul v. Seitz*, 3 Minn. 297; *Cincinnati v. Stone*, 5 Ohio St. 38; *Pack v. Mayor*, 8 N. Y. 222; *Painter v. Pittsburgh*, 46 Penn. St. 213.

⁵ *Eaton v. European, &c. R. Co.*, 59 Me. 520; 8 Am. Rep. 430.

⁶ *Pack v. Mayor*, 8 N. Y. 222.

⁷ *Reedie v. Ry. Co.*, 4 Exch. 244.

⁸ *Allen v. Willard*, 57 Penn. St. 374; *Kelly v. Mayor*, 11 N. Y. 432.

A partial reservation of authority or control in certain respects does not transform the contractor into a mere servant. If, in fact, the contract places the contractor in an independent relation, and he reserves *general* control over the work, as to the manner and method of its execution, the fact that the employer reserves the right to prescribe *what* shall be done, but not *how* it shall be done, or *who* shall do it, does not divest him of the character of a contractor.¹ The simple test is, *who has the general control over the work?*² — *who has the right to direct what shall be done, and how to do it?* And if the person employed reserves this power to himself, his relation to the employer is independent, and he is a contractor; but if it is reserved to the employer or his agents, the relation is that of master and servant.³ The contract being to do a certain piece of work, the mode of payment does not affect the relation.

¹ *Allen v. Willard*, 57 Penn. St. 374; *Hunt v. Penn. R. Co.*, 51 Penn. St. 475; *Kelly v. Mayor*, 11 N. Y. 432; *Pack v. Mayor*, 8 N. Y. 222; *Schwartz v. Gilmore*, 45 Ill. 455, may seem opposed to this doctrine, but it is not so in fact. In that case the defendant not only reserved the right to change the plans, but also reserved to his architect general control over the work, and by the terms of the contract he was declared superintendent thereof. Thus the reservation of control went to all the details of the work, and the court held that the contractor and his servants must be regarded as servants of the defendant.

² In *Blake v. Thirst*, 2 H. & C. 20, the defendant, a builder, contracted in writing with land commissioners to make a sewer. He verbally underlet to N. the excavation and brick work at a fixed price per yard, including fencing, lighting and watching, the defendant supplying the bricks in his own carts, and removing the surplus clay. N. employed his own men, but the defendant's name as contractor was over the door, and he testified that in the work had not been done to suit him he should have dismissed N. In consequence of N.'s neglect to provide a sufficient light, the plaintiff fell into an unfenced trench and was injured. After the injury N. put up a fence and a light. The defendant was held liable, — *BRAMWELL, B.*, remarking: "The question is whether the defendant had the right to

control the thing done here? I think he had. Suppose the defendant had entered into two contracts for sub-letting; one to dig the hole and the other to light and watch, — he would surely be liable. It does not make any difference that the whole was provided for under one contract."

³ *Brackett v. Lubke*, 4 Allen (Mass.), 419; *Kelly v. Mayor*, 11 N. Y. 432; *Sadler v. Henlock*, 4 El. & Bl. 570; *Forsyth v. Hooper*, 11 Allen (Mass.), 419; *Schwartz v. Gilmore*, 45 Ill. 455. In *Kelly v. Mayor*, 11 N. Y. 432, the defendant entered into a contract with one John Quin to grade Seventy-first street, New York. By the terms of the contract "the whole work was to be done under the direction and to the entire satisfaction of the commissioners of repairs and supplies, the superintendent of roads, and the surveyor having charge of the work." It was held that this reservation did not change the *status* of the parties from that of contractor and contractee to that of master and servant. "The object of the clause relied upon," said *SELDEN, J.*, "was not to give the commissioner of repairs and the officers named the right to interfere with the workmen, and direct them in detail *how* they should proceed, but to enable them to see that every part of the work was satisfactorily completed. It authorized them to prescribe *what* was to be done, but not *how* it was to be done,

When the work is, of itself, in any of its details, unlawful, or necessarily results in the creation of a nuisance, the employer having the power to abate it, and it being his duty to do so, he is liable if an injury results from a nuisance created by the contractor.¹ So, too, he is liable if he retains control over the method and means of doing the work. Thus, where the defendant city let a contract for re-paving its streets, but reserved entire control over the *manner* of doing the work, it was held that the relation of master and servant existed, and that the defendant was liable for injuries resulting from the negligent or improper execution of the work;² and the same is also the rule if he interferes and directs *how* the work shall be done, and injury results to others while his orders are being executed.³ "When," says APPLETON, J.,⁴ "the contract is to do an act in itself lawful, it is presumed it is to be done in a lawful manner. Unless, therefore, the relation of master and servant exists, the party contracting is not responsible for the negligent or tortious acts of the person with whom the contract is made, especially if those acts are outside of the contract. If the injury was the natural result of work contracted to be done, and it could not be accomplished without causing the injury, the person contracting for doing it would be held responsible." If the company can be said to have co-operated in the act which produces the injury, it is liable; and this is always the case when the act must necessarily be productive of a nuisance.⁵ In all cases it will be presumed that the act was

nor *who* should do it." In *Paek v. Mayor*, 8 N. Y. 222, the defendant city of New York employed a person to grade a street for it. The contract provided that the contractor should conform the work to such further directions as the corporation or its officers might give from time to time. The plaintiff sustained injuries from the negligence of the contractor's workmen. The court held that the reservation of this authority by the city was not such a reservation of control over the *manner* of performing the work as rendered the contractor and his workmen servants of the corporation; that an authority reserved by the contractee as to the *results* of the work to be done, the contractor still reserving control over the *method* of doing it, does not change the relation from that of contractee to master.

¹ *Clark v. Fry*, 8 Ohio St. 358; *Carman v. Steubenville, &c. R. Co.*, 4 Ohio St. 399; *Dygart v. Schenck*, 23 Wend. (N. Y.) 446; *Vanderpool v. Husson*, 28 Barb. (N. Y.) 196; *Matheny v. Wolfs*, 2 Duv. (Ky.) 137; *Wood's Master and Servant*, 606.

² *Cincinnati v. Stone*, 5 Ohio St. 38.

³ *Heffernan v. Benkart*, 1 Robt. (N. Y.) 432.

⁴ *Eaton v. European, &c. R. Co.*, 59 Me. 520; 8 Am. Rep. 430.

⁵ *Houston, &c. R. R. Co. v. Meador*, 50 Tex. 77; *Robinson v. Webb*, 81 Bush (Ky.), 464; *Ellis v. Sheffield Gas Co.*, 2 El. & Bl. 767; *Peachey v. Rowland*, 13 C. B. 867; *Habbit v. London, &c. Ry. Co.*, 4 Exchq. 454; *King v. N. Y. Central R. R. Co.*, 66 N. Y. 181; *Congreve v. Morgan*, 5 Duer (N. Y.), 495.

to be done in a lawful manner, and with proper care and skill.¹

¹ In *Reedie v. London, &c. Ry. Co.*, 4 Exch. 244, the defendant let to a contractor the work of building a bridge over a highway, and by the carelessness of the contractor's servants a brick was dropped from the work, and falling upon the plaintiff's husband, who was lawfully passing along the highway, killed him, and the court held that the defendants were not liable, even though they reserved the right to dismiss any of the contractor's workmen for incompetence. In that case it must have been well understood by the parties that, unless the work was carefully executed, injury might result to persons passing along the highway, yet the court held that the contractee was not liable. In *Butler v. Hunter*, 7 H. & N. 826, the defendant employed an architect to repair his house. It became necessary to take down and rebuild the front of the house, and the work was let to a builder. The plaintiff was the owner of the adjoining premises, between which and the defendant's house there was a party-wall, fourteen inches thick, and in front of the defendant's house what is called a brest summer, one end of which was inserted into the party-wall about six inches. In removing the front of the defendant's house the contractor's workmen removed the brest summer, and not having shored up the plaintiff's house, the front wall of the house fell, and he sustained considerable damage. It appeared that the work might have been done with safety if the wall had been shored up, which was the ordinary and usual precaution adopted in such cases, and the court held that the defendant could not be held chargeable. "I think," said POLLOCK, C. B., "that, as a matter of fact, if a person gives an order to a tradesman to do some work, he means him to do it in the ordinary and tradesmanlike way;" and the employer has a right to presume that he will do it in that way; and if he is guilty of no negligence in the selection of a contractor, he cannot be held chargeable because he did not personally see to it that the work was so done. In this case the position was taken and ably urged by the plaintiff's counsel that inasmuch as injury might

result from a careless execution of the work, the defendant was personally bound to see to it that such precautions were taken as to prevent it; but the court repudiated the doctrine, and held expressly that this duty was only imposed when the injury was consequent upon doing the work in the ordinary mode; and such is the uniform rule adopted by the courts both of this country and England. *Ellis v. Sheffield Gas Co.*, 2 E. & B. 767; *Knight v. Fox*, 5 Exch. 721. In *Hole v. Sittingbourne, &c. Ry. Co.*, 6 H. & N. 488, the defendant was authorized to construct a drawbridge across a navigable stream. The act of Parliament authorizing the construction of the bridge provided that it should not be lawful to detain any vessel navigating the river for a longer time than was sufficient to enable any carriages, animals or passengers, ready to traverse, to cross the bridge, and for opening it to admit such vessel. The defendants employed a contractor to construct the bridge, and by some defect in the construction of the draw the bridge could not be opened, and the plaintiff's vessel was thereby prevented from navigating the river, and the court held that the defendants were liable. In this case the power to do the act was derived from legislative authority, and the right was circumscribed with certain special restrictions which the defendants were absolutely bound to conform to, or the work became a public nuisance. The court very properly held that the defendants were bound absolutely to comply with the terms of the act conferring authority upon them to construct the bridge, and that they could not shirk responsibility for a failure in that respect by contracting with another to do the work for them. The duty upon them was absolute, and they were bound at their peril to conform to it. POLLOCK, C. B., said: "Where a person is authorized by act of Parliament or bound by contract to do particular work, he cannot avoid responsibility by contracting with another person to do that work. In *Ellis v. Sheffield Gas Co.*, ante, Lord CAMPBELL said: 'It is a proposition absolutely untenable that in no case can a man be responsible

For acts negligently or unskilfully done, it cannot be held chargeable.¹

for the act of a person with whom he has made a contract. *I am clearly of the opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing, as if he did it himself.*' Here, the contractor was employed to make a bridge, and he did make a bridge which obstructed navigation. . . . *When the act complained of is purely collateral and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act; the remedy is against the person who did it.* . . . But when the contractor to do a particular act *the doing of which produces mischief*, another doctrine applies. Here the legislature empowered the company to build the bridge; in building that bridge the contractor created an obstruction to the navigation, and for *that* the company are liable. I suggested in the course of the argument that where a man employs a contractor to build a house, who builds it so as to darken another person's windows, the remedy is not against the builder, but against the owner of the house. It may be that the same principle applies to cases where a man is employed by another to do an act *which it is the duty of the latter to do*. In such cases it is the duty of the owner of the soil to inquire what is in the course of being done — to know what is the plan — to see that the materials are good, and to take care that no mischief ensues. [See *Butler v. Hunter*, *ante*, decided a year later, in which the same learned judge laid down the doctrine that the contractor having committed the work to a tradesman is not bound to inquire *how* he intends to do or is in fact doing the work. But it will be noticed that in the case suggested, *supra*, the work would necessarily result in a nuisance if the duty obligatory upon the contractor was not observed.] So here, it was the duty of the company to see *how* the contractor was about to construct the bridge. They ought to have taken care to ascertain what he was about to do, what materials he would use, *and to have seen that the specification and materials were such as would*

insure the construction of a proper and efficient bridge. But I do not rest my judgment on that ground, but simply on this, *that there is a distinction between mischief that is collateral and that which directly results from the act which the contractor agreed and was authorized to do.*" *Steel v. South-Eastern Ry. Co.*, 16 C. B. 553; *Allen v. Hayward*, 7 Q. B. 960.

¹ *Clark v. Vt., &c. R. R. Co.*, 28 Vt. 103; *Eaton v. European, &c. R. R. Co.*, 59 Me. 420; *McCafferty v. Spuyten Duyvil, &c. R. R. Co.*, 61 N. Y. 178; *Central, &c. R. R. Co. v. Grant*, 46 Ga. 417; *Meyer v. Midland Pacific R. R. Co.*, 2 Neb. 819; *Union Pacific R. R. Co. v. Hanse*, 1 Wyo. 27; *Robbins v. Chicago*, 2 Black (U. S.), 418; *St. Paul Water Co. v. Ware*, 16 Wall. (U. S.) 566. In *Peachey v. Rowlands*, 13 C. B. 187, the defendants contracted with certain persons to build a drain in a highway, and the contractors employed C. to fill in the earth over the brick work and to carry away the surplus. C left the earth so much raised above the level of the road that the plaintiff, driving by in the dark, was thereby upset and injured. It was held that the defendants were not responsible for the negligence of C. The defendant employed somebody to do what might be done in a proper and safe manner. It was done negligently and improperly, and the plaintiff was injured, but it was not thus done by the defendants, nor at their instance, and they were not held responsible. In *Overton v. Freeman*, 11 C. B. 833, A. contracted with parish officers to pave a certain district, and entered into a sub-contract with B., under which the latter was to do the paving of the street, the materials being supplied by A. and brought to the spot in carts. Preparatory to paving, the stones were laid by laborers, in the employ of B., on the pathway, and there left unguarded during the night, so as to obstruct the same. The plaintiff fell over them and was injured. It was held that B. was responsible for the negligence, and not A. "I think," says MAULE, J., "the present case falls within the principle of those authorities which have decided that the subcontractor, and not the per-

SEC. 285. What Reservation of Control over the Work Renders the Contractee Liable. — Where a person contracts to do an entire

son with whom he contracts, is liable civilly, as well as criminally, for any wrong done by himself or his servants in the execution of the work contracted for." In an Iowa case, — *Callahan v. Burlington, &c., R. R. Co.*, 23 Iowa, 562, — the plaintiff brought an action to recover compensation for injuries to his timber from a fire negligently set by the employé of a subcontractor with the defendant, for the purpose of clearing the way of logs, trees, brush, and rubbish. The contract provided that the way should be cleared of all trees, etc., by removal or burning, *as the engineer should direct*, before the grading should be commenced. The engineer ordered the burning, *which, by the negligence of the person who set the fire*, escaped on the plaintiff's land and did the damage complained of. It was held that the company was not liable, BECK, J., announcing the rule applicable to such cases thus: "If the person sought to be charged under the rule as employer did not contract with the party doing the wrongful act, for his labor or services, and is not directly liable to him for compensation for such labor or services, and has no such control over him as will enable the employé to direct the manner of performing the labor or services, he is not liable for the wrongful act of the agent or servant. In order to create the liability, it is especially necessary that the control of the employé over the servant should be of such a character as to enable him to direct the manner of performing the services, and to prescribe what particular acts shall be done in order to accomplish the acts intended." In an Irish case, — *Gilbert v. Halpin*, 3 Ir. Jur. (N. S.) 300, — the plaintiff brought an action against the defendant as secretary of the Commissioners to improve the harbor of Wicklow, for the loss of his vessel by reason of the negligence of the commissioners, who caused certain piles to be driven, and neglected to place, or cause to be placed, any light, or to use any other reasonable precaution to guard vessels from being driven thereon. The defendants pleaded, among other pleas, that they committed the execution of the work to their contractor, John

Killien, and that at the time, etc., the said piles were still in the possession and under the control of the said Killien. GREEN, B., in delivering his opinion, says: "I think the case falls within the rule that the contractor, and not the employé, ought to be liable." "There is a plain difference," remarks RICHARDS, B., "between the case of master and servant and that of employé and contractor. The employé was authorized to perform the work, and he authorized the contractor. No man would drive down piles in a navigable river without being authorized. Therefore, I think it was the contractor's duty to have apprised his employer that this work had come to such a stage that it was necessary to get lights to prevent accidents. It was not to be expected that the commissioners would be on the ground on all occasions to see what might be required to guard against danger. The contractor failed in performing his duty, and I think he ought to be liable." "The question," says PENNEFATHER, B., "is, who is liable. If the contractor, the commissioners are not liable, for it is clear, from all the cases, that if the contractor is liable the employé is not. It appears to me, that if it was the duty of the contractor to put these lights, his employés were not bound." "The principle of law is clear," remarks PIOR, C. B., "that when a person is engaged by contract to do a certain work, the contractor and not the employé is liable for this." Where the defendant corporation directed a street to be graded, and contracted with a person to do the grading, it was held that they were not liable for the negligence of the contractor or his servants. *Kelly v. Mayor*, etc., of New York, 11 N. Y. 432. So, where a railroad company contracted with a person to build its road-bed, the company was held not liable for torts committed by the contractor or his servants. *Clark v. Vt. & Canada R. R. Co.*, 28 Vt. 103; *Pawlet v. R. & W. R. R. Co.*, 28 id. 297. BENNETT, J., in the last case cited, said: "Though it may be assumed in the case before us that a public nuisance has been committed by the servants of the

piece of work, without being subject to the employer's control, at so much a day, week, or month, the method of compensation does not affect his *status*. He is a contractor precisely as much as though he

subcontractor, and a particular injury has resulted therefrom to Phelps, and for which the town of Pawlet has been compelled to make compensation, yet we cannot discover any privity existing between the defendants and the employés of the subcontractor. The contract made for building of the abutments to the bridge was for a lawful purpose, and in no way involved the commission of a wrong, and the employers of the subcontractor were not the servants of the defendants nor under their control." The rule may be said to be firmly established, that when the owner of land undertakes to do a work which, in the ordinary mode of doing it, is a nuisance, he is liable for any injuries which may result from it to third persons, though the work is done by the contractor exercising an independent employment and employing his own servants. But when the work is not in itself a nuisance, and the injury results from the negligence of such contractor or his servants in the execution of it, the contractor alone is liable, unless the owner is in default in employing an improper and unskilful person as the contractor. *Cuff v. Newark, &c. R. R. Co.*, 35 N. J. 17. Where an action cannot be maintained against a party unless there has been personal negligence on his part, it is not enough to show that he has ordered work to be done, not necessarily amounting to any nuisance, nor causing any injury, but in the course of which an injury is accidentally inflicted, although it appears that he did not give any special direction to adopt a particular precaution which might have prevented it; for it must be taken that he gave general directions to do the work in a proper manner, and to adopt all proper precautions; and the neglect of any such precaution, even assuming it to be negligence which might, under ordinary circumstances, render the employer legally liable, is not his personal negligence, so that he would not be liable in an action for an injury sustained in such a case by one of his own workmen, or in a case in which a statutable defence was

raised on the ground that there was no negligence on the part of the defendant, otherwise than by his servants or workmen. *Scott v. Mayor, etc., of Manchester*, 38 Eng. Law & Eq. 477. The rule is, that in order to constitute the relation of master and servant, the person employed must be subject to the orders and control of the employer. He must be acting strictly in the place of the employer, and representing the employer's will and not his own, and the business must be strictly that of the employer and not his own, or the employer cannot be held chargeable for the consequences of his acts. Thus, where the plaintiff had contracted with a town to widen a highway, by removing the rocks from a ledge therein, for a specific sum of money, and the stone taken out, and afterward contracted with the defendant to build a dam for him, for which he was to receive a certain price per day, while at work upon the dam and blasting the rocks, — the defendant furnishing the powder for blasting, and superintending the building of the dam, but having no control of the blasting, — and in blasting, a rock was thrown upon the house of S., causing an injury for which C. was compelled to pay, it was held that the relation of master and servant did not exist between them, and that the defendant was not bound to indemnify him against the damage he had been compelled to pay. The relation was held an independent one on the part of the plaintiff, and the fact that he was paid by the day, and that the defendant superintended the work of building the dam, was held not sufficient to divest him of the character of a contractor. *Corbin v. American Mills Co.*, 27 Conn. 274. If the owner of a vessel employs a steam tug to tow the vessel, and during the service the tug runs into another vessel, the owner of the vessel being towed is not responsible for the injury, unless, at the time, the crew of the tug were under the control and subject to the orders of the master of the vessel. *Sproul v. Hemmingway*, 14 Pick. (Mass.) 1; *Wood's Master and Servant*, 607-610.

was paid an entire sum for doing the work.¹ While a reservation of control over the work in some respects by the contractee, does not render him liable as master generally, yet it would seem that if the injury arises in respect of the particular matter over which he reserved control, he exercising the power reserved, he would in that case be held chargeable as master.²

SEC. 286. Where the Contractee Owes a Duty to the Public or Individuals.—So, where the employer owes certain duties to third persons, or the public, in the execution of a work, he cannot relieve himself from liability, to the extent of that duty, by committing the work to a contractor. Thus, in one case,³ the city of St. Paul, desiring to have water-pipes laid in its streets, passed an ordinance authorizing the St. Paul Water Company to lay them; and as it was necessary that large excavations should be made along the streets, and considerable blasting of rock below the streets, the city incorporated in the ordinance authorizing the laying of the pipes a provision that the Water Company should “protect all persons against damages by reason of excavations made by them in laying pipes, and keep the excavations *properly guarded* by day and night, and become responsible for all damages which may accrue by reason of the neglect of their employés in the premises, and that the streets and highways should not be unnecessarily encumbered or obstructed in laying said pipes.” The Water Company accepted the ordinance, and let out the work by contract to one Gilfillan. While the work was being prosecuted by Gilfillan and his servants in one of the streets, the plaintiff, driving his horse and wagon in it, was seriously injured, owing to his horse taking fright at a steam drill in the street, which was put there to drill the rocks that it was necessary to remove, and was suddenly and without notice set in motion as the plaintiff approached it with his team. The evidence disclosed that the accident resulted because the excavations were not properly guarded, and that the highways were unnecessarily obstructed

¹ Corbin v. American Mills, 27 Conn. 274.

² Allen v. Hayward, 7 Q. B. 975, 976.

³ Water Co. v. Ware, 16 Wall. (U. S.) 566; Houston, &c. R. R. Co. v. Meador, 50 Tex. 77; Brackett v. Lubke, 4 Allen (Mass.), 178; Pickard v. Smith, 10 C. B. N. s. 470; Storrs v. Utica, *ante*; Chicago, &c. R. R. Co. v. Whipple, 22 Ill. 105; Cairo, &c. R. R. Co. v. Worsley, 85 Ill. 370; Cuff

v. Newark, &c. R. R. Co., 35 N. J. L. 17; Veazie v. Penobscot R. R. Co., 49 Me. 119; McCafferty v. Spuyten Duyvil, &c. R. R. Co., 61 N. Y. 178; McWilliams v. Detroit Central Mills Co., 31 Mich. 274; Clement v. Canfield, 28 Vt. 302; Gardner v. Smith, 7 Mich. 410; Bay City, &c. R. R. Co. v. Austin, 21 id. 390; Clement v. Canfield, 28 Vt. 302.

and encumbered, upon which the plaintiff recovered a verdict. The defendants claimed exemption from liability because the injury resulted from the negligence of the contractor's employes, and not from any negligent act of the defendants themselves, and that the ordinance was simply intended as an indemnity to the city, and did not enable a third person to avail himself of its provisions; but, upon appeal, the judgment was affirmed, — DAVIS, J., upon this point, remarking: "The defendant agreed with the municipal authorities to protect all persons against damages by reason of the excavations made by them preparatory to laying the pipes, and to keep the work properly guarded by day and night, and to be responsible for all damages which may occur by reason of neglect of their employes in the premises. Such an agreement would not acquit the municipality of an obligation, otherwise attaching, to keep the streets safe and convenient for travellers; but it may well be held that a party injured through a defect or want of repair in such a street, occasioned by the negligence or carelessness of such a contractor in doing the work, or those for whose acts he is responsible, may, at his election, sue the contractor for redress or pursue his remedy against the municipality, as it is clear that the contractor, in case of a recovery against the latter, would be answerable to the municipality as stipulated in his agreement." The rule is, that a person or corporation charged with a duty, either by contract or statute, cannot divest himself of it by shifting it upon another,¹ or change the responsibility for its wrongful performance. The duty is wholly independent of the means by which the result is accomplished.²

SEC. 287. Specific Performance of Contract for Construction. — In pursuance of the principle that specific performance of a contract cannot be decreed where the contract by its terms calls for a succes-

¹ *Houston, &c. R. Co. v. Meador*, 50 Tex. 77; *Brackett v. Lubke*, 4 Allen (Mass.), 178; *Cuff v. Newark, &c. R. Co.*, 35 N. J. L. 17.

² *Cuff v. Newark, &c. R. Co.*, 35 N. J. L. 17. When a construction train furnished and operated by the company's employes is entirely controlled by the contractor, the company cannot be held liable for injuries resulting from the negligence of the engineer. *Miller v. Minnesota, &c. R. Co.*, 76 Iowa, 655; 38 Am. Eng. R. Cas. 234. So where a contractor, for the construction of the road, was operating

the road and conveying freight and passengers, receiving reward therefor, it is error to instruct that the company is liable for his negligence, where there is no evidence that the company had made to him a surrender of its road-bed or that the contractor was operating the road under a contract which the company had no authority to make. *Rome, &c. R. Co. v. Chasteen*, 88 Ala. 591; 40 Am. & Eng. R. Cas. 559. See as to who are independent contractors, *Rogers v. Florence R. Co.*, 81 S. Car. 378; 39 Am. Eng. R. Cas. 384.

sion of acts, whose performance must require constant and protracted attention and supervision, a court of equity cannot compel the specific performance of a contract to build a railroad either at the suit of the contractor or of the company;¹ but when equity requires it, it will appoint a receiver to take possession of the roadway and materials for the purpose of completing the line, and will invest the receiver with the requisite title and right to the roadway and materials, so as to raise the necessary means to complete the work.²

SEC. 287 a. **Railroads crossing Each Other.** — It has been seen that the right of way of a railroad like all other property is subject to the State's right of eminent domain, and therefore part of it may be condemned in order to allow another railroad to cross it.³ But in view of the great danger incident to travel where railroads cross each other at grade, such crossings are always discouraged, and in some jurisdictions absolutely prohibited. Thus, in a Pennsylvania case, in dealing with a statute concerning railroad crossings, MERCER, J., observed: "The evident intentment of the statute is to discourage crossings at grade. This is a question in which the company, whose road is to be crossed, is not the only party liable to injury thereby. It involves the safety and security of the public. Crossings at grade are always attended with danger. As our population becomes more dense, travel and traffic will increase, and the injuries resulting from grade crossings will be multiplied. Each succeeding year will in-

¹ *Ross v. Union Pacific R. Co.*, 1 Woolw. (U. S.), 26; *Danforth v. Philadelphia, &c. R. Co.*, 30 N. J. Eq. 12; *Fallon v. Railroad Co.*, 1 Dill. (U. S.) 121; *South Wales v. Wythes*, 1 K. & J. 186; *Ranger v. Great Western R. Co.*, 1 Eng. Ry. Cas. 51; 1 Story's Eq. (10th ed.), 778 n; *ante*, § 210. "I have every possible inducement to afford the plaintiffs as large a measure of relief as I can give them consistently with the established principle of this court, but I feel the difficulties to be quite insuperable." Wood, V. C., in *Peto v. Brighton, &c. R. Co.*, 1 H. & M. 468; note in 22 Am. & Eng. R. Cas. 272. See also 42 Am. & Eng. R. Cas. 607. Since equity will never enforce specific performance against one party unless it can also enforce it against the other party as well, it will not enforce the contract of construction against a railroad company in favor of the contractor. Munro

v. Wivenhoe, &c. R. Co., 4 De Gex J. & S. 723; *Peto v. Brighton, &c. R. Co.*, 1 H. & M. 468; *Heathcote v. N. Staffordshire R. Co.*, 20 L. T. N. S. chap. 22; *Waring v. Manchester, &c. R. Co.*, 7 Hare, 492; *Ross v. Union Pac. R. Co.*, 1 Woolw. (U. S.) 26.

² *Kennedy v. St. Paul, &c. R. Co.*, 2 Dill. (U. S.), 448. In this case the completion of the construction was necessary in order to prevent the lapse of a valuable land grant.

³ See *ante*, § 237; *Northern R. Co. v. Concord, &c. R. Co.*, 27 N. H. 183; *Fitchburgh R. Co. v. New Haven, &c. R. Co.*, 134 Mass. 547; *East St. Louis, &c. R. Co. v. East St. Louis R. Co.*, 108 Ill. 265; 17 Am. & Eng. R. Cas. 163; *Western Penn. R. Co.'s Appeal*, 99 Penn. St. 155; *Central Vt. R. Co. v. Woodstock R. Co.*, 50 Vt. 452; *Lake Shore, &c. R. Co. v. Cincinnati, &c. R. Co.*, 30 Ohio St. 604.

crease the necessity for avoiding them. Their construction should now and henceforth be discouraged ;”¹ and equity will enjoin a crossing at grade where it is practicable to avoid such a crossing.²

One company has no absolute right to condemn a right of way across the road of another ; it must always be made to appear that the crossing is necessary, and the courts have authority to review the determination of the company’s engineers as to the necessity of the crossing at all, and as to the expediency of crossing at any particular point.³ As a general rule the courts will not interfere by injunction to restrain a railroad company from condemning a right of way across tracks of another company. There is no want of constitutional power in the legislature to provide for such condemnation ; the public use contemplated is not the same use, and,

¹ Pittsburgh, &c. R. Co. v. Southwest Penn. R. Co., 77 Penn. St. 173. See also Pennsylvania R. Co.’s Appeal, 116 Penn. St. 84.

² Missouri, &c. R. Co. v. Texas, &c. R. Co., 4 Wood (U. S.), 360 ; 10 Fed. Rep. 297 ; 6 Am. & Eng. R. Cas. 597 ; Toledo, &c. R. Co. v. Detroit, &c. R. Co., 63 Mich. 645 ; 28 Am. & Eng. R. Cas. 280 ; Pittsburgh Junction R. Co.’s Appeal (Penn.), 6 Atl. Rep. 564 ; 28 Am. & Eng. R. Cas. 266 ; Baltimore, &c. R. Co.’s Appeal (Penn.), 10 W. N. Cas. 530 ; 3 Am. & Eng. R. Cas. 42 ; Humeston, &c. R. Co. v. Chicago, &c. R. Co., 74 Iowa, 554 ; 35 Am. & Eng. R. Cas. 263 ; Central Vt. R. Co. v. Woodstock R. Co., 50 Vt. 452.

³ Pittsburgh, &c. R. Co. v. Southwest Penn. R. Co., 77 Penn. St. 173 ; *In re* St. Paul, &c. R. Co., 37 Minn. 164. See also *State v. Hennepin County Court*, 35 Minn. 761 ; *Northern Central R. Co.’s Appeal*, 103 Penn. St. 621. Under the California Statute (Code, § 1244) providing for the condemnation of a right of way across the track of a railroad, the proceedings to acquire a right of way over the first company’s easement in the land and over the original owner’s fee may be joined. *California Southern R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59. The Nebraska Statute concerning the crossing of railroads is held to extend to foreign as well as domestic corporations. *Union Pac. R. Co. v. Burlington, &c. R. Co.*, 1 McCrary (U. S.), 463. Compare *Constitution of Mississippi* (1890), § 197. Under the

New York Statute (and under others, see *ante*, § 208), it is required that in a proceeding to condemn, the inability of the two companies to agree must appear. The commissioners provided by the statute are to determine the necessity of the crossing, the manner in which it is to be done, the exact locality, and in general should arrange all such details as would ordinarily be provided for by the contract between the companies had they been able to agree. They are also to determine the duties of the companies with regard to the operation of trains over the crossings — whether a flagman shall be employed, whether trains shall be required to come to a full stop before crossing, etc. See *Matter of Lockport, &c. R. Co.*, 19 Hun (N. Y.), 38 ; 77 N. Y. 557 ; *Matter of Boston, &c. R. Co.*, 79 N. Y. 69. See also *Matter of New York, &c. R. Co.*, 44 Hun (N. Y.), 215, *affirmed* 110 N. Y. 374 ; 36 Am. & Eng. R. Cas. 576 n. ; 19 Am. & Eng. Ency. Law, p. 868. The Constitution of Texas, Art. X., § 1, provides that “every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad.” It is held that such a provision is not self-enacting but requires appropriate supplemental legislation prescribing the regulation of its exercise. The exercise of the right may, therefore, be enjoined until by negotiation or proper statutory provision it can be established with proper limitations. *Missouri, &c. R. Co. v. Texas, &c. R. Co.*, 10 Fed. Rep. 497.

although applied to public uses, the property so taken is, nevertheless, private property, and so within the power of eminent domain; and the courts of law afford an ample *forum* for the adjustment of the matter of compensation.¹ But the condemnation of the road of another company longitudinally is a more serious interference with the franchises of the road whose property is condemned and may be restrained by injunction, unless a plain and express authority to make such a condemnation has been conferred.² And a company proceeding in good faith to acquire land and construct its road may have an injunction against another corporation which maliciously and in bad faith takes a lease of the land and is proceeding to lay a switch thereon for the purpose of harassing and delaying the petition.³

In the construction and maintenance of railroad crossings, and in the use of them, both companies are bound to the exercise of the

¹ Lake Shore, &c. R. Co. *v.* Chicago, &c. R. Co., 97 Ill. 506; 2 Am. & Eng. R. Cas. 440. See also East St. Louis, &c. R. Co. *v.* East St. Louis R. Co., 108 Ill. 265; 17 Am. & Eng. R. Cas. 162. In the case of Lake Shore, &c. R. Co. *v.* Chicago, &c. R. Co., 96 Ill. 125; 2 Am. & Eng. R. Cas. 437, a railroad company sought to condemn a right of way across the tracks of another company, and, pending the proceedings in the county court, the latter company sought to enjoin by suit in equity their further prosecution. A decree was made, refusing the injunction and dismissing the bill, whereupon a writ of error was filed, and a motion made that the writ be made to operate as a *supersedeas*. It was held that the grounds in support of the motion could be interposed in defence to the condemnation proceedings, and that the court should refuse jurisdiction.

² Alexandria & Fredricksburgh R. Co. *v.* Alexandria & Washington R. Co., 75 Va. 780; 40 Am. Rep. 743; 10 Am. & Eng. R. Cas. 23; Boston, &c. R. Co. *v.* Salem, &c. R. Co., 2 Gray (Mass.) 1. On a bill by one railroad company to enjoin a rival company from crossing their track, it was held that the defendant's right to cross being established, the court would retain the bill for the purpose of regulating the manner of effecting the crossing. South Carolina R. Co. *v.* Columbia, &c. R. Co., 13 Rich. Eq. (S. C.) 339.

The Iowa Statute, granting the right to

construct a railroad across the track of another company, provides that the crossing shall be so constructed as not unnecessarily to impede the travel or transportation upon the railroad crossed. In the case of Huneston, &c. R. Co. *v.* Chicago, &c. R. Co., 74 Iowa, 554; 35 Am. & Eng. R. Cas. 263, it appeared that the track of the old road at the point at which it was proposed to construct the crossing was upon a heavy grade, so that if loaded trains were stopped within two hundred feet of the crossing, as the statute required, it would be impossible to acquire sufficient momentum to ascend the grade, and that trains going the other way, being on a down grade, could be made to stop only with great difficulty and at the sacrifice of much expense in the strain upon the engines. It appeared that a crossing under the track could be constructed at a cost of less than \$15,000 in excess of the crossing at grade. It was held that the old road was entitled to enjoin the crossing at grade; that the fact that the new company, pending the proceedings, had constructed various works at a cost of \$6,000, which would become useless in case the crossing at grade was enjoined, was not sufficient reason for refusing the injunction. See 19 Am. & Eng. Ency. Law, p. 869, from which this statement of the case is taken.

³ Rochester, &c. R. Co. *v.* New York, &c. R. Co., 44 Hun (N. Y.), 26.

highest care to prevent injury to their passengers; either through a defect in the crossing or through collision with trains of the other road.¹ In some of the States very salutary statutes exist which require all companies to cause their trains to come to a full stop before crossing the track of another road, or to provide a watchman or flagman at every crossing. Such statutes are clearly within the police power of the State, and tending as they do to the protection of passengers and train operatives are always upheld.²

SEC. 287 b. Highway and Private Crossings. — By virtue of its power of police regulation over all railroads within its limits, the State has power to require that every railroad company shall construct and maintain suitable crossings where its road intersects a highway or a private way. And it seems that such statutes may be made to apply to a company whose road was constructed prior to their passage as well as to others.³ In this connection the Supreme

¹ *California Southern R. Co. v. Southern Pacific R. Co.*, 67 Cal. 59; 20 Am. & Eng. R. Cas. 309; *Baltimore, &c. R. Co. v. Walker*, 45 Ohio St. 577; 35 Am. & Eng. R. Cas. 271; *New York, &c. R. Co. v. Grand Rapids, &c. R. Co.*, 116 Ind. 60; 35 Am. & Eng. R. Cas. 283. In this last case the court stated the rule that where an agreement has been made, regulating the manner in which each company shall use the crossing, the employes on a train having a right to cross are entitled to presume that the agreement will be observed, and are not bound to anticipate a breach of it.

² *Lake Shore, &c. R. Co. v. Cincinnati, &c. R. Co.*, 30 Ohio St. 604; *Mobile, &c. R. Co. v. People*, 29 Ill. App. 428. *Compare State v. Noyes*, 47 Me. 190. The State may require the establishment of stations or depots at points where two roads cross. *State v. Wabash, &c. R. Co.*, 83 Mo. 144; 25 Am. & Eng. R. Cas. 133.

³ *Illinois Cent. R. Co. v. Willenborg*, 117 Ill. 203; 57 Am. Rep. 862; 26 Am. & Eng. R. Cas. 358; *Worcester, &c. R. Co. v. Nashua*, 63 N. H. 593; *Boston, &c. R. Co. v. County Com'rs*, 79 Me. 386; 32 Am. & Eng. R. Cas. 272; *Louisville, &c. R. Co. v. Smith*, 91 Ind. 119; 13 Am. & Eng. R. Cas. 608. *Compare Gulf, &c. R. Co. v. Rowland*, 70 Tex. 298; 35 Am. & Eng. R. Cas. 286 (this case held that a

statute requiring companies to erect farm-crossings could not be operative on companies whose roads were already constructed, since the land-owner had been paid the cost of erecting such crossings; it having been included in the condemnation proceedings). Under the Iowa statute the land-owner has the right to select the place at which the crossing shall be made, and this right is subject only to the limitation that the selection shall not be unreasonable. *Van Vrankin v. Wisconsin, &c. R. Co. (Iowa)*, 27 N. W. Rep. 761. See also as to selection, *Williams v. Clark*, 140 Mass. 238.

In the case of *Boston, &c. R. Co. v. County Com'rs*, 79 Me. 386; 32 Am. & Eng. R. Cas. 271, the court had under consideration a statute (Rev. Stat. Maine, c. 18, § 27) which provided that the expense of building and maintaining such part of a town way or highway as is within the limits of the railroad's right of way where such highway crosses the track at grade shall be borne by the railroad company. The defendant company refused to comply with the statute on the ground that it was passed long after the construction of its road; moreover, its charter provided that it should not be altered, amended, or repealed. It was held, however, that the statute was valid and could be enforced against defendant; it was an exercise of the police power of the State and could

Court of Illinois, in enforcing a statute requiring railroad companies to erect a farm-crossing where its road divided private property, have said :¹ "No reason is perceived why upon the same principle on which a railroad company may be required to fence its track and construct cattle guards it may not be required also to construct farm-crossings. The one is as much required as the other for the convenience and safety of adjoining land-owners. Such corporations are permitted, in order to secure the best and most useful road-bed, to make deep cuts, and to throw up embankments on their right of way through farms. On account of the peculiar construction of all railways, it is obviously impracticable for the owner whose lands are divided by the track to pass from one part to another unless crossings are provided. Indeed, it would be most dangerous if persons should attempt to cross a railroad track at a point where no provision is made for that purpose, and persons are not permitted to do so. It certainly cannot be inferred that the legislature would irrevocably grant to a railroad corporation a franchise to construct a railway through farm lands in such manner as to cut off all right of passage to and from the portion separated by the road-bed. The proposition that a corporation can construct a railroad from Galena to Cairo, and cannot under the police power of the State be compelled to construct 'farm-crossings' over its tracks for the use of the owners of lands over which it passes, is too absurd to be considered seriously."² But the power of the State in this regard is confined to a reasonable exercise and cannot be made use of to appropriate property without compensation. Thus, it is held in Michigan that a statute requiring that all railroads companies should

not be considered an impairment of the charter contract. The court overruled the case of *State v. Noyes*, 47 Me. 189, as being too narrow in its views. A similar view was taken in *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345, overruling *Miller v. New York, & C. R. Co.*, 21 Barb. (N. Y.) 513. In the case of *Illinois Cent. R. Co. v. Bloomington*, 76 Ill. 447; 32 Am. & Eng. R. Cas. 276 n., long after the construction of a railroad, a street was extended to cross it, and the city passed an ordinance requiring the railway company to make safe and proper crossing by grading the approaches of the street at the crossing. There was nothing in the charter of the company or in the general law of

the State which imposed such a duty. It was held that the company could not be made liable to this new burden any further than might have been required of an individual, that the ordinance was void as requiring too much of the company. This case is distinguished in *Illinois Cent. R. Co. v. Willenborg*, 117 Ill. 203; 57 Am. Rep. 862.

¹ *Illinois Cent. R. Co. v. Willenborg*, 117 Ill. 203; 57 Am. Rep. 862; 26 Am. & Eng. R. Cas. 358.

² The court distinguished the cases of *Illinois Cent. R. Co. v. Bloomington*, 76 Ill. 447, and *Chalcraft v. Louisville, & C. R. Co.*, 113 Ill. 86.

construct residence crossings where the road was immediately adjacent to or laid upon a highway, and that these crossings should be constructed and maintained substantially as those provided where the road crossed a street and highway, is unconstitutional as applied to railroads already constructed; that it would amount to an appropriation of the company's property to compel it to maintain such crossings at its own expense, and that such a statute was too comprehensive to be included within the police power of the State.¹ So also a statute requiring the company to make a crossing outside of any enclosure on demand of any two citizens is held unconstitutional.²

While there is some conflict of authority as to whether a railroad company is entitled to compensation where a highway is laid out across its tracks,³ the better view now is that such compensation must be made. The property of such a company can no more be taken for the purposes of highway except upon due compensation than can that of a private individual.⁴ "The vague notion," says Chief-Justice SHAW, "that damages cannot be given in favor of a railroad company whose road is crossed by another public way, we think, is founded on the consideration that inasmuch as the track of the railroad has been already appropriated to one public use, the authorizing of its further public use is not an appropriation of private property to public use, and, therefore, affords no claim for damages. There is something plausible in this; but on examination we think it does not warrant the distinction in support of which it is relied on."⁵

¹ *People v. Detroit, &c. R. Co.*, 79 Mich. 491; 42 Am. & Eng. R. Cas. 257.

² *Gulf, &c. R. Co. v. Ellis*, 70 Tex. 307; 35 Am. & Eng. R. Cas. 292. See also *Gulf, &c. R. Co. v. Rowland*, 70 Tex. 298; 35 Am. & Eng. R. Cas. 286.

³ See 6 Am. & Eng. Ency. Law, p. 554, note 2. But none of the authorities there cited sustain the view of the text.

⁴ *Old Colony, &c. R. Co. v. Plymouth County*, 14 Gray (Mass.), 155; *Boston, &c. R. Co. v. Middlesex*, 1 Allen (Mass.), 324; *Grand Junction R. Co. v. County Com'rs*, 14 Gray (Mass.), 553; *Crossley v. O'Brien*, 24 Ind. 325. "Municipal authorities, though expressly authorized by statute, cannot lay out a highway across the road-bed of a railroad and compel the erection of cattle guards, etc., without compensation. The statute conferring this author-

ity was held to be repugnant to the constitution of Michigan and void. *People v. Lake Shore, &c. R. Co.*, 52 Mich. 277; 13 Am. & Eng. R. Cas. 611; *Chicago, &c. R. Co. v. Hough*, 61 Mich. 507; *Grand Rapids v. Grand Rapids, &c. R. Co.*, 58 Mich. 641." *People v. Detroit, &c. R. Co.*, 79 Mich. 491; 42 Am. & Eng. R. Cas. 257. But a statute requiring railroad companies to erect crossings wherever highways intersect their tracks is not void as to highways laid out after their passage as failing to provide compensation, where the general statute concerning the laying out of highways sufficiently provides for such compensation. *State v. Shardlow*, 43 Minn. 524; 45 Am. & Eng. R. Cas. 106.

⁵ *Old Colony R. Co. v. Plymouth County*, 14 Gray (Mass.), 155.

The rule as to the measure of damages in such cases is set out in a subsequent chapter.¹

In accordance with the principles discussed more fully elsewhere, the power to lay out a highway across a railroad and thus appropriate a part of the company's right of way is not to be easily inferred; it exists only in cases of clear and express grant of the authority.²

The duty of the company with reference to highway crossings is to construct and maintain suitable crossings wherever its road intersects the highway at grade.³ This duty exists although the highway was laid out after the road was constructed,⁴ certainly when a fair construction of the statute requires it.⁵ This duty is a continuing one,⁶ and requires the maintenance, repair, and improvement of the crossing to meet the increased wants of the public.⁷ It embraces the duty to construct and maintain not only the actual crossing, but its approaches even where they extend beyond the limits of its right of way.⁸ The character of the crossing must be such that the usefulness of the highway shall not be impaired by the construction and operation of the railroad across it;⁹ although it is not required

¹ See *ante*, Chapter XIV.

² See also *Chicago, &c. R. Co. v. Lake*, 71 Ill. 333; *Hannibal v. Hannibal, &c. R. Co.*, 49 Mo. 480; *Little Miami, &c. R. Co. v. Dayton*, 23 Ohio St. 510; *Iron R. Co. v. Ironton*, 19 Ohio St. 229; *Bridgeport v. New York, &c. R. Co.*, 36 Conn. 255; 4 Am. Rep. 63. Under a statute declaring that a way "may be so made as to pass over or under a railroad," a way crossing at grade is not authorized. *Central Vermont R. Co. v. Royalton*, 58 Vt. 234.

³ *Gear v. Chicago, &c. R. Co.*, 45 Iowa, 83; *Farley v. Chicago, &c. R. Co.*, 42 Iowa, 234; *Bury v. Northeastern R. Co.*, 72 Ga. 137; 28 Am. & Eng. R. Cas. 575; *Cooke v. Boston, &c. R. Co.*, 133 Mass. 185; 10 Am. & Eng. R. Cas. 328; *Chesapeake, &c. R. Co. v. Dyer County*, 87 Tenn. 712; 38 Am. & Eng. R. Cas. 676; *Paducah, &c. R. Co. v. Com.*, 80 Ky. 147; 10 Am. & Eng. R. Cas. 318; *People v. Chicago, &c. R. Co.*, 67 Ill. 118; *State v. Dayton, &c. R. Co.*, 36 Ohio St. 436; *Buchner v. Chicago, &c. R. Co.*, 60 Wis. 264; 14 Am. & Eng. R. Cas. 447.

⁴ *Louisville, &c. R. Co. v. Smith*, 91

Ind. 119; 13 Am. & Eng. R. Cas. 608; *ante*, note 3, p. 1166. Compare *Gulf, &c. R. Co. v. Rowland*, 70 Tex. 298; 35 Am. & Eng. R. Cas. 286.

⁵ *Illinois Central R. Co. v. Willenborg*, 117 Ill. 203; 53 Am. Rep. 862; 26 Am. & Eng. R. Cas. 358; *Northern Cent. R. Co. v. Baltimore*, 46 Md. 425.

⁶ *Chesapeake, &c. R. Co. v. Dyer County*, 87 Tenn. 712; 38 Am. & Eng. R. Cas. 676; *Pittsburgh, &c. R. Co. v. Dunn*, 56 Penn. St. 280; *Cooke v. Boston, &c. R. Co.*, 133 Mass. 185; 10 Am. & Eng. R. Cas. 328; *Manley v. St. Helena, &c. R. Co.*, 2 Hurl. & N. 840.

⁷ *Burnett v. New Haven, &c. R. Co.*, 42 Conn. 174; *English v. New Haven, &c. Co.*, 32 Conn. 241; *Cooke v. Boston, &c. R. Co.*, 133 Mass. 185; 10 Am. & Eng. R. Cas. 328.

⁸ *Titecomb v. Fitchburgh, R. Co.*, 12 Allen (Mass.), 254; *Maltby v. Chicago, &c. R. Co.*, 52 Mich. 108; 13 Am. & Eng. R. Cas. 606. *Post*, Chapter XV., Section on "BRIDGES." See, however, *People v. Lake Shore, &c. R. Co.*, 52 Mich. 108; 13 Am. & Eng. R. Cas. 611.

⁹ *People v. New York, &c. R. Co.*, 89

actually to improve the highway,¹ it must restore it to its former state of usefulness as nearly as is practicable.² The duty of the company relative to crossings ordinarily applies only to public highways or streets;³ but if it has by license allowed a crossing to become public, it will be compelled to maintain it in proper repair.⁴ For a failure to discharge its duties in regard to crossings, the company is liable to indictment,⁵ and is responsible in damages for all the consequences of its failure.⁶ It may be compelled to discharge its duties by *mandamus*,⁷ or, as many of the statutes specifically provide, the municipality or the land-owner interested may, after due notice, construct or repair the crossing and collect the cost from the company.⁸

Where the statute imposes upon a railroad company which constructs its line across a highway the duty to restore the same "to its former state or to such state as not unnecessarily to impair its usefulness," it does not relieve the commissioners of highways from the care and control of those parts of public highways constituting approaches to railroad crossings, although constructed by the railroad

N. Y. 266; 10 Am. & Eng. R. Cas. 230; *Farley v. Chicago*, &c. R. Co., 42 Iowa, 234.

¹ *Bentley v. Chicago*, &c. R. Co., 58 Iowa, 242; 8 Am. & Eng. R. Cas. 210.

² *State v. Minneapolis*, &c. R. Co., 39 Minn. 219; 35 Am. & Eng. R. Cas. 250.

³ *International*, &c. R. Co. v. *Jordan* (Tex. 1883), 10 Am. & Eng. R. Cas. 301; *Missouri*, &c. R. Co. v. *Long*, 27 Kan. 684; 6 Am. & Eng. R. Cas. 254; *Flint*, &c. R. Co. v. *Willey*, 47 Mich. 88; 5 Am. & Eng. R. Cas. 305.

⁴ *Harriman v. Pittsburgh*, &c. R. Co., 45 Ohio St. 11; 32 Am. & Eng. R. Cas. 37; *Barry v. New York*, &c. R. Co., 92 N. Y. 289; 13 Am. & Eng. R. Cas. 615; *Kelley v. Southern Minn. R. Co.*, 28 Minn. 98; 6 Am. & Eng. R. Cas. 264.

⁵ *Paducah*, &c. R. Co. v. *Com.*, 80 Ky. 147; 10 Am. & Eng. R. Cas. 318; *Pittsburgh*, &c. R. Co. v. *Com.*, 101 Penn. St. 192; 10 Am. & Eng. R. Cas. 321; *ante*, § 231.

⁶ Thus, where a horse is injured through a defect in the crossing, the company must respond in damages to the owner. *Payne v. Troy*, &c. R. Co., 83 N. Y. 572; 6 Am. & Eng. R. Cas. 54; *Baughman v. Shenango*, &c. R. Co., 92 Penn. St. 335; 6 Am. & Eng. R. Cas. 51; *Hudson v. Chicago*,

&c. R. Co., 59 Iowa, 581; 8 Am. & Eng. R. Cas. 464; *Evansville*, &c. R. Co. v. *Carvener*, 113 Ind. 51; 32 Am. & Eng. R. Cas. 134. So also the company is liable for all other injuries whether to persons or animals, resulting from its failure properly to discharge its duty relative to the crossing. *Mann v. Central Vt. R. Co.*, 55 Vt. 484; 14 Am. & Eng. R. Cas. 620; *Johnson v. St. Paul*, &c. R. Co., 31 Minn. 283; 15 Am. & Eng. R. Cas. 467.

⁷ *State v. Minneapolis*, &c. R. Co. 39 Minn. 219; 35 Am. & Eng. R. Cas. 250; *ante*, § 231.

⁸ *Chesapeake*, &c. R. Co. v. *Dyer County*, 87 Tenn. 712; 38 Am. & Eng. R. Cas. 676. A provision in the charter of a railway corporation that the road shall be so constructed as not to obstruct the safe and convenient use of any private way which it crosses, imposes upon the corporation the duty of maintaining a safe and convenient crossing for such private way. *Keefe v. Sullivan County R. Co.*, 63 N. H. 271. In the case of *Williams v. Clark*, 140 Mass. 238, it was held that if a company agree forever to maintain a crossing over A.'s land and afterwards raises the grade of its road, A. must bear the expense of the new approaches. *Sed quære*.

company in the discharge of its statutory duty. But they may institute proceedings to compel a railroad company to fully perform this duty, and when it is in default may proceed to do the necessary work and maintain an action against the company for the expense.¹

Nor is a railroad corporation relieved from the duty imposed upon it by statute to restore a highway intersected by its road to such state as not unnecessarily to have impaired its usefulness, by the fact that a street railway company whose road runs along the highway is obliged to keep the highway between the rails of its track in repair. The duty of maintaining the crossing in proper condition is not limited or restricted by privileges granted to or duties imposed upon others.²

SEC. 287 c. Duty to establish Stations.—It is a part of the duty owing by a railroad company to the public to establish and maintain stations at points along its road so as to furnish reasonable facilities for the use of the road to the inhabitants of the country through which it passes; and contracts which have the effect to prevent a proper discharge of this duty are never upheld.³ But it rests entirely within the discretion of the company as to where it is best to locate its stations and in the absence of a statute or of a valid contract requiring the location of a station at a certain place, a court has no authority to issue a *mandamus* to compel a location there.⁴ In a recent case in the Supreme Court of the United States, a very strong case was presented. It appeared that the charter of the company gave it a discretion as to the location of the route of its road, and imposed no specific duties in regard to the establishment of

¹ *Bryant v. Randolph*, 133 N. Y. 70, *disapproving* *Bartlett v. Crozier*, 17 Johns. (N. Y.) 440; *West v. Brockport*, 16 N. Y. 161.

² *Masterson v. New York Cent. R. Co.*, 84 N. Y. 247. In this case the plaintiff's testator was a stranger, riding, by the invitation of the driver, in a wagon upon a highway crossed by defendant's road. A wheel of the wagon went into a hole in the road between the rails of defendant's track, and he was jolted from the wagon and killed. In an action to recover damages the court charged in substance that "carelessness upon the part of the driver, assuming he was a competent driver and a sober man and there was no reason which the deceased could discover why he should not ride with him, would not defeat a re-

covery, unless the death was caused by the wrongful and wilful act." Defendant's counsel requested a charge "that if the driver's negligence was the proximate cause of the jar, the plaintiff cannot recover." The court refused to alter its charge. Held, no error, that the charge in this respect was sufficient. *Cosgrove v. New York Cent. R. Co.*, 13 Hun (N. Y.), 329, and *Barringer v. New York Cent. R. Co.*, 18 Hun (N. Y.), 398, *distinguished*.

³ See § 184 and cases cited; *Mobile, &c. R. Co. v. People*, 132 Ill. 559; 42 Am. & Eng. R. Cas. 671.

⁴ *Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492; 48 Am. & Eng. R. Cas. 475, *reversing* 3 Wash. Ter. 303; 29 Am. & Eng. R. Cas. 82.

stations along its line. When the road was first constructed the company stopped its trains at a place known as Yakima City, the county seat and principal town of the county, but built no depot there. When the road was completed four miles further it reached the town of North Yakima, a town which had been laid out by the company on its own land. The company then established a passenger and freight station there, and ceased to stop its trains at Yakima City. *Mandamus* was then applied for to compel it to make Yakima City a station and to stop its trains there. But before the suit was determined, Yakima City rapidly retrograded, and the town of North Yakima, as rapidly increased in size and population, became the largest city of the county and was made the county seat. There were other stations which furnished sufficient facilities to the country south of North Yakima, and it was shown that under existing conditions a station at Yakima City would not pay expenses. It was also shown that the surrounding country would be better served by a station at North Yakima than at Yakima City. The court held that the *mandamus* should not issue. Courts cannot attempt supervision of railroads nor create their duties; the remedy in such cases is to be sought in proper legislation.¹ Nevertheless, there is strong authority for the view that courts have power to compel the

¹ In the case of *Atchison, &c. R. Co. v. Denver, &c. R. Co.*, 110 U. S. 681-682; 16 Am. & Eng. R. Cas. 57, in passing upon the question as to whether a railroad could be compelled to stop its trains and establish a station at its junction with another road, WAITE, C. J., said: "Such matters are and always have been proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for an injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power." In *People v. New York, &c. R. Co.*, 104 N. Y. 66; 29 Am. & Eng. R. Cas. 480, the court refused to grant a *mandamus* to compel a company to construct and maintain a station and warehouse sufficient to accommodate a town of twelve hundred inhabitants which supplied a large passenger and freight business to the road; and this notwithstanding the railroad commissioners had recommended such a station and warehouse. DANFORTH, J., speaking for

the court, remarked that "a plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public," but that the court was helpless, as it was no part of the common-law duty of the company to provide warehouses or passenger stations, and no such duty was imposed by the legislature. He further observed "no doubt, as the respondent urges, the court may by *mandamus* also act in certain cases affecting corporate matters, but only when the duty concerned is *specific and plainly imposed upon the corporation*. . . . Such is not the case before us. The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation." See also *Southeastern R. Co. v. Com'rs*, 6 Q. B. Div. 586, 592. Compare, however, the brief but vigorous dissenting opinion of Mr. Justice BREWER in the case of *Northern Pac. R. Co. v. Washington*, 142 U. S. 492.

establishment of stations as a part of the company's duty as a carrier of goods and passengers. In a case before the Supreme Court of Nebraska, the road ran within one thousand feet of the corporate limits of B., a town having fifteen hundred inhabitants or more, but refused to stop its trains there or to establish a station. The court held that it was a part of the common-law duty of the company, as a carrier of passengers, to maintain such stations as would afford reasonable facilities to the people of the outlying country, and therefore issued a *mandamus* to compel the location of a station at B.¹

There is no question that the legislature may provide that the company shall establish stations at particular points, and where this is done the courts, of course, can compel the performance of the specific duty by *mandamus*,² so also the State may confer upon a board of commissioners power to determine whether stations shall be located at certain points, and their conclusions are final and can likewise be enforced by judicial process.³ In several of the States there are

¹ State v. Republican Valley R. Co., 17 Neb. 647; 18 Neb. 512; 22 Am. & Eng. R. Cas. 500, 506, citing Vincent v. Chicago, &c. R. Co., 49 Ill. 33; Messenger v. Pennsylvania R. Co., 36 N. J. L. 407; State v. Nebraska Teleph. Co., 17 Neb. 126. But this case was expressly disapproved in the case of Northern Pac. R. Co. v. Washington Ter., 142 U. S. 492. The Illinois courts go a long way towards holding that a *mandamus* will issue to compel the location of a station where it is needed, but they do not oppose the rule stated in the text, though they strongly incline to the view of the Nebraska court. In People v. Louisville, &c. R. Co., 120 Ill. 48, a *mandamus* issued to compel the relocation of a station at a county seat where there had once been a station; this on the ground that having originally established a station there the company had no power to change it without authority. See People v. Chicago, &c. R. Co., 130 Ill. 175; 40 Am. & Eng. R. Cas. 352; Mobile, &c. R. Co. v. People, 132 Ill. 559, 571; 42 Am. & Eng. R. Cas. 671. These cases are reviewed at length by Mr. Justice GRAY in Northern Pac. R. Co. v. Washington, 142 U. S. 492; 48 Am. & Eng. R. Cas. 485-486.

² Com. v. Eastern R. Co., 103 Mass. 254, 258.

³ Railroad Com'rs v. Portland, &c. R. Co., 63 Me. 220. See also Southeastern Ry. Co. v. Com'rs, 6 Q. B. Div. 586-592.

In a case in Connecticut, under the statute of that State providing that no railroad company "shall abandon any depot or station after such depot or station has been established for twelve months except upon approval of the commissioners and after due notice and hearing, it appeared that the New Haven & Northampton Co. in 1848 constructed a railroad which in 1849 they leased to the New York & New Haven R. Co. The latter, soon after taking possession of the railroad, built a platform for the accommodation of passengers at a place on the road which was thereafter called "Brook's Station," and placed there an old baggage car which served as a shelter for waiting passengers. No agent was ever placed there, and no tickets were sold there, nor was any freight way-billed to or from that station, but to and from another station in the same town. But tickets were sold at other stations to passengers for that station, and trains were stopped to take up passengers, and trains carrying the mails stopped there regularly. The court held 1. That Brook's Station was a "station or depot" within the meaning of the statute. 2. That upon the expiration of the lease

statutory provisions against the abandonment of an established station except upon consent of the board of commissioners; where this is true judicial process will lie to prevent a breach of the statutory duty or to compel the re-establishment of an abandoned station.¹

The threatened violation of a mere naked legal right, unaccompanied by special circumstances, does not furnish an adequate ground for an injunction, when legal remedies are adequate to redress any resulting injury. In a New York case, a street railroad corporation, having obtained the consent of the town officers and land-owners required by statute, constructed its railroad over a portion of its route, specified in its articles of association. The consents were granted upon the express condition that the company should run trains daily over the whole of the route to and from the terminus thereof in that town. The defendant proposed to change the terminus, abandoning a portion of its route, and was preparing to make the necessary alterations for that purpose, when an action was brought by the supervisors of the town to restrain such abandonment, and to

the road reverted to the New Haven & Northampton Co. in the condition it then was, and that they, the lessors, were concluded by the establishment of the station by the lessees during the lease. 3. That a *mandamus* would lie at the instance of the Attorney-General to compel the New Haven & Northampton Co. to re-establish the station, they having abandoned it without the consent of the commissioners. *State v. New Haven, &c. R. Co.*, 37 Conn. 153.

¹ Changing the site of a station from one place to another in the same town, when made for reasons of convenience, necessity, or the public good, is not within the prohibition of the Mississippi statute against the "abolishment or disuse of any depot when once established," without the consent of the railroad commission. Such a change, however, can only be made without obtaining the consent of the commission when the new site is convenient and accessible, and public interest does not suffer. *State v. Alabama, &c. R. Co.*, 68 Miss. 653; 50 Am. & Eng. R. Cas. 10. Under the New York law an injunction will not be granted to restrain a city railroad company from removing its depot to a safer and more convenient locality. *Moore v. Brooklyn City R. Co.*, 108 N.

Y. 98; 36 Am. & Eng. R. Cas. 76. A city is not a trustee for the public or for individuals, so that it can maintain an action for damages against a railroad company for the loss or inconvenience such individuals suffer from the abandonment of a station. *City of St. Thomas v. Credit Valley R. Co.*, 12 Ont. Rep. 273; 36 Am. & Eng. R. Cas. 473. But a private individual who has contracted with the company to have it maintain a station near his property is entitled to recover damages for a breach of the contract by a removal of the station; and in such case compensation may be had for the reduction in the value of his property caused by such removal. *Houston, &c. R. Co. v. Molloy*, 64 Tex. 607; 25 Am. & Eng. R. Cas. 244. But one cannot recover for such decrease in the value of his property when the station was on the land of another and removed therefrom. *Pittsburgh So. R. Co. v. Reed* (Penn.), 28 Am. & Eng. R. Cas. 233. See also *Attorney-General v. Eastern R. Co.*, 137 Mass. 45; 21 Am. & Eng. R. Cas. 237 (as to distinction between re-location and abandonment of station); *New Haven, &c. Co. v. Hammersley*, 104 U. S. 1; 2 Am. & Eng. R. Cas. 418.

compel the defendant to continue the running of its trains over the whole of the route. The court found that the proposed change was demanded by public convenience and safety; that the operation of the road over that portion of the route proposed to be abandoned was and is a dangerous obstruction to travel. It was held that the action was not maintainable, because no public injury was shown to be likely to result from the proposed change, and that the plaintiffs, as highway commissioners, had no legal capacity to maintain the action, and that this would be so, even if the public interest required the observance of the condition. If the defendant violates its charter, or fails to perform the conditions under which it exercises its franchise, the remedy is a proceeding in behalf of the State by the Attorney-General to annul its charter; and if it unlawfully occupies or obstructs the highway, the remedy is by indictment or proceedings under the statute.¹

SEC. 287 *d.* Right to provide Reasonable Regulations as to Stations. — Exclusive Privileges. — A railroad company has authority to provide reasonable rules and regulations with regard to its stations, with which all who come there either to take passage on its trains or to solicit the patronage of passengers must comply.² Thus it may provide that every person shall be required to show his ticket to the gateman before being admitted into the train yard.³ But such a regulation is valid only so long as it is reasonable; therefore, where the gateman refuses to allow a passenger to take his train merely because the date of his ticket is illegible, though the ticket is otherwise good, the company must answer in damages because such an enforcement of the rule is unreasonable.⁴ It would appear,

¹ *Moore v. Brooklyn City R. Co.*, 108 N. Y. 98.

² *Summit v. State*, 8 Lea (Tenn.), 413; 41 Am. Rep. 637; 9 Am. & Eng. R. Cas. 302; *Baltimore, &c. R. Co. v. Carr*, 71 Md. 135. See also the article on "Stations" in the American and English Encyclopædia of Law.

³ *Dickerman v. St. Paul Union Depot Co.*, 44 Minn. 433; 45 Am. & Eng. R. Cas. 596; *Watkins v. Pennsylvania R. Co.* (D. C.), 52 Am. & Eng. R. Cas. 159. See in this connection the argument of Mr. Enoch TOTTEN in the above case, set out in the note to the case as reported in the Am & Eng. R. Cas. vol. 52, p. 169. A regulation by the company that a person

must purchase a ticket or be excluded from the station is held to be reasonable. *Harris v. Stevens*, 31 Vt. 79; 73 Am. Dec. 337. But the company cannot deny admission to the station to those persons who come to meet an expected passenger or to see one safely off.

⁴ *Northern Cent. R. Co. v. O'Conner* (Md.), 24 Atl. Rep. 449; 52 Am. & Eng. R. Cas. 176; *Watkins v. Pennsylvania R. Co.* (D. C.), 52 Am. & Eng. R. Cas. 159. In the former of these cases, the date being illegible, the gateman insisted that the passenger have it indorsed by the ticket receiver, but he refused; in an action by the passenger the court allowed a recovery, fixing the measure of damages

also, that if a feeble passenger is attended by a relative or friend who is to assist him on the train, it would be unreasonable to refuse such friend an entrance to the train yard, although he had no ticket.¹ Persons who are boisterous or intoxicated, or who indulge in profanity, or who are mere loungers may be expelled from the station; the company not only has a right to so expel them but it owes the duty to its passengers to relieve and protect them from the annoyance attending the presence of such persons.²

The company may also adopt regulations as to the conduct of hack and omnibus drivers who bring passengers to, and carry them from, the station. For example, it may, on its own grounds, assign places to the different hackmen and exclude all hackmen from places not assigned to them; and the right to adopt such a regulation carries with it the right to enforce it, so that the agent cannot be held liable for assault where he uses only such force against a hackman as is necessary to enforce obedience to the regulation.³ But while the station and the grounds adjacent are the private property of the railroad company, they are, like all other property of the company, affected with a public use; the company cannot, therefore, grant to any person or company the exclusive privilege of an approach to its station or of the use of its station grounds for the

at the amount paid by passenger for another ticket, compensation for loss of time, necessary hotel expenses, and also a remuneration for any inconvenience suffered. In the latter of the above cases the plaintiff's ticket was irregular, but he was entitled to travel on it. The gateman had no authority to recognize it; but the court held that plaintiff had a right to damages, though it stated very clearly the right of the company to provide regulations as to its stations.

¹ Persons at the station for such purposes are entitled to all the privileges of a passenger. See *Hamilton v. Texas, &c. R. Co.*, 64 Tex. 251; 21 Am. & Eng. R. Cas. 336.

² *Johnson v. Chicago, &c. R. Co.* 51 Iowa, 25; 50 N. W. Rep. 543. In the case of *Fluker v. Georgia R., &c. Co.*, 81 Ga. 461; 38 Am. & Eng. R. Cas. 379, it appeared that the plaintiff had for a long period enjoyed the exclusive privilege (as a licensee) of occupying a part of the station and of entering upon the cars

while at the station for the purpose of supplying passengers with lunches. The company after notice revoked the license, and on plaintiff's insisting upon an attempt to exercise the privilege he was expelled several times. The court held that he had no ground of action. The company had a right to forbid the use of its premises for any such purposes, and the fact that it had allowed plaintiff the privilege for many years did not affect its rights. And the expulsion having been accomplished without unnecessary violence, no damages could be recovered. See *Wood v. Leadbetter*, 18 M. & W. 838; *Barney v. Oyster Bay, &c. Co.*, 67 N. Y. 301; *Pittsburgh, &c. R. Co. v. Bingham*, 29 Ohio St. 364.

³ *Cole v. Rowen*, 88 Mich. 219; 50 Am. & Eng. R. Cas. 1. So it may require that hacks shall not stand in front of the entrance to the station, and may employ force to remove a hackman who refuses compliance. *Smith v. New York, &c. R. Co. (Penn.)*, 24 Atl. Rep. 304.

purpose of transporting passengers or freight to or from the depot. The exclusion of other persons engaged in the same business is a violation of the duty which the railroad company owes, of furnishing equal facilities to all connecting carriers.¹ The Massachusetts Court, however, has upheld such a grant of exclusive privileges in the face of statute specifically defining the duties owing by all carriers to connecting carriers. But this decision is much weakened by the fact that three of the judges dissented; and is unquestionably opposed by the weight of authority.²

¹ *McConnell v. Pedigo* (Ky.), 18 S. W. Rep. 15; 50 Am. & Eng. R. Cas. 5; *Kalamazoo Hack, & Co. v. Sootsma*, 84 Mich. 194; 22 Am. St. Rep. 695; 47 Am. & Eng. R. Cas. 445; *Cravens v. Rodgers*, 101 Mo. 247; 22 Am. St. Rep. 699-700 *n.*; 42 Am. & Eng. R. Cas. 656 (even though the favored individual expends much money in erecting suitable approaches, etc.); *Montana Union R. Co. v. Langlois*, 9 Mont. 419; 42 Am. & Eng. R. Cas. 656 (extensive opinion). The doctrine of the text is very clearly laid down in *Marriott v. London, & Co. Ry. Co.*, 1 C. B. N. s. 499; 87 E. C. L. 498. In the Michigan case above cited the court said: "While many of the cases above cited are decided in reference to statutes of the same import as our own, it is clear that the action of the railroad company in leasing this ground to the plaintiff, would, if sustained as valid, tend to encourage and promote a monopoly of

carriage of passengers from this depot at Kalamazoo, not only to connecting routes of travel upon other railroads out of the city, but to places within the city, contrary to the spirit of our laws, and against that public policy that refuses to encourage or foster monopolies in any kind of business." The doctrine of the text is also strongly sustained by analogous cases. See *New England Express Co. v. Maine Cent. R. Co.*, 57 Me. 188; 2 Am. Rep. 31; *Palmer v. London, & Co. Ry. Co.*, L. R. 6 C. P. 194; *Parkinson v. Great Western Ry. Co.*, L. R. 6 C. P. 554; *Markham v. Brown*, 8 N. H. 523; 31 Am. Dec. 209; *Camblos v. Railroad Co.*, 9 Phila. 411. See also *Griswold v. Webb*, 16 R. I. 649; 40 Am. & Eng. R. Cas. 683.

² *Old Colony R. Co. v. Tripp*, 147 Mass. 35; 9 Am. St. Rep. 661; 33 Am. & Eng. R. Cas. 488. See also *Barker v. Midland Ry. Co.*, 86 E. C. L. 46.

CHAPTER XVI.

MECHANIC'S LIEN.

SEC. 288. Does not cover Road-bed,
Bridges, &c.
289. Rolling-Stock.
290. Lien is assignable.
291. Party cannot have Successive
Liens, when.
292. Rights of Lienor as against
Mortgagees.

293. Essentials to Validity of Lien.
294. Persons in whose Favor Lien
may exist.
295. Mechanics, Laborers, Workmen,
Servants, &c., who are.
295 *a*. Material Men.

SEC. 288. **Does not cover Road-bed, Bridges, etc.** — Because of the character of railroads as *quasi* public highways, and the inconveniences and annoyances to which the public are apt to be subjected by the enforcement of liens against a railroad or its appurtenances, the ordinary mechanic's lien laws are construed as not embracing railroads unless it is expressly provided otherwise.¹ In many of the States, however, there are special statutes providing for existence of the lien for work done or materials furnished for railroads; and as there is no constitutional objection to such liens, the legislature being the sole judge as to the wisdom and expediency of statutes allowing them. These statutes are generally extended to laborers, subcontractors, and material men, and embrace not only the buildings or other structures belonging to the road but also the road-bed itself.²

A railroad from one end to the other is an entirety, and, as a whole only, may be subject to coercive sale;³ and for this reason,

¹ *Buncombe v. Tomney*, 115 U. S. 122; 20 Am. & Eng. R. Cas. 495; *Newcastle R. Co. v. Simpson*, 26 Fed. Rep. 133; *Graham v. Mt. Sterling Coal R. Co.*, 14 Bush (Ky.), 425; 29 Am. Rep. 412. The Ohio statute, giving a mechanic's lien on "any house, mill, manufactory, or other building, appurtenance, fixture, bridge, or other structure," and on the interest of the owner of the same, "in the lot of land on which the same shall stand or be removed to," for labor performed, or machinery, or materials fur-

nished by the contractor "for erecting, altering, repairing, or removing the same," is held not to give a lien upon a railroad. *Rutherford v. Cincinnati, &c. R. Co.*, 35 Ohio St. 559. The mechanic's lien is not analogous to that held by a vendor. *King v. Alford*, 9 Ch. Div. 643; 24 Am. & Eng. R. Cas. 331.

² See succeeding sections. Also *Peters v. St. Louis, &c. R. Co.*, 24 Mo. 586; *Code of Tenn.* (1884), §§ 2774 *et seq.*

³ *Dunn v. North Mo. R. Co.*, 24 Mo. 493; *Graham v. Mt. Sterling Coal R. Co.*,

unless the statute in express terms so provides, a mechanic's lien will not lie against a detached portion of a railroad track, nor against its bridges, culverts, trestles, etc.¹ In the case first cited in the last note, an attempt was made to enforce a mechanic's lien upon certain bridges, culverts, trestles, etc., of the defendant. The mechanic's lien law did not in express terms embrace railroad structures, and the court held that such a construction could not be given to the law, because to permit the enforcement of such liens on such structures would destroy the usefulness of the road, and would be not only contrary but ruinous to the public interest. "The effect of the construction contended for," said ELLIOT, J., "might be to parcel out the various bridges, culverts, etc., of the road among the mechanics who furnished the material and erected them, and retard or destroy the usefulness of the road to the corporation as well as to the public." And a similar doctrine, and upon the same grounds, was adopted in the Missouri case² referred to. But this doctrine does not apply to depot-buildings and structures of a similar character,³ and a statute

14 Bush (Ky.), 425; 29 Am. Rep. 412; *Applegate v. Ernst*, 3 Bush (Ky.), 650; 96 Am. Dec. 272. Lien laws are not retroactive, and do not apply to labor done or material furnished *before* their passage. *Central, &c. R. Co. v. Henning*, 52 Tex. 466; *Arbuckle v. Illinois, Mid. R. Co.*, 81 Ill. 429. In *Parker v. Massachusetts R. Co.*, 115 Mass. 580, the statute of 1873 giving a person to whom a debt is due a lien for labor done in building a railway, by virtue of an agreement with a contractor, was held not to apply where the contract was made between the railway company and the contractor before the law was passed, *although the labor was performed afterwards*. In the case of *Graham v. Mt. Sterling R. Co.*, 14 Bush (Ky.), 425; 29 Am. Rep. 412, the contractor attempted to enforce his lien against some of the bridges and trestles of the railroad. In denying his right so to enforce his lien, the court said: "To give to the mechanic's lien law a construction that would allow enforcement of mechanics' liens on such structures would destroy the usefulness of these roads so valuable to the public.

"This court decided in *Applegate v. Ernst*, 3 Bush (Ky.), 650; 96 Am. Dec. 272, that a 'railroad from one end to the

other is an entirety, and, as a whole only, may be subject to taxation or coercive sale. Fragmentary taxation or sales might be unjustly vexatious and injurious to the owners, pervert the destination of the road, and disturb the public use and interest.' To avoid such evils and absurdities, the law treats a railroad and all its appurtenances as one entire thing, not legally subject to coercive severance or dislocation. In that consolidated character it must be taxed for State revenue, and cannot be a fit subject for local taxation by the separate counties through which it runs."

¹ *Graham v. Mt. Sterling Coal R. Co.*, 14 Bush (Ky.), 425; 29 Am. Rep. 412; *Dunn v. N. Mo. R. Co.*, 24 Mo. 493; *Tyler, &c. R. Co. v. Driscoll*, 52 Tex. 13; *Central, &c. R. Co. v. Henning*, 52 id. 466; *Schulenburg v. Memphis, &c. R. Co.*, 67 Mo. 442. Such structures are not "buildings" within the statute. *La Crosse, &c. R. Co. v. Vanderpool*, 11 Wis. 119; 78 Am. Dec. 691. See also *New Eng. Car Springs Co. v. Balt. &c. R. Co.*, 11 Md. 81; 69 Am. Dec. 181.

² *Dunn v. North Mo. R. Co.*, 24 Mo. 493.

³ *Hill v. La Crosse, &c. R. Co.*, 11 Wis. 214.

giving a mechanic or material man a lien upon "*buildings*" applies to buildings of a railway company as well as to those of a private corporation or individuals.¹

For similar reasons, unless the statute provides otherwise, neither contractors nor laborers have a lien upon any specific portion of a railroad, but their lien must be filed upon the *entire* road, and not upon the particular section upon which the labor was performed;² and in the enforcement of the lien *the whole road* must be sold. Public policy is opposed to the subjection of detached portions in favor of various mechanics or contractors.³ But where the statute expressly gives a lien *upon the particular section of the road upon which the labor was performed*, that section alone is subject to the lien.⁴ In Missouri, under the statute, it is held that where a railroad is built through or in two or more States, a lien may be enforced upon that portion of the road which is situated in that State, although the work was done or materials were furnished on that part of the road which is without the State;⁵ but we think that this construction cannot be given to these statutes, except where both the language of the act and the circumstances are *very peculiar*, as it cannot,

¹ *Botsford v. New Haven, &c. R. Co.*, 41 Conn. 464. In this case, the point was raised that the statutory lien could not apply, because the *easement* of the soil only is taken by the company, the fee remaining in the land-owner. "If," said FOSTER, J., "it be granted that the easement in the soil is taken for the railroad in the exercise of the right of eminent domain, it by no means follows that the soil is so taken with an immunity from all liens and incumbrances upon it. Such an exercise of the sovereign power would be dishonest."

² *Cox v. Western Pac. R. Co.*, 44 Cal. 18; *Knapp v. St. Louis, &c. R. Co.*, 6 Mo. App. 205. But the lien only applies to that portion of the road which is completed when the lien matures. *Neilson v. Iowa Eastern R. Co.*, 51 Iowa, 184. In Missouri it is held that the statute does not apply where materials are furnished for, or labor is performed only upon, temporary structures which are never incorporated in the permanent work. *Knapp v. St. Louis, &c. R. Co.*, 6 Mo. App. 205; *affirmed*, 74 Mo. 374.

³ *Knapp v. St. Louis, &c. R. Co.*, 74

Mo. 374; 7 Am. & Eng. R. Cas. 394; *Schulenberg v. Memphis, &c. R. Co.*, 67 Mo. 442; *Cranston v. Union Trust Co.*, 75 Mo. 29; *St. Louis, &c. Bridge Co. v. Memphis, &c. R. Co.*, 72 Mo. 664; *Reynolds v. Hosmer*, 51 Cal. 205; *Farmers' L. & T. Co. v. Candler*, 87 Ga. 241; 47 Am. & Eng. R. Cas. 296. But it seems that the lien may be enforced against only that portion of the road which is within the State. *Ireland v. Atchison, &c. R. Co.*, 79 Mo. 572; 20 Am. & Eng. R. Cas. 493.

A lien obtained against a railroad running through several counties, by filing the requisite statutory notice and claim in one county, extends to the proceeds of the sale of the entire road both as against the owners and mortgages of the road. *Farmers' L. & T. Co. v. Canada, &c. R. Co.*, 127 Ind. 250; 47 Am. & Eng. R. Cas. 271; *Midland R. Co. v. Wilcox*, 122 Ind. 84.

⁴ *Cox v. Western Pacific R. Co.*, 47 Cal. 87.

⁵ *St. Louis Bridge, &c. Co. v. Memphis, &c. R. Co.*, 72 Mo. 664.

in the absence of express terms to that effect, be presumed that the legislature intended to extend the benefits of these extraordinary acts to persons who performed their labor, or furnished materials, in another jurisdiction, and without any reference to the security afforded by such a statute, which could have no force where the indebtedness was incurred. There can be no pretence that a lien given by the laws of Missouri could be extended to a part of the same railroad which lies in another State, or that a sale of a railroad to enforce a lien arising under the laws of Missouri could embrace or affect the title to that portion of the road lying outside the State; and, this being the case, it exhibits the exercise of an unusual comity, to permit a contractor or laborer from another jurisdiction to avail himself of the lien given by the laws of one State for materials furnished or services performed in another. Under statutes which give mechanics and laborers a lien upon the "road" or "other structure" and the land upon which it is constructed, for the labor or materials furnished in the construction or repair of the road, a lien cannot be claimed upon a street railway, because a street railway and a railroad are essentially different things (*ante*, § 1), and the land upon which it is constructed is the property not of the railway company but of the city or of abutting owners.¹

SEC. 289. **Rolling-Stock.** — Unless the statute is expressly extended to the rolling-stock and other movable property of the corporation, it is not embraced in the mechanic's lien, as it is held not to constitute a part of its real estate;² and even where the statute

¹ *Front St. Cable R. Co. v. Johnson*, 2 Wash. St. 115; 25 Pac. Rep. 1084. *Contra*, *St. Louis Bolt, & Co. v. Donahue*, 3 Mo. App. 559; this case, however, is poorly reported, and its correctness may well be questioned. But see *Botsford v. New Haven, & C. R. Co.*, 41 Conn. 464. In *McIlvaine v. Hestonville R. Co.*, 5 Phila. (Pa.) 13, it is held that a stable built by a street railway company in which to keep its horses is subject to the lien of a mechanic for work done on the road.

² See *post*, § 466. In *New Eng. Car Springs Co. v. Balt. & C. R. Co.*, 11 Md. 81; 69 Am. Dec. 181, it was held that the word "machines" as used in the mechanic's lien statute would not embrace the cars or other rolling-stock used on a railroad. In the case of *Neilson v. Iowa Eastern R. Co.*, 51 Iowa, 184; 33 Am.

Rep. 124, this question as to the rolling-stock was considered, and the doctrine of the text sustained. *SEEVERS, J.*, speaking for the court, said: "The petition, it will be observed, asks that the lien be established 'on the land and right of way.' It also asked its establishment on the rolling-stock. This was done. If the rolling-stock was appurtenant to, and constituted a part of, the real estate, it was unnecessary to ask that the lien be established thereon. We have then for determination the question, whether one who furnishes ties for the purpose of being used in the construction of a railroad can have a lien on the rolling-stock. If it is real estate, or constitutes a part of the 'building, erection, or improvement,' he has such lien; otherwise not. The land, road-bed, and right of way, and whatever is appur-

is extended to that class of property, it does not, as in the case of the road-bed, etc., extend to *all* the rolling-stock, etc., of the road, so that

tenant thereto, are real estate, and constitute the 'building, erection, or improvement' contemplated by the statute. Is the rolling-stock appurtenant thereto in such sense as to make it a part of the real estate? This question has been frequently mooted and largely discussed. It is said there is not an entire accord in the authorities in reference thereto. It was considered by this court in *Davenport v. Miss., &c. R. Co.*, 16 Iowa, 348, and *Dubuque v. Ill. Cent. R. Co.*, 39 id. 56. In the first case *LOWE, J.*, seems to have been of the opinion that rolling-stock was a part of the road. The other justices expressed no opinion on this point. In the last case *BECK and DAY, JJ.*, expressed the opinion that the rolling-stock of such corporations was personal property. No opinion in relation thereto was expressed by the other justices, one of whom was on the bench when the first case was determined. The question is therefore an open one in this State. The leading cases in which it is said it has been determined that rolling-stock is real estate, to which our attention has been called, are, *Pennock v. Coe*, 23 How. (U. S.) 117; *Gee v. Tide Water Canal Co.*, 24 id. 257; *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609; *R. Co. v. James*, 6 Wall. (U. S.) 750; *Scott v. C. & S. R. Co.*, 6 Bliss (U. S.), 529; *Farmers' L. & T. Co. v. St. Jo. R. Co.*, 3 Dill. (U. S.) 412; and *Pierce v. Emery*, 32 N. H. 485. No such question was determined in the case last cited. The only matter decided was as to the validity and effect of a mortgage on after-acquired property. This is evident from the subsequent case of the *Boston, &c. R. Co. v. Gilmore*, 37 N. H. 410, which is an authority in favor of the proposition that rolling-stock is personal property, and our attention has not been called to a single decision of a State court holding differently. We are not prepared to say, however, there are none. It has been said: 'Engines and cars are no more appendages of a railroad than are wagons and carriages of a highway. Both are equally essential to the enjoyment of the road; neither constitute a part of it.' *State Treasurer v.*

Sommerville, &c. R. Co., 28 N. J. L. 21. There is much force in the foregoing, because the instances are not unfrequent where one corporation owns the road and franchise, and another the rolling-stock. In the late case of *Williamson v. New Jersey So. R. Co.*, 29 N. J. Eq. 311, a case we have not seen, the Court of Appeals of New Jersey is said, in an elaborate opinion, to have held that rolling-stock was personal property and not real estate. The cases above cited in the Federal Courts, it is said, were distinguished, as we think they well might be, on the ground, if no other, that in some of them the only question involved was as to the power to execute, and the effect and validity of mortgages as to after-acquired property. In one, rolling-stock had, by the statute of the State, under the laws of which the corporation existed, been declared to be a fixture, and in another the property in controversy consisted of the houses, lots, and locks of a canal company. It has been determined in the following cases, in addition to those above cited, that rolling-stock is personal property. *Randall v. Elwell*, 52 N. Y. 521; 11 Am. Rep. 747; *Hoyle v. Plattsburgh R. Co.*, 54 N. Y. 314; 13 Am. Rep. 595; *Chicago, &c. R. Co. v. Fort Howard*, 21 Wis. 45; *Coe v. Columbus R. Co.*, 10 Ohio St. 372; 75 Am. Dec. 518; *Meyer v. Johnston*, 53 Ala. 237, 353. In *Hoyle v. Plattsburgh R. Co.*, it is said the 'want of the element of localization in use is a controlling and conclusive reason why the character of realty should not be given to rolling-stock of a railroad,' and in this thought it must, we think, be admitted there is much force. How can it be said that a car belonging to a railroad in this State, when being propelled through the State of New York at the rate of twenty miles an hour, is real property in this State? The proposition to us seems absurd. In *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57; 24 Am. Rep. 719, we approved of the criterion adopted in *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634, that in determining whether a given thing was real estate, 'the intention of the party making the

the whole must be sold under the lien, but only to so much of it as is necessary to satisfy the lien.¹

SEC. 290. **Lien is assignable.**—There is some conflict in the authorities as to the assignability of the mechanic's or laborer's lien, based partly upon the peculiar wording of the statutes and partly upon the difference in the views which the various courts have taken as to the character of the lien created by the statute. In some jurisdictions the lien is regarded as being a personal privilege which is not assignable.² But the better view seems to be that the original holder of the lien may transfer all his rights secured by it, and his assignee become entitled to all his privileges;³ though

annexation to make a permanent accession to the freehold' was a controlling consideration. Tested by this rule rolling-stock cannot be regarded as real estate. The intention may be ascertained by the use, and common and universal custom and usage. It is well known that the cars of one road are in constant use on other roads. It was never intended otherwise. The demands of commerce and trade require it. It was never intended they should be annexed permanently to the freehold. It may be safely assumed that all mortgages executed on railroads specially mention rolling-stock as being included. Why is this done if it was regarded as real estate, or as appurtenant thereto? Why the labored efforts of counsel, sustained by the elaborate opinions of the highest court in the country, demonstrating that mortgages executed by such corporations were liens on after-acquired rolling-stock, if the same was appurtenant to the realty? About an afterward erected station-house there never was any doubt, because it is permanently annexed to the real estate, such being the intention. Not so, however, as to rolling-stock; hence the strain to prove it was covered by mortgages previously executed. For the reason above stated, and because the decided weight of authority, as we believe, is in favor of the rule, we hold that rolling-stock is not real estate, and that the plaintiffs are not entitled to the lien thereon." *Compare* Grand Trunk R. Co. v. Eastern Counties Bank, 11 Lower Canada Jur. 11.

¹ Knapp v. St. Louis, &c. R. Co., 74 Mo. 374; 7 Am. & Eng. R. Cas. 394,

affirming 6 Mo. App. 205; Cranston v. Union Trust Co., 75 Mo. 29.

² Fitzgerald v. First Presbyterian Church, 1 Mich. N. P. 243; Ruggles v. Walker, 34 Vt. 468; Cairo, &c. R. Co. v. Fackney, 78 Ill. 119 (not assignable at law); Dana v. Mississippi, &c. R. Co., 27 Ark. 564.

³ Austin, &c. R. Co. v. Rucker, 59 Tex. 587; 12 Am. & Eng. R. Cas. 259; Davis v. Bilsland, 18 Wall. (U. S.) 659; Ritter v. Stevenson, 7 Cal. 388 (lien assignable only in writing); Mason v. Germaine, 1 Mont. 203; Rogers v. Omaha Hotel Co., 4 Neb. 54, Tuttle v. Howe, 14 Minn. 145. In Midland R. Co. v. Wilcox, 122 Ind. 84; 23 N. E. Rep. 508, the court, speaking by ELLIOTT, J., said: "We know that there is an apparent conflict in the authorities upon the question of the assignability of a mechanic's lien, but this conflict is caused principally by the fact that at common law choses in action were not assignable, although in equity it is otherwise. The rule declared by the cases supported by the stronger reason is that such liens are assignable in equity, Major v. Collins, 11 Ill. App. 658; Friedman v. Roderich, 20 Ill. App. 622; Dixon v. Buell, 21 Ill. 203; Cairo, &c. R. Co. v. Fackney, 78 Ill. 116; Railroad Co. v. McCaughey, 62 Tex. 271; Railway Co. v. Daniels, 62 Tex. 70. As our statute adopts, and in truth enlarges, the equity rule, it must follow that such liens may be assigned. This is the ruling of our court and it is right. Sinton v. The Roberts, 46 Ind. 476. The conclusion we have declared is supported by many other courts

it is sometimes held that he can enforce it only in the name of his assignor.¹

SEC. 291. **Party cannot have Successive Liens, when.** — A party can under an entire contract acquire but one lien;² and the circumstance that payments under the contract are due from time to time as the work progresses does not authorize the filing of successive liens.³

SEC. 292. **Rights of Lienor as against Mortgagees.** — As against a mortgage executed *before* a mechanic's lien exists, the mortgage generally takes precedence over the lien,⁴ as the legislature has no power to impair the obligation of a valid contract or the lien of duly recorded encumbrances, or to authorize any act which will have that effect; therefore, unless the lien law existed before the mortgage was executed, and the statute in express terms provides that such liens shall have priority over mortgages, and the road is, when the mortgage is executed, incomplete, so that the mortgagee is chargeable with notice that such liens may arise, the title of the mortgagees will be paramount;⁵ but where the road is incomplete when the mortgage

in strongly reasoned opinions. *Murphy v. Adams*, 71 Me. 118; *Tuttle v. Howe*, 14 Minn. 145; *Skyrne v. Mining Co.*, 8 Nev. 239; *Iaeger v. Bossieux*, 15 Gratt. (Va.) 83; *Kerr v. Moore*, 54 Miss. 286; *Stryker v. Cassidy*, 76 N. Y. 52. It is in close harmony with the general principle that a security is the incident of a debt and passes with the assignment of the debt to the assignee. *Perry v. Roberts*, 30 Ind. 244; *Felton v. Smith*, 84 Ind. 485, and authorities there cited, 495; *Reeves v. Hayes*, 95 Ind. 521; *Day v. Bowman*, 109 Ind. 363; *Com. L. Ins. Co. v. Talbot*, 113 Ind. 373. The doctrine which runs through all our cases is that the debt is the substantive thing, the security the shadow, and that the two are inseparable. *Hough v. Osborne*, 7 Ind. 140; *Garrett v. Puckett*, 15 Ind. 485; *Hubbard v. Harrison*, 38 Ind. 323. We cannot regard the reasoning of some of the courts, which hold that the right to the lien is a purely personal privilege, as either valid or forcible." Where the plaintiff's claims against the railroad company are based upon orders drawn by a subcontractor upon plaintiff in favor of a laborer, these orders cannot be considered as constituting an assignment to the plaintiff of the laborer's claim for the amount due him by the sub-contractor.

Dudley v. Toledo, &c. R. Co., 65 Mich. 655; 30 Am. & Eng. R. Cas. 236.

¹ *Murphy v. Adams*, 71 Me. 119; *Pearsons v. Tinckner*, 36 Me. 387; *Caldwell v. Lawrence*, 10 Wis. 331. See also *Rollins v. Cross*, 45 N. Y. 766; *Hubbell v. Schreyer*, 14 Abb. Pr. N. S. (N. Y.) 284. In Nevada, however, it may be enforced in the assignee's name. *Skyrne v. Occidental Mills, &c. Co.*, 8 Nev. 220. So in other States *Tuttle v. Howe*, 14 Minn. 145; 15 Am. & Eng. Ency. Law, 103 n.

² *Cox v. West. Pac. R. Co.*, 44 Cal. 18.

³ *Cox v. West. Pac. R. Co.*, 47 Cal. 87.

⁴ *Coe v. N. J., &c. R. Co.*, 31 N. J. Eq. 105.

⁵ *Coe v. N. J., &c. R. Co.*, 31 N. J. Eq. 105; *Brooks v. Railway Co.*, 101 U. S. 443; *Toledo, &c. R. Co. v. Hamilton*, 134 U. S. 296. Where work has been done under a contract, upon a railroad, the company cannot by the execution of a mortgage, and a sale thereunder, defeat the lien, but as against such lien such mortgage and sale are void. *Shamokin Valley, &c. R. Co. v. Malone*, 85 Penn. St. 25. See also *Fox v. Seal*, 21 Wall. (U. S.) 424; *Tommey v. Spartansburgh, &c. R. Co.*, 7 Fed. Rep. 429; *Tyrone, &c. R. Co. v. Jones*, 79 Penn. St. 60; *Meyer v. Construction Co.*, 100 U. S. 457; 21 Am. Ry. Cas. 465.

is executed, the lien takes precedence over the mortgage.¹ But where the road is completed when the mortgage is executed, and the lien arises for making repairs thereon, or additions thereto, the mortgage takes priority over the lien.² And in the case last cited, it was also held that a prior mortgage will take precedence over a mechanic's lien, when the improvements made by him form an integral part of the road.³ A mortgage executed before the corporation has acquired either the legal or equitable title to land does not take precedence over a lien in favor of a mechanic, arising for labor done upon such land, or materials furnished *after* the execution of the mortgage, but before the corporation has acquired title to the land.⁴ Thus, in the case last cited, a land-owner agreed with a railroad company that he would give the land for a depot and station upon the road, if the company would erect a building for the purpose upon the land. The company agreed to do so, and employed the petitioner to do the mason-work thereon. He began work November 23, 1870, and finished January 17, 1871, and immediately thereafter filed a certificate of his lien. The company began to use the place as a station immediately after making the agreement with the land-owner and before the building was commenced, taking and delivering passengers and freight there, and continued such use until the building was completed. No conveyance of the land was ever made by the owner. The company had previously, in May and

¹ *Meyer v. Hornby*, 101 U. S. 728; *Brooks v. Railway Co.*, 101 U. S. 443; *Taylor v. Cedar Rapids, &c. R. Co.*, 4 Dill. (U. S.) 570; *Railroad Co. v. Meyer*, 100 U. S. 457; *Farmers' L. & T. Co. v. Canada, &c. R. Co.*, 127 Ind. 250. *Compare Cent. Trust Co. v. Cameron Iron Co.*, 47 Fed. Rep. 136. In *Neilson v. Iowa Eastern R. Co.*, 44 Iowa, 71, it was held that a mechanic's lien for ties furnished to a railroad attaches from the commencement of the building, and takes precedence over a mortgage executed after that time, although the particular work for which the lien is claimed was not commenced until after the execution of the mortgage. So also it is held in Massachusetts that the lien takes priority over a mortgage executed after the mechanic's contract was made, but before building was begun or materials furnished. *Carew v. Stubbs*, (Mass. 1892) 30 N. E. Rep. 219. And a

party delivering rails to a railroad company has a lien which is entitled to priority over that acquired under a trust created after the delivery of the rails but before proceedings were instituted to enforce the lien; and this, although the contract provided that no lien should exist until after the time for payment. *Chicago, &c. R. Co. v. Union Rolling Mills Co.*, 109 U. S. 703; 16 Am. & Eng. R. Cas. 626. See also *Boston v. Chesapeake, &c. R. Co.*, 76 Va. 180; 12 Am. & Eng. R. Cas. 263.

² *Bear v. Burlington, &c. R. Co.*, 48 Iowa, 619. See *post*, Chap. XXIX.

³ In *Coe v. N. J. Midland R. Co.*, 31 N. J. Eq. 105, a depot-building was held, as against a mechanic's lien, to be property connected with the line of the railroad and regarded as part of the mortgaged premises under a mortgage prior to the lien.

⁴ *Botsford v. New Haven, &c. R. Co.*, 41 Conn. 454.

June, 1869, made two mortgages of the entire franchise and property of the road, the mortgages providing in express terms that they were also to cover all lands and buildings that might afterwards be acquired by or belong to the company. It was held, upon a petition to foreclose the lien, that even if the mortgages could legally embrace after-acquired property, which the court did not decide, yet the equitable title to the land in question did not vest in the company until the condition on which they received the land was performed, by the completion of the building so that it could be conveniently used for the purpose for which it was erected; and that therefore the lien of the petitioner took precedence of the mortgage encumbrance.

In Pennsylvania, under the joint resolution of 1843, the lien of a contractor, laborer, or workman upon the real or personal estate of a railroad company, for the construction, improvement, or repair of the road, is unlimited in duration, and takes precedence over a mortgage or transfer of the road, executed *subsequently* to such lien.¹ But it is held that where, in a proceeding to foreclose the mortgage, such lienors, etc., are made parties to the bill, and a decree is entered against them *pro confesso*, and the road and franchises are ordered to be sold discharged of all liens, such lienors cannot long afterwards assert their claims against the purchasers at such sale, but by their *laches* are estopped from so doing, although the resolution referred to provides that a mortgage or transfer of the road, after such lien has attached, shall be deemed fraudulent, null, and void as against the persons in whose favor it arises.²

As between several holders of mechanics' liens on the same structures, the common-law rule prevails that *qui prior est in tempore, potior est in jure*. The rule of maritime law which allows a priority of lien to the last creditor furnishing supplies and repairs for the preservation of a vessel on a voyage has no application to liens for labor or materials furnished in the construction of a railroad.³

SEC. 293. **Essentials to Validity of the Lien.** — The lien given to contractors, mechanics, laborers, etc., upon real estate, for labor done thereon, is purely statutory; consequently, in order to be operative or available, it must not only come clearly within the provisions of

¹ Fox v. Seal, 21 Wall. (U. S.) 424; Penn. St. 101; 3 Am. & Eng. R. Cas. Tyrone, &c. R. Co. v. Jones, 79 Penn. St. 525.

60.

² Woods v. Pittsburgh, &c. R. Co., 99 Wall. (U. S.) 459; Fox v. Seal, 22 Wall. (U. S.) 424; *post*, Chap. XXIX.

³ Galveston, &c. R. Co. v. Cowdrey, 11

the statute, but all the measures required by the statute to be taken by the lienors in order to give it validity must be strictly taken. Furnishing materials or performing labor, etc., creates an incipient lien,¹ but unless the necessary steps are taken to perfect it, it does not cling to the property, except for the period within which such steps must be taken. Thus, if notice is required to be given to the land-owner, or if the claim is required to be filed in a certain office within a certain time,² the lien ceases to exist if such steps are not taken within the time specified. Thus, where notice of the lien is required to be given or filed within ninety days from the completion of the work, unless such notice is given or filed within that period, it is lost;³ and the notice must contain *all* the elements specified in the statute, as to the nature of the claim,⁴ the description of the property, its ownership, and all other matters.⁵ So, too, the method stated in the statute for the enforcement of the lien, and the time within which such proceedings must be com-

¹ *Boston v. Chesapeake, &c. R. Co.*, 76 Va. 180; 12 Am. & Eng. R. Cas. 263; *Delaware, &c. Co. v. Davenport, &c. R. Co.*, 46 Iowa, 406.

² *Boston v. Chesapeake, &c. R. Co.*, 76 Va. 180; 12 Am. & Eng. R. Cas. 263. Under the Virginia statute the claim for the lien was required to be filed in every county in which the property sought to be subjected was located. It was therefore held that a claim filed only in the city of Richmond was insufficient where the contractors sought to subject the property of the entire road. *Boston v. Chesapeake, &c. R. Co.*, 76 Va. 180; 12 Am. & Eng. R. Cas. 263.

³ *Delaware R. Const. Co. v. Davenport, &c. R. Co.*, 46 Iowa, 406.

⁴ *Lankey v. Wells*, 16 Nev. 271; *Holmes v. Richet*, 56 Cal. 307; *Shields v. Garrett*, 12 Phila. (Penn.) 458.

⁵ *Rugg v. Hoover*, 28 Minn. 404; *Wehr v. Shyneck*, 55 Md. 434; *Newman v. Brown*, 27 Kan. 117.

A New Jersey statute provided: "In case of the insolvency of any corporation, the laborers in the employ thereof shall have a lien upon the assets thereof for the amount of wages due to them respectively, which shall be paid prior to any other debt or debts of said company; and the word 'laborers' shall be construed to include all persons doing labor or service of whatever

character, for or as workmen or employés in the regular employ of such corporation." Construing this the court holds: 1. That the lien so given comes into existence as of the date which the court adjudges to be the time when the insolvency occurred which gives it jurisdiction. 2. That persons holding claims for wages, who are not in the employ of the corporation at the time when it becomes insolvent, are not within the policy of the act, and therefore have no lien upon the corporation assets. 3. That the presentation of a claim embracing other items than charges for wages does not work a forfeiture of the right of lien. 4. That laborers in the employ of the corporation when it becomes insolvent have a lien upon its assets for the whole amount of wages due them respectively, no matter how long before the date of insolvency the wages may have accrued. 5. That the acceptance of a promissory note, without security, does not operate as a waiver of the lien, unless an intention to relinquish such right is unmistakably manifested. 6. That the lien for wages does not include interest which has accrued thereon before the lien attached; and 7. That the proving of a claim for a sum in excess of the amount really due does not work a forfeiture of the right of lien. *Delaware, &c. R. Co. v. Oxford Iron Co.*, 33 N. J. Eq. 193.

menced must be strictly pursued.¹ Indeed, as the right and the remedy are both given by statute, the lienor must comply strictly with all the requirements of the statute, both to complete and effectuate the right.²

SEC. 294. **Persons in whose Favor Lien may exist.** — A lien upon a railroad for materials or labor can only arise in favor of such persons as the statute designates. In some of the States, it is extended to contractors, subcontractors, mechanics, laborers, and workmen. In the case of subcontractors, it is held that the statute giving a lien does not extend beyond him, and that a person furnishing materials for the road upon a contract with him has no lien against the railroad company or its property therefor.³ In the case of subcontractors, if they intend to rely upon the responsibility of the corporation rather than upon that of the contractor, it is generally made necessary for them to notify the corporation thereof, so that it may protect itself by withholding payments which may become due to him from time to time under the contract; and until such notice is given, he has no claim upon the corporation, either by way of lien or otherwise, for work done or materials furnished under his contract,⁴ nor does his lien become complete, unless he fully complies with all the provisions of the statute;⁵ and if payments for the whole work have become due to the contractor and have been made by the corporation, before the work is completed, and before the subcontractor has given notice as required by statute, he can have no claim upon the corporation, either by way of lien or otherwise, for the amount due him from the contractor.⁶

¹ Delaware, &c. Co. v. Davenport, &c. R. Co., 46 Iowa, 406; Lounsbury v. Iowa, &c. R. Co., 49 Iowa, 255; Cranston v. Union Trust Co., 75 Mo. 29.

² See the general subject of procedure examined in 15 Am. & Eng. Ency. Law, article "*Mechanic's Lien*," pp. 1 *et seq.*; Phillips on Mechanics' Liens.

³ Cairo, &c. R. Co. v. Watson, 85 Ill. 531; Smith Bridge Co. v. Louisville, &c. R. Co., 72 Ill. 506; Blatzer v. Raleigh, &c. R. Co., 115 U. S. 634; 24 Am. & Eng. R. Cas. 354. One who had contracted to furnish 5,000 ties for the construction of a road is said not to be a "contractor" within the meaning of the Pennsylvania statute giving a special remedy; nor are the agents and employes of such person

within the act. Hart's Appeal, 96 Penn. St. 335; 11 Am. & Eng. R. Cas. 618. But under the Kansas statute granting a mechanic's lien, proof that the railroad company paid a bridge builder for work done on one of its bridges upon estimates made by one of its agents as the work progressed is sufficient to show that such bridge builder is a "contractor" within the statute. Atchison, &c. R. Co. v. McConnell, 25 Kan. 370.

⁴ Cairo, &c. R. Co. v. Couble 85 Ill. 555.

⁵ Cairo, &c. R. Co. v. Couble, 4 Brad. (Ill. App.) 133.

⁶ Rowland v. Centreville, &c. R. Co., 61 Iowa, 380; 11 Am. & Eng. R. Cas. 47.

SEC. 295. **Mechanics, Laborers, Workmen, Servants, etc., who are.**

— There is considerable conflict in the cases, as to who are mechanics, laborers, servants, etc., within the meaning of these statutes conferring the lien. In a Canada case,¹ under a statute which provides that every "mechanic, machinist, builder, miner, laborer, or *other person* doing work upon or furnishing materials to be used in the construction of any building shall have a lien or charge for the price of the work," it was held that an architect who designs or superintends the work comes within its provisions. "It was contended," said PROUDFIT, V. C., "that the act only contemplated persons who applied manual labor on, or furnished materials to be used in, a building in course of construction; that an architect did neither, and that the phrase *other person* must be construed person of the same character as those mentioned specifically in the section. The duties of architect in preparing elevations, working-plans, specifications, superintending the construction of the building according to the plans, and seeing that proper materials are used, etc., are essential things to be done in the construction of the work; and the architect seems to me, if not comprehended under the designation of builder, to come under that of *other person*." In New York,² New Jersey,³ Louisiana,⁴ and Minnesota,⁵ a similar doctrine, and upon the same grounds, was held. But in Pennsylvania,⁶ under a statute similar to the New York statute, it is held that an architect is a "mechanic" within the meaning of the term as employed in the statute, and that as such he is entitled to a lien upon a building or other structure, the plans for which are drawn by him, or the construction of which he superintends. "The contract in this case," say the court, "denominates the plaintiff an *architect*. That he was at the same time a mechanic is evident from the requirement not only to draw the plans of the work to be done, but the duty of explaining and directing its proper execution. This is work often done by the master-mechanic, and is as essential to the due construction of a building as is the purely mechanical part; for without it, shape, symmetry, and proportion would be wanting, — elements, not of beauty alone but of strength and convenience in every super-

¹ Arnoldi v. Gouin, 22 Grant Ch. 314.² Stryker v. Cassidy, 76 N. Y. 50.³ Mutual Benefit Life Ins. Co. v. Rowland, 26 N. J. Eq. 389.⁴ Mulligan v. Mulligan, 18 La. An 20.⁵ Knight v. Norris, 13 Minn. 475. So

in Alabama. Hughes v. Forgeson (Ala. 1892), 11 So. Rep. 209 (under a statute giving lien to "any person who has done labor or work upon the building.").

⁶ Bank of Pennsylvania v. Gries, 35 Penn. St. 423.

structure. To preserve these elements some architectural skill is required, but is generally exercised, in ordinary buildings, by a mere mechanic by occupation. This would certainly not impair his right to a lien as such mechanic. A mere naked architect, who may be such without being an operative mechanic, who draws plans in anticipation of building usually to enable the builder to determine what kind he will erect, could hardly be supposed to be within the act which provides a lien for work 'done for or about the erection or construction of the building.' But very distinguishable from this is the case of a party employed to devote his entire time to a building, and who draws the plans for every part of the work, and directs its execution according to such plans and specifications. This is labor — mechanical labor of a high order — contributing its proportionate value to the beauty, strength, and convenience of the edifice. Why is not this to be considered as meritorious as mere manual labor with the tools of a trade? Both are necessary to the accomplishment of the end in view, and both were necessary, or were deemed so to be in this case, to the progress of the building, and in and about its construction." ¹

But in Missouri ² and Kentucky, ³ the doctrine of the Pennsylvania cases is questioned, and it is held that an architect is not entitled to a lien for drawing plans for, or superintending the construction of, a building, under a statute giving a lien to a "mechanic, workman, laborer," etc., upon the ground that he is not within the defined classes of persons. In Montana ⁴ a similar rule was adopted under a similar statute, as to a person who was employed by a corporation at a monthly salary to superintend the erection of buildings and the working of mines. It seems to us, however, that the doctrine of the New York and Pennsylvania cases, before cited, expresses the better rule, and that the services of an architect in designing, or of a person superintending the construction of a building, comes clearly within the spirit of the statute, which, after enumerating the particular classes of persons for whose benefit the statute was intended, con-

¹ In *Ames v. Dyer*, 41 Me. 397, it was held that a person who draws plans for a ship has no lien upon the ship therefor; but this is upon the ground that the statute only gives a lien thereon to "any ship-carpenter, caulker, blacksmith, joiner, or other person who shall perform labor or furnish materials for or on account of any ship," and does not include an architect,

or the class of labor done by him in designing the ship.

² *Reeder v. Bensbury*, 6 Mo. App. 445; see also *Blakeley v. Blakeley*, 27 Mo. App. 39.

³ *Foushee v. Grigsby*, 12 Bush (Ky.), 75.

⁴ *Smallhouse v. Kentucky, &c. Co.*, 2 Mont. 443.

tains another sweeping and comprehensive clause, "or other person who performs any labor or furnishes materials for any building," etc., even though he is not to be treated as a "mechanic" in the ordinary sense of the term. But the Tennessee Supreme Court has recently held in view of all the authorities that an architect is not entitled to the lien unless it is expressly so provided.¹

Where a claim for a lien is filed by a subcontractor or a person who had furnished materials for a building, it is a proper practice to make the contractor, as well as the owner of the building, a defendant in the suit, so that the court may adjust all the equities between the parties. But if the contractor is a necessary party, his omission must be objected to by demurrer or answer; otherwise, the objection is waived.² A mortgagee cannot, where the lienor (a subcontractor) has complied with the statute, object to the validity of the lien, on the ground that he did not present to the company a statement of his claim certified by the contractor to be just, after a judgment establishing his lien has been rendered, in proceedings to which the contractor and the company were parties.³

Under statutes giving "laborers" upon railroads, engaged in their construction, a right of action against the corporation, or a lien upon the railroad therefor, it is sometimes an important and vexed question, who come under that head. Webster, in his dictionary, defines a laborer as being "one who labors in a toilsome occupation; a man who does work that requires little skill, as distinguished from an artisan;" and under his definition of "labor" he includes "intellectual exertion, mental exertion;" so that it appears that a person may perform "labor" without being a "laborer" within the ordinary meaning of the term. In a Pennsylvania case,⁴ this distinction was adopted, the court holding that a civil engineer was neither a "laborer nor workman" within the meaning of those terms as used in a mechanic's lien law. "Ordinarily," say the court, "these words cannot be understood as embracing the learned professions, but rather such as gain their livelihood by manual toil. When we speak of the laboring or working classes, we certainly do not intend to include therein persons like civil engineers, the value of whose services rests rather in their scientific than in their physical ability.

¹ Thompson v. Baxter (Tenn. 1893),
21 S. W. Rep. 668.

² Carney v. Lacrosse, &c. R. Co., 15
Wis. 503.

³ Brooks v. Railway Co., 101 U. S. 443.

⁴ Pennsylvania, &c. R. Co. v. Leuffer,
84 Penn. St. 168; Peck v. Russ, 55 Wis.
465; 10 Am. & Eng. R. Cas. 642.

We thereby intend those who are engaged, not in head, but in hand, work, and who depend upon such hand work for their living. Worcester defines a laborer to be 'one who labors; one regularly employed at some hard work; a workman; an operative; often used of one who gets a livelihood at some coarse, manual labor, as distinguished from an artisan or professional man.' In like manner, a workman is defined as 'one who works; one employed in any labor, especially 'manual labor.'" "It is true, in one sense, the engineer is a laborer; but so is the lawyer and doctor, the banker and corporation officer, yet no statistician has ever been known to include these among the laboring classes."

Neither a contractor nor a subcontractor is regarded as being included in the term "laborer;"¹ and in New York² a consulting-engineer was held not to be a "laborer or operative" within the meaning of those terms as employed in a statute giving to those classes special advantages for the recovery of their wages. But under the Iowa statute which provides for a lien in favor of any "person engaged in the construction of a railway" under contract with the company, it is held that a subcontractor is entitled to the lien.³ In Indiana the statute expressly provides for subcontractors, but it is considered that a *day laborer* employed by a contractor constructing a part of the road, and a man who furnishes materials to the same contractor,⁴ are neither subcontractors within the statute. Many of the statutes provide specifically for the lien of the contractor and of subcontractors.⁵

¹ Chicago, &c. R. Co. v. Sturgis, 44 Mich. 538; Martin v. Mich. &c. R. Co., 62 Mich. 458. The Georgia statute of 1869 provided that "mechanics and laborers" should have a lien "for work done or materials furnished in certain specified cases. It was held that a contractor or subcontractor was not included by the terms used. Savannah, &c. R. Co. v. Callahan, 49 Ga. 506; 56 Ga. 332. Under the Florida statute giving a lien in favor of every person who shall "perform labor" on a railroad, no lien can be awarded to a contractor employed in the construction of a road for damages sustained by him from a breach of the contract by the railroad company. St. Johns, &c. R. Co. v. Bartola, 28 Fla. 82. In Georgia it is held that the lien given by Ga. Code, § 1979 to "contractors to build railroads," is confined to those contractors employed by the

person or company owning the railroad, and does not extend to subcontractors who procure the work to be done on their own account, though in pursuance of a contract between themselves and the primary contractors. Carter v. Rome, &c. Const. Co., 89 Ga. 158; 15 S. E. Rep. 36.

² Erricson v. Brown, 38 Barb. 340.

³ Vaughn v. Smith, 58 Iowa, 553; 7 Am. & Eng. R. Cas. 82.

⁴ Farmers' L. & T. Co. v. Canada, &c. R. Co., 127 Ind. 250; 47 Am. & Eng. R. Cas. 271.

⁵ Where a construction contract for the building of a railroad was set aside, at the instance of the railroad company, as being *ultra vires*, with an allowance of compensation to the contractor for work actually performed by him, he has, for the sum so allowed, a contractor's lien under the Pennsylvania statute; and this lien takes

In Nevada¹ a "foreman" or "boss" of mining hands was held to be a "laborer or person performing labor," within the mechanic's lien law. But it will be observed that this doctrine does not conflict with the previous cases, but comes clearly within the definition given by Webster. In Missouri,² Montana,³ and Kentucky,⁴ a person employed to superintend the construction of a building is held not to be a "laborer or workman" within the meaning of those terms as used in a mechanic's lien law. Thus it will be seen that the true test by which to determine whether a person is a "laborer" or "workman," so as to be entitled to the advantages of statutes giving liens to those classes, or special remedies against the corporation,

preference over the claim preferred by adverse counsel for services rendered to the company in litigation with the contractor. *Newcastle Ry. Co. v. Simpson*, 36 Fed. Rep. 133.

¹ *Capron v. Stout*, 11 Nev. 304. In New York, under the provision of § 18 of the Act of 1848, authorizing the promotion of corporations for manufacturing, mining, mechanical, etc., purposes, which makes the stockholders "liable for all debts that may be due and owing to their laborers, servants, and apprentices for services performed for such corporation," it is held that a person described as the bookkeeper and general manager of the company, and who kept an account of all the receipts and disbursements of the company, and in the absence of the superintendent had the charge and control of its business, and was employed at a yearly salary of \$1,200, is not a servant or a laborer. — *DANFORTH, J.*, saying: "The clause in question creates a privileged class into which none but the humblest employes are admitted. The services referred to are menial or manual services. He who performs them must be of a class whose members usually look to the reward of a day's labor or service for immediate or present support, from whom the company do not expect credit, and to whom its future ability to pay is of no consequence, — one who is responsible for no independent action, but who does a day's work or a stated job under the direction of a superior. *Gordon v. Jennings*, 9 Q. B. Div. 45; *Dean v. De Wolf*, 16 Hun (N. Y.), 186, *affirmed*, 82 N. Y. 626. Blackstone speaks of stewards,

factors, and bailiffs as perhaps constituting a class of servants; but this doubtfully, 'because they serve in a superior ministerial capacity;' and in view of the declarations already made by this court as to the object of the statute, — *Coffin v. Reynolds*, 37 N. Y. 640; *Gurney v. Atlantic, &c. R. Co.*, 58 N. Y. 367; *Aiken v. Wassan*, 24 N. Y. 482; *Stryker v. Cassidy*, 76 N. Y. 53; 32 Am. Rep. 262, — it may be added that as such individuals occupy positions and are usually of such capacity as enables them to look out for themselves, they are not within the privilege of the statute. According to the rule that when two or more words of analogous meaning are coupled together they are understood to be used in their cognate sense, express the same relations, and give color and expression to each other, the word 'servant,' though general, must be limited by the more specific ones, 'laborer' and 'apprentice,' with which it is associated, and be held to comprehend only persons performing the same kind of service that is due from the others. A general manager is not *ejusdem generis* with an apprentice or laborer." *Wakefield v. Fargo*, 90 N. Y. 213. See *Sandiman v. Breach*, 7 B. & C. 96; *Rex v. Cleworth*, 4 B. & S. 927; *Kitchen v. Shaw*, 6 A. & E. 729; *Barnard v. Pennick*, 7 B. & C. 536; *Williams v. Golding*, L. R. 1 C. P. 69; *Smith v. People*, 47 N. Y. 337; *Hovey v. Ten Brock*, 3 Rob. (N. Y.) 316.

² *Blakely v. Blakely*, 27 Mo. App. 39.

³ *Smallhouse v. Kentucky, &c. Co.*, 2 Mont. 443.

⁴ *Foushee v. Grigsby*, 12 Bush (Ky.), 75.

where they are employed by contractors, etc., depends upon the circumstance whether they are employed to perform manual labor requiring but little skill, or not.¹ One who is in the employ of a contractor with the company merely as a timekeeper and a superintendent is not a "laborer."² Nor is one a "laborer" who merely contracts for and furnishes the labor of others or of teams, whether with or without his own services.³

SEC. 295 *a*. **Material Men.** — The statutes generally provide that the lien shall exist in favor of persons who furnish material used in the construction of the road or its appurtenances; and upon proof that the statutory requisites as to notice have been complied with, the courts are inclined to a liberal construction in favor of the holder of the lien.⁴ But the material must have been actually furnished and used in the construction of the road, and material dealers cannot claim a lien for material furnished by them to a subcontractor to be used in the erection of boarding-houses for men, and stables for horses employed in building the road.⁵

¹ Under the Iowa statute a day laborer is entitled to the lien, though he is merely an employé of the subcontractor. *Morgan v. Carroll*, 35 Iowa, 26. See also in this connection *Templin v. Chicago, &c. R. Co.*, 73 Iowa, 548; 34 Am. & Eng. R. Cas., 107 (where company sells the road and enters into a contract with third party for construction, such third party has no lien as against the purchasers unless he is a subcontractor); *Peters v. St. Louis, &c. R. Co.*, 24 Mo. 586; *Delaware, &c. R. Co. v. Oxford Iron Co.*, 33 N. J. Eq. 192; 1 Am. & Eng. R. Cas. 205, 211 *n.*; *Austin, &c. R. Co. v. Rucker*, 59 Tex. 587; 12 Am. & Eng. R. Cas. 258; *Mundt v. Sheboygan, &c. R. Co.*, 31 Wis. 451 (statute is remedial, and therefore to be construed liberally); *Cambria Iron Co. v. Laclede, &c. Co.*, 36 Fed. Rep. 420 (lien superior to that of a general creditor who attaches after wages fall due.

² *Missouri, &c. R. Co. v. Baker*, 14 Kan. 563; *Missouri, &c. R. Co. v. Brown*, 14 Kan. 557.

³ *Balch v. New York, &c. R. Co.*, 46 N. Y. 521.

⁴ The Minnesota statute provides a lien for laborers or material men, etc., who construct a railroad "within this State." Under this it is not necessary that the material man should have furnished the material within the State. *Thompson v. St. Paul, &c. R. Co.*, 45 Minn. 13; *Malory v. Lacrosse, &c. Co.*, 80 Wis. 170.

⁵ *Stewart Lumber Co. v. Missouri Pac. R. Co.*, 33 Neb. 29, *overruling* 28 Neb. 39, and *following* *Dudley v. Toledo, &c. R. Co.*, 65 Mich. 655. The Nebraska statute in this case provided a lien where parties have furnished labor or materials in the construction, repair, and equipment of a railroad.

CHAPTER XVII.

RAILWAYS AS CARRIERS OF PASSENGERS: DUTIES OF.

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| <p>SEC. 296. Distinction between Duties of Carriers of Goods and of Passengers.</p> <p>297. Obligation to receive and carry.</p> <p>297 <i>a</i>. Who are Carriers of Passengers.</p> <p>298. How and when the Relation of Passenger arises.</p> <p>299. Duties as to Construction and Repair of Roadway.</p> <p>300. Care required in relation to Engines, Cars, &c.</p> <p>301. Ordinary Care, Reasonable Care, &c.: Relative Obligations of Carriers and Passengers.</p> <p>302. Degree of Care required from Railway Companies.</p> <p>303. Injuries resulting from Passenger putting himself in a Dangerous Position.</p> <p>304. Riding in Baggage Car, Engine, Freight Car, &c.</p> <p>305. Duty as to stopping of Trains for Passengers to alight.</p> <p>306. Invitation to alight.</p> | <p>SEC. 307. Injuries received in getting upon a train.</p> <p>308. Accommodations; Contributory Negligence.</p> <p>309. Same subject: Seats in Car.</p> <p>310. Duty as to Stations.</p> <p>310 <i>a</i>. Further as to Injuries at Stations.</p> <p>311. False Announcement of Arrival of Trains.</p> <p>312. Overshooting Stations, &c.</p> <p>313. Liability for delay in running Trains.</p> <p>314. Duty to protect Passengers from Assault by Strangers.</p> <p>315. Liability for Wilful Injury to Passenger by its Servants.</p> <p>316. Rule as to Assaults, &c., upon Trespassers, &c.</p> <p>317. Damages for Injuries to Passengers.</p> <p>318. Injuries received on Sunday.</p> <p>318 <i>a</i>. Sick or Intoxicated Passengers.</p> |
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SEC. 296. Distinction between Duties of Carriers of Goods and of Passengers. — As the business of carrying passengers has been of rapid growth, so has the department of the law relating thereto been of rapid development. The first case in which damages for an injury to a passenger were recovered, was tried only at the close of the last century.¹ In that case a passenger by a stage-coach, having been injured by the negligence of the carrier, brought his action for damages, and Lord KENYON, in passing upon the question, said that

¹ *White v. Boulton*, Peake's Cas. 81. The rule relative to this class of carriers in this country has been held to be that a stage-coach proprietor is bound to furnish good coaches, gentle and well-broken horses, and a prudent and skilful driver, and that a recovery may be had for an injury resulting from any fault in this re-

spect. *Ingalls v. Bills*, 9 Met (Mass.) 1; 43 Am. Dec. 346; *McKinney v. Mill*, 1 McLean (U. S.), 540; *Sales v. Western Stage Co.*, 4 Iowa, 547; *Farrish v. Reigle*, 11 Gratt. (Va.) 697; *Peck v. Neil*, 3 McLean (U. S.), 22; *McLane v. Sharp*, 2 Harr. (Del.) 481.

where the proprietors of stage-coaches "carry passengers, they are bound to carry them safely and properly." This statement of the duty of carriers of passengers, while it does not express their exact duty as now held, nevertheless recognizes the distinction which exists between the liability of common carriers of passengers and common carriers of goods. Indeed, the duty in the two cases differs widely, and for obvious reasons. Goods are inanimate and without intelligence, and cannot of themselves exercise any care or caution with a view to their own safety; while persons can exercise such caution so far as their conveyance is concerned. Goods are liable to be stolen, broken, or destroyed if not cared for by the carrier; while persons are not liable to be stolen, and it is presumed will exercise care and caution to prevent injury to themselves as far as possible. The intelligence and volition of persons carried makes such a material difference in all possible calculations, that it precludes the carrier from assuming the duties of an insurer in regard to them. If the law imposed any such duty upon them, the result would almost certainly be, either the refusal of carriers to undertake passenger traffic, or to raise the rates to a sum adequate to meet the relation, or to provide by special contract in every case precisely what their liability shall be. But the law has imposed no such onerous burden upon them.¹ "There is a wide distinction," says PARKE, J.,² "between contracts for the conveyance of passengers, and those for the conveyance of goods. In the latter case the parties are liable at all events, except the goods be destroyed or damaged by the act of God or the King's enemies; while in the former case they are only responsible to their passengers in case of express negligence."³ Their liability may be said not to be "a constant quantity," but varies with the persons carried and the circumstances of each case,⁴ and they are only liable for actual or culpable negligence.

¹ *Aston v. Heaven*, 2 Esp. 533; *Bennett v. Peninsular Steamboat Co.*, 6 C. B. 775; *Sharp v. Grey*, 9 Bing. 460; *Pendleton, &c. R. Co. v. Shires*, 18 Ohio St. 255; *Feital v. Middlesex R. Co.*, 109 Mass. 398; 12 Am. Rep. 720; *Knight v. Portland, &c. R. Co.*, 56 Me. 234; 96 Am. Dec. 449; *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282; *Munroe v. Leach*, 7 Met. (Mass.) 274; *Mier v. Penn. R. Co.*, 64 Penn. St. 225.

² In *Croft v. Waterhouse*, 11 Moore, 138; 3 Bing. 319.

³ See also *per* Sir JAMES MANSFIELD in *Christie v. Griggs*, 2 Camp. 79.

⁴ *Johnson v. Winona, &c. R. Co.*, 11 Minn. 296; 88 Am. Dec. 83; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 150; *Brockway v. Lasala*, 1 Edw. (N. Y.) 135; *Fuller v. Naugatuck R. Co.*, 21 Conn. 563; *Hall v. Conn. River R. Co.*, 13 Conn. 326; *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378; *Boyce v. Anderson*, 2 Pet. (U. S.) 150.

From the nature of things a carrier cannot be held to insure the safety of his passengers. One who undertakes to travel by water or by land, by coach or by rail, must assume all risks which are necessary incidents of transportation, and which do not result as a proximate consequence of the carrier's neglect of duty. The only guaranty he can require is that his carrier shall exercise the utmost diligence and care in the construction and operation of its road and its machinery and vehicles, and in the selection and superintendence of its servants, in order to secure safe transportation.¹

In this connection it may be well to observe the character of the liability of railway companies as carriers of passengers. It is not correct to say that this liability is contractual, or that it arises wholly out of the contract of carriage. The duty to carry safely is *imposed by law*, and exists independently of the contract. And any failure properly to discharge this duty is a tort for which recovery may be had if it causes injury. It is true that the contract or agreement of carriage, express or implied, is essential to create the relation of passenger and carrier, and to that extent the liability is dependent on contract. But when the relation is once created, the duty to carry safely, whether provided for by the contract or not, is imposed by law, and any breach of it is a ground for an action *ex delicto* to the injured passenger. A passenger, therefore, when injured through the negligence of his carrier, may sue either in contract or tort, though the latter action is preferable because of the more narrow rule as to the measure of damages applied in the former.²

¹ *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306; 89 N. Y. 627; 125 N. Y. 299; *McKinney v. Neil*, 1 McLean (U. S.), 540; *Chicago, &c. R. Co. v. Trotter*, 60 Miss. 442; 61 Miss. 417; *Skinner v. Atchison, &c. R. Co.*, 39 Fed. Rep. 188; *San Antonio, &c. R. Co. v. Robinson*, 79 Tex. 608. That carriers of passengers are not insurers of the safety of their passengers, but are liable only for injuries resulting from its negligence, is a proposition now so well settled that authorities for it are not needed. Reference may be made, however, to *Gilson v. Jackson County, &c. R. Co.*, 76 Mo. 282; 12 Am. & Eng. R. Cas. 132; *Dougherty v. Missouri River R. Co.*, 81 Mo. 325; 21 Am. & Eng. R. Cas. 497; *Renneker v. South Carolina R. Co.*, 20 S. C. 219; 18 Am. & Eng. R. Cas. 149; *Camden, &c.*

R. Co. v. Burke, 13 Wend. (N. Y.) 611; *Redhead v. Midland Ry. Co.*, L. R. 2 Q. B. 412; 4 Q. B. 379.

² *Seewe v. Northern Pac. R. Co.* (Minn.), 52 Am. & Eng. R. Cas. 348; *Lake Erie, &c. R. Co. v. Acres*, 108 Ind. 548; 28 Am. & Eng. R. Cas. 112; *New Orleans, &c. R. Co. v. Hurst*, 36 Miss. 667-668; *Cincinnati, &c. R. Co. v. Eaton*, 94 Ind. 474; 18 Am. & Eng. R. Cas. 254; *Creign v. Brooklyn, &c. R. Co.*, 75 N. Y. 192; *Murdock v. Boston, &c. R. Co.*, 133 Mass. 15; *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222; 11 Am. & Eng. R. Cas. 92; 46 Am. Rep. 688; *Baltimore, &c. R. Co. v. Kemp*, 61 Md. 619; 18 Am. & Eng. R. Cas. 233. In *Webber v. Herkimer, &c. R. Co.*, 109 N. Y. 311, it was held that the liability of a carrier of passengers injured in consequence of some

SEC. 297. Obligation to receive and carry. — Common carriers of passengers who hold themselves out as such are bound to receive all who require passage, so long as they have room for them and there is no sufficient legal excuse for refusing.¹ They have no right to refuse to carry persons because of race or color, or without good cause.² They may establish *reasonable* rules for carrying on the business, subject to which only, any person may claim the right to be carried.³ Whether or not any particular regulation is reasonable depends not only upon its intrinsic character but upon the circumstances in which it is attempted to be enforced. There are some authorities, therefore, which hold that the question of reasonableness in this connection is one for the jury.⁴ But it is believed that this is not the better doctrine; authority and principle are both strongly in favor of the rule

defect in the vehicle is based solely upon negligence; and the three years' limitation fixed by the statute for the bringing of "an action to recover damages for a personal injury resulting from negligence" applies. See this subject discussed more at length, *post*, § 301.

If the action were based simply on the contract of carriage, the company might set up the defence that such contract was *ultra vires*. Yet it is well understood that even though the contract was *ultra vires* the company's powers, that fact does not affect the company's liability. *Central R. & B. Co. v. Smith*, 76 Ala. 573.

¹ *Bennett v. Dutton*, 10 N. H. 481; *Thompson on Carr. of Pass.* 1; *Turner v. North Beach, &c. R. Co.*, 34 Cal. 594; *Lake Erie, &c. R. Co. v. Acres*, 108 Ind. 548; 28 Am. & Eng. R. Cas. 112; *Houston, &c. R. Co. v. Rand* (Tex. 1882) 9 Am. & Eng. R. Cas. 399; *Hannibal, &c. R. Co. v. Swift*, 12 Wall. (U. S.) 263; *Saltonstall v. Stokes*, 13 Pet. (U. S.) 181; *Pleasant v. North Beach, &c. R. Co.*, 34 Cal. 586; *Tarbell v. Central Pacific R. Co.*, 34 Cal. 616. See also *Bretherton v. Wood*, 3 B. & B. 54.

² *Indianapolis, &c. R. Co. v. Binard*, 46 Ind. 293; *West Chester, &c. R. Co. v. Miles*, 55 Penn. St. 209; 93 Am. Dec. 744; *Sanford v. Catawissa, &c. R. Co.*, 2 Phila. (Penn.) 107; *Day v. Owen*, 5 Mich. 520.

³ *Chicago, &c. R. Co. v. Williams*, 55 Ill. 185; *Gray v. Cincinnati Southern R.*

Co., 11 Fed. Rep. 683; *Com. v. Power*, 7 Met. (Mass.) 596; 41 Am. Dec. 472; *Abel v. Delaware, &c. Canal Co.*, 103 N. Y. 581; *Chicago, &c. R. Co. v. People*, 56 Ill. 365; 9 Am. Rep. 690. But a rule or regulation cannot be enforced when its effect is to impair the obligation of the contract existing between the railroad company and the State. *Attorney-General v. Fitchburg R. Co.*, 142 Mass. 40; 26 Am. & Eng. R. Cas. 54.

It is no evidence of the waiver of any rule that the employes of the company were accustomed to act in disregard of it, unless the officer charged with its enforcement was aware of such custom. *O'Neill v. Keokuk, &c. R. Co.*, 45 Iowa, 546; *Prince v. International, &c. R. Co.*, 64 Tex. 144; 21 Am. & Eng. R. Cas. 152; *Hobbs v. Texas, &c. R. Co.*, 49 Tex. 357; 34 Am. & Eng. R. Cas. 268; 19 Am. & Eng. Ency. Law, p. 822. Compare *Britton v. Atlantic, &c. R. Co.*, 88 N. C. 536; 18 Am. & Eng. R. Cas. 391. A regulation is eminently reasonable, which requires that passengers shall not stand on the platform, or get on or off the train while it is in motion. *Alabama, &c. R. Co. v. Hawk*, 72 Ala. 112; 18 Am. & Eng. R. Cas. 195; *Wills v. Lynn, &c. R. Co.*, 129 Mass. 35; 2 Am. & Eng. R. Cas. 27.

⁴ *Brown v. Memphis, &c. R. Co.*, 4 Fed. Rep. 37; *Com. v. Power*, 7 Met. (Mass.) 596; 41 Am. Dec. 472 n.; 2 Am. & Eng. Ency. Law, p. 759.

that such a question is one for the court. Under any other view of the rule there could be no uniformity in the conclusions reached; one jury might declare a regulation unreasonable and a succeeding one immediately declare it to be reasonable. Moreover, it is not always possible that juries can be made aware of the reasons which call for the regulation. The weight of authority, therefore, decidedly favors the rule that it is for the court to determine the reasonableness of any regulation.¹ Instances of proper regulations might be multiplied. Thus carriers may have separate cars for ladies,² and separate cars for colored people,³ and may enforce them in a reasonable

¹ *Louisville, &c. R. Co. v. Fleming*, 14 Lea (Tenn.), 128; 18 Am. & Eng. R. Cas. 356; *Smith v. Wabash, &c. R. Co.*, 92 Mo. 359; 31 Am. & Eng. R. Cas. 331; *South Florida R. Co. v. Rhoads*, 25 Fla. 40; 37 Am. & Eng. R. Cas. 100; *Vedder v. Fellows*, 20 N. Y. 127; *Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420; 19 Am. & Eng. Ency. Law, pp. 640 *et seq.* So, also, the construction and interpretation of the rules and regulations adopted is for the court and not the jury. *Smith v. Wabash, &c. R. Co.*, 92 Mo. 359.

² These regulations usually provide for a separate car from which all men are to be excluded, except those travelling with ladies as their escorts; there is no question as to their validity. *Peck v. New York, &c. R. Co.*, 70 N. Y. 587; *Memphis, &c. R. Co. v. Benson*, 85 Tenn. 627; 31 Am. & Eng. R. Cas. 112; *Bass v. Chicago, &c. R. Co.*, 36 Wis. 450; 17 Am. Rep. 495; 39 Wis. 636; 42 Wis. 654. But where a passenger being unable to find a seat elsewhere enters the ladies car without objection, he is lawfully there and not a trespasser, and he cannot be forcibly removed until a seat is offered him elsewhere. *Bass v. Chicago, &c. R. Co.*, 36 Wis. 450; 39 Wis. 636; 42 Wis. 654; 17 Am. Rep. 495; *Lake Shore, &c. R. Co. v. Rosenzweig*, 113 Penn. St. 519; 26 Am. & Eng. R. Cas. 489.

³ *Separate Accommodation for White and Colored Races*.—The doctrine was first laid down in the case of *West Chester, &c. R. Co. v. Miles*, 55 Penn. St. 209; 93 Am. Dec. 744, that there is such a natural, legal, and customary difference between the white and colored races that their separation in public conveyances may

be the subject of sound regulation. The reasonableness of such regulation cannot be well questioned in view of the fact that it tends to secure order, to promote the comfort of all, and preserve and maintain the rights of both the carrier and its passengers. And this doctrine has been adhered to ever since. But in every instance there must be no unjust discrimination, and accommodations equally good must be furnished to all classes. *Ex parte Plessy*, 45 La. An. —; 11 So. Rep. 948; *Chilton v. St. Louis, &c. R. Co.* (Mo. 1893), 21 S. W. Rep. 457; *Day v. Owen*, 5 Mich. 520; *Britton v. Atlantic, &c. R. Co.*, 88 N. C. 536; 18 Am. & Eng. R. Cas. 391; *Gaines v. McCandless*, 4 Phila. (Penn.) 255; *Chesapeake, &c. R. Co. v. Wells*, 85 Tenn. 613; 31 Am. & Eng. R. Cas. 111; *Heard v. Georgia, &c. R. Co.*, 1 Interst. Com. Com. Rep. 428; *Green v. Bridgeton* (U. S. C. Ct. 1879), 9 Cent. L. J. 206; *Civil Rights Bill*, 1 Hughes (U. S.), 541; *Murphy v. Western, &c. R. Co.*, 23 Fed. Rep. 637; 21 Am. & Eng. R. Cas. 258; *Logwood v. Memphis, &c. R. Co.*, 23 Fed. Rep. 318; 21 Am. & Eng. R. Cas. 256; *McGrimm v. Forbes*, 37 Fed. Rep. 639; *Houck v. Southern Pac. R. Co.*, 38 Fed. Rep. 226; *Hutchinson on Carr.*, § 542. *Contra Cogger v. Northwest, &c. Packet Co.*, 37 Iowa, 145. And compare also *Chicago, &c. R. Co. v. Williams*, 55 Ill. 185; 8 Am. Rep. 641; *Gray v. Cincinnati Southern R. Co.*, 11 Fed. Rep. 683; 6 Am. & Eng. R. Cas. 587. In some jurisdictions there are statutes which prohibit the enforcement of such a regulation, and where these exist, the carrier has, of course, no right to insist upon it. Central

manner, provided in doing so they are guilty of no unjust discrimination. So they may run through or express trains, stopping only at such stations as they indicate in their time-tables; and they are not bound to receive passengers upon their trains for stations at which the train is not advertised to stop.¹ Nor are they bound to receive a drunken person,² or gamblers who seek to board the train to ply their vocation,³ and the same rule would doubtless apply to known pickpockets, sneak thieves, train robbers, etc. Neither are they bound to carry a person who is fleeing from justice, or one whose conduct is riotous or disorderly, or who is known to be a dangerous character, or a maniac, or whose person or clothing is in such a filthy or disgusting condition as to make his presence in the car obnoxious to other passengers, or who is affected with a contagious disease, or is infested with vermin,⁴ or is intoxicated to such an extent as to render it probable that he would be disgusting, disagree-

R. Co. v. Green, 86 Penn. St. 421; Washington, &c. R. Co. v. Brown, 17 Wall. (U. S.) 450. But in other States statutes exist, which require carriers to make and to enforce such a regulation; and while such a statute is void in so far as it attempts to interfere with interstate commerce (Hall v. De Cuir, 95 U. S. 485), there is no question that it is constitutional and valid as regards passengers travelling between points within the same State. Louisville, &c. R. Co. v. State, 66 Miss. 662, affirmed in 133 U. S. 587; 41 Am. & Eng. R. Cas. 46; *ex parte* Plessy, 45 La. An. —. See Arkansas Acts (1891), ch. 17, p. 15; Louisiana Acts (1890), no. 111, p. 152; Tennessee Acts (1891), ch. 52, p. 135. See also De Cuir v. Benson, 27 La. An. 1; Miller v. Steamboat Co., 12 N. Y. Supp. 301.

¹ Atchison, &c. R. Co. v. Gants, 38 Kan. 608; 34 Am. & Eng. R. Cas. 290; Pennsylvania R. Co. v. Wentz, 37 Ohio St. 333; 3 Am. & Eng. R. Cas. 478. The company is not bound by the conductor's agreement to let a passenger off at a station at which its published regulations do not allow the train to stop. Ohio, &c. R. Co. v. Hatton, 60 Ind. 12; Pittsburgh, &c. R. Co. v. Nuzum, 60 Ind. 533.

But a regulation by a company, having five passenger stations within the limits of a city, that tickets shall be sold only to

the station which forms the terminus of the road, and that baggage shall be checked only to that station, although the other stations are regular stopping-places for passenger trains, is unreasonable and void as a matter of law, although it was made to prevent the transfer of passengers and baggage to a rival line. Pittsburgh, &c. R. Co. v. Lyon, 123 Penn. St. 140; 37 Am. & Eng. R. Cas. 231.

² Vinton v. Middlesex R. Co., 11 Allen (Mass.), 304; 87 Am. Dec. 714.

³ Thurston v. Union Pacific R. Co., 4 Dill. (U. S.) 321. In this case the court held that it was a question for the jury whether from the passenger's previous course on its trains, the company had good reason for supposing that such was his purpose in a given instance. Probably in cases of this kind a railway company would not be justified in refusing to carry the passenger upon a mere suspicion that such was the passenger's intent, nor upon the other hand, merely because the person had the reputation of being a gambler. It must, in order to justify its refusal to carry, be able to show good grounds for inferring that the person was not only a gambler, but also that he intended to ply his vocation on the train.

⁴ Walsh v. Chicago, &c. R. Co., 42 Wis. 23; 24 Am. Rep. 376; Paddock v. Atchison, &c. R. Co., 37 Fed. Rep. 841.

able, or annoying to the passengers. But slight intoxication, such as would not seriously affect the conduct of the passenger, will not justify the company in refusing to receive and carry him.¹ Neither are they generally bound to take a passenger when their cars are already full.² But if a person has purchased a ticket to go by a certain train, under a stipulation of the company that it will run trains at certain times and in a certain manner, "or good for this day only," they cannot excuse themselves from carrying him upon the ground that they have no room. Nor if they have sold tickets to passengers good only upon a certain train, can they rely upon this excuse. In such cases they are bound to have room for all the passengers to whom tickets have been sold for the trip.³ If their cars are full, and they continue to take more passengers than they can reasonably provide for, without notice to them of their inability to provide for them, they are under all the obligations usually due to such passengers.⁴ It has been held that they are not bound to carry a passenger whose ostensible purpose is to injure their business, — as, a person who is soliciting traffic for a rival line.⁵ But having accepted the fare of a person whom it might not be obliged to carry, and received him on board its train or other passenger vehicles, although ignorant at the time of the passenger's identity, it cannot, if he properly demeans himself as a passenger, expel him therefrom upon discovering his identity. Thus, in a case in the United States

¹ Pittsburgh, &c. R. Co. v. Vandyne, 57 Ind. 576.

² Jencks v. Coleman, 2 Sumn. (U. S.) 221.

³ Hawcroft v. Great Northern Ry. Co., 16 Jur. 196.

⁴ Evansville, &c. R. Co. v. Duncan, 28 Ind. 444; 92 Am. Dec. 322; Thompson's Carriers of Passengers, 29.

⁵ In Jencks v. Coleman, 2 Sumn. (U. S.) 221, the plaintiff was the known agent of the Tremont line of stage-coaches; the proprietors of the steamboat "Benjamin Franklin" had, as he well knew, entered into a contract with the Citizens' Stage-Coach Company to carry passengers between Boston and Providence in connection with and to meet the steamboats. The plaintiff had been in the habit of coming on board the steamboat at Providence and Newport for the purpose of soliciting passengers for the Tre-

mont line. It was held, that if the jury should be of opinion that the above contract was reasonable and *bona fide*, and not entered into for the purpose of an oppressive monopoly, and that the exclusion of the plaintiff was a reasonable regulation in order to carry this contract into effect, the proprietors of the steamboat would be justified in refusing to take the plaintiff on board. It is also held, that a regulation is not unreasonable which requires that passengers shall not drum for custom for hotels while on the train. Texas, &c. R. Co. v. Pearle (Tex. 1885), 26 Am. & Eng. R. Cas. 195 n. But a regulation which prohibits passengers from wearing the uniform cap of a rival company while on the train, is unreasonable, and cannot be enforced. South Florida R. Co. v. Rhodes, 25 Fla. 40; 27 Am. & Eng. R. Cas. 100.

Supreme Court,¹ the libellant was expelled from the city of San Francisco by a Vigilance Committee, and was forcibly put on board an outgoing steamer and landed at the Mexican port of Acapulco. With the determination of returning to San Francisco in defiance of the Vigilance Committee, he got on board a steamer destined for that port, of which the respondent was master. After the steamer had put to sea, his identity and the fact of his expulsion from San Francisco were discovered, and the respondent, with a view of preventing him from returning to San Francisco, believing that he would be killed by the Vigilance Committee if he returned, put him on board another steamer, which again landed him at Acapulco. It was held that, having been permitted to go upon the respondent's vessel without objection, and having tendered his fare and otherwise demeaned himself properly, the respondent could not lawfully refuse to carry him, and that he was entitled to recover damages, although it seems that the respondent might have refused to receive him on board the ship before it sailed. DAVIS, J., said: "If there are reasonable objections to a proposed passenger, the carrier is not required to take him. In this case, Duane could have been well refused a passage when he first came on board the boat, if the circumstances of his banishment would, in the opinion of the master, have tended to promote further difficulty should he be returned to a city where lawless violence was supreme. But this refusal should have preceded the sailing of the ship. After the ship had got to sea it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board. This was not done; and the defence that Duane was a 'stowaway,' and therefore subject to expulsion at any time, is a mere pretence; for the evidence is clear that he made no attempt to secrete himself until advised of his intended transfer to the 'Sonora.' Although a railroad or steamboat company can properly refuse to transport a drunken or insane man, or one whose character is bad, they cannot expel him after having admitted him as a passenger and received his fare, unless he misbehaves during the journey.² Duane conducted himself properly on the boat until his expulsion was de-

¹ Pearson v. Duane, 4 Wall. (U. S.) 605.

² Coffin v. Brathwaite, 8 Jur. 875. It is doubtful if a carrier can refuse to transport a person as stated by DAVIS, J., simply because his "character is bad." If

one is expelled because he is a gambler, there must be reasonable ground for apprehending that he proposes to ply his vocation upon the passage. Thurston v. Union Pacific R. Co., 4 Dill. (U. S.) 821.

terminated, and when his fare was tendered to the purser he was entitled to the same rights as other passengers. The refusal to carry him was contrary to law, although the reason for it was a humane one. The apprehended danger mitigates the act, but affords no legal justification for it."

It being a recognized rule of law that carriers have power to make and enforce reasonable rules and regulations concerning the conduct of their business, passengers and other persons who avail themselves of the accommodations offered by such carriers must inform themselves of the regulations and observe them.¹ But the regulations must be so published that all persons who are to be affected by them, whether passengers or servants, can easily become informed of their existence and requirements; for no one can be bound by a rule or regulation of the existence or character of which he had no means or opportunity of informing himself.² There is no conclusive presumption that a passenger is informed of the regulations of the company, and the maxim *ignorantia legis neminem excusat* cannot be invoked in such a case.³

Power to make rules and regulations carries with it authority to enforce them by proper means; the company may therefore expel from its premises those who refuse compliance with its regulations, though this right must in every instance be exercised with due regard to the safety of the expelled.⁴ This subject, however, is pursued in a subsequent chapter.

¹ Louisville, &c. R. Co. v. Fleming, 14 Lea (Tenn.), 128; 18 Am. & Eng. R. Cas. 348; Alabama, &c. R. Co. v. Hawk, 72 Ala. 112; 18 Am. & Eng. R. Cas. 195 (passenger riding on platform of car in violation of regulation); Little Rock, &c. R. Co. v. Miles, 40 Ark. 298; 13 Am. & Eng. R. Cas. 10; Abend v. Terre Haute, &c. R. Co., 111 Ill. 202; 17 Am. & Eng. R. Cas. 614 (passenger riding in baggage-car in violation of regulation); McRae v. Wilmington, &c. R. Co., 88 N. C. 526; 18 Am. & Eng. R. Cas. 316. There can be no recovery where the injury was occasioned by the passenger's failure to obtain the knowledge of, and to act upon, the established usage, custom, and regulations of the company. Southern R. Co. v. Kendrick, 40 Miss. 374.

² St. Joseph, &c. R. Co. v. Wheeler, 35 Kan. 185; 26 Am. & Eng. R. Cas.

173; Fay v. Minneapolis, &c. R. Co., 30 Minn. 231; 11 Am. & Eng. R. Cas. 193; Burlington, &c. R. Co. v. Rose, 11 Neb. 177; Lake Shore, &c. R. Co. v. Brown, 123 Ill. 162; 31 Am. & Eng. R. Cas. 61; McGee v. Missouri Pac. R. Co., 92 Mo. 208; 38 Am. & Eng. R. Cas. 1; Pennsylvania R. Co. v. Spicker, 105 Penn. St. 142; 23 Am. & Eng. R. Cas. 672; Trottinger v. East Tenn., &c. R. Co., 11 Lea (Tenn.), 533; 13 Am. & Eng. R. Cas. 549.

³ Lake Shore, &c. R. Co. v. Rosenzweig, 113 Penn. St. 519; 26 Am. & Eng. R. Cas. 489.

⁴ Tarbell v. Central Pacific R. Co., 34 Cal. 616; Landrigan v. State, 31 Ark. 50; 25 Am. Rep. 547; Harris v. Stevens, 31 Vt. 79; 73 Am. Dec. 337; *post*, Chapter XXI.

SEC. 297 *a*. **Who are Carriers of Passengers.** — That railroad companies are *ordinarily* common carriers of passengers is admitted, and as to whether other persons or companies occupy that status is not important here. But the question arises in some cases as to whether the company against which an action has been brought for a negligent discharge of its duty is, in law, a common carrier of passengers under the peculiar circumstances involved in the particular case. In an early case in Tennessee,¹ the court held that an instruction was proper which told the jury in substance that "a common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage, and that to constitute one such a carrier, it was necessary that he should hold himself out as such; a party having the conveniences for carrying persons may, in some or perhaps in many cases, carry passengers for hire, when done at the instance of the passengers and for their accommodation, without incurring the responsibilities of common carriers." The Supreme Court in approving this statement of the rule went on to apply the distinction between private and common carriers of persons, holding that the former are "to be held accountable under rules much less stringent."² The definition of a common carrier as above stated in the instruction of the court appears to be that generally accepted.³

¹ Nashville, &c. R. Co v. Messino, 1 Sneed (Tenn.), 220. In this case it appeared that "freight and passengers were received and carried for pay regularly and without refusal;" but the company had not solicited passengers nor given any public notice that they would be carried, its road being in an unfinished state.

² In a somewhat similar case before the Supreme Court of the United States, it appeared that the defendants were contractors for the construction of a road, and were running a construction train to transport material for the road. The train was not adapted for passenger traffic, and defendants did not desire such traffic, though it did not expel persons who got on the train to ride, and often, though not regularly, collected fare from them. The plaintiff asked to be carried, and defendants consented and accepted his fare. In the course of the journey the train collided with an ox on the track, and as a result of the collision plaintiff was injured. The court held that defendants were "simply

private carriers for hire. As such carriers, having only a construction train, they were not under the same obligations and responsibilities which attach to common carriers of passengers by railway. . . . All that plaintiff could exact from them under these circumstances was the exercise of such care and skill in the management and running of the trains as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances." *Shoemaker v. Kingsbury*, 12 Wall. (U. S.) 369.

A railroad does not become a carrier of passengers on its freight trains by reason of the fact that it occasionally carries passengers upon them as a matter of accommodation, although fare is charged, any more than it becomes a carrier of goods by its passenger trains from occasionally carrying goods for hire on them for accommodation. *Murch v. Concord, &c. R. Co.*, 29 N. H. 9; 61 Am. Dec. 631; *Elkins v. Boston, &c. R. Co.*, 23 N. H. 275.

³ See Hutchinson on Carriers (2d ed.),

SEC. 298. **How and when the Relation of Passenger arises.** — It is not always easy to determine when the relation of passenger begins, but it would seem from the cases that it is not necessary that a contract for the passage should have been actually made on the fare actually paid, in order to create the relation, but it is *necessary that a person should be under the control of the carrier*, in order to be entitled to his care as such. Therefore a person cannot be regarded as a passenger, who is not upon the premises of the carrier. But a person who goes into the station *with the bonâ fide intention of becoming a passenger* is entitled to the care and the rights of a passenger, at least so far as the safety of his person from defects in the station, platforms, etc., is concerned.¹ But until a person is upon the carrier's premises, or otherwise directly under his control, with the *bonâ fide* intention of becoming a passenger, he is not entitled to the rights of such.² Not only must there be *bonâ fide* intention of becoming a passenger, but also a purpose to comply with the rules of the company as to the payment of fare, or otherwise consummating the contract which entitles him to carriage. While a person who rides free by the permission of the company or its agents is a passenger,³ yet a person who secretes himself upon the carrier's vehicle with the intent of "stealing" a passage, being there fraudulently and without the carrier's assent, is not a passenger; nor is one who openly and knowingly takes his place in the cars with the purpose of travelling upon a forged ticket or a pass fraudulently obtained.⁴ So where one enters a car which he knows is not

§ 47, 538; Thompson on Carr. of Pass. p. 26; Wood's Browne on Carriers, §§ 40 *et seq.* See also Piedmont Mfg. Co. v. Columbia, &c. R. Co., 19 S. C. 353; 16 Am. & Eng. R. Cas. 194; Schloss v. Wood, 11 Col. 287; 35 Am. & Eng. R. Cas. 492.

¹ Gordon v. Grand Street, &c. R. Co., 40 Barb. (N. Y.) 546. The purchase of the ticket and the entry by passenger on the premises or accommodations of the company, creates the relation of passenger and carrier with all the right, duties, and obligations which attend that relation. Wabash, &c. R. Co. v. Rector, 104 Ill. 296; 9 Am. & Eng. R. Cas. 264.

² Allendar v. Chicago, &c. R. Co., 37 Iowa, 264.

³ Todd v. Old Colony R. Co., 3 Allen (Mass.), 18; 80 Am. Dec. 49; Jacobus v. St. Paul, &c. R. Co., 20 Minn. 125;

18 Am. Rep. 360; Rose v. Des Moines Valley R. Co., 39 Iowa, 246. It is held in New Jersey that where a person rides free upon a railway train under a contract that in consideration of such free passage he will assume all risks of accident, he cannot recover for an injury resulting from an accident; but there are strong objections to this doctrine, both upon principle and upon grounds of public policy.

⁴ In Chicago, &c. R. Co. v. Michie, 83 Ill. 427, it was held that a railway company is not liable for an injury to a person who is riding by stealth on the engine in violation of the rules of the company known to him, even though with the permission of the engineer. The conductor upon a train is the only train-hand who can bind the company by his assent to a person riding free. One who boards a

provided for the transportation but is devoted to other purposes, *e. g.*, the mail service; and he is there without the knowledge of the company and in a place where the employes of the train would not ordinarily discover him, he is not a passenger, although he was there in good faith and intended to pay fare; the company, therefore, owed him no duty of safe transportation.¹ In an Illinois case,² the true rule in such cases was adopted. In that case it was held that where a person fraudulently induces an agent of the company to disregard his duty, and permit him to ride free, he cannot recover for an injury sustained while so riding, received in consequence of the mere negligence of the company; in other words, that a person under such circumstances is not a passenger in the strict legal sense of the word. In a Missouri case,³ a drover obtained a pass for his wife, by fraudulently representing that she was the owner of part of the stock. The conductor refused to honor the pass, and she refusing to pay her fare, he put her off the train, without incivility or undue force; and it was held that she was not a passenger, and that no recovery could be had for her expulsion from the train under those circumstances. So, too, a person riding upon a pass issued to another person, which is not transferable, is not a passenger, unless the conductor knows

freight train in the car yard, having purchased no ticket, is not a passenger, and cannot recover for an injury not wilful. *Haase v. Oregon, &c. R. Co.*, 19 Oreg. 354; 44 Am. & Eng. R. Cas. 360. But if the passenger boards a train with a worthless pass, but which he believes to be good, he is a passenger until the conductor has informed him of his error and he refuses to pay other fare. *Russ v. The War Eagle*, 14 Iowa, 363; *Robostelli v. New York, &c. R. Co.*, 33 Fed. Rep. 796; 34 Am. & Eng. R. Cas. 519. See also *Great Northern R. Co. v. Harrison*, 10 Exch. 376.

¹ *Bricker v. Caldwell*, 132 Penn. St. 1; 40 Am. & Eng. R. Cas. 688; *Gardner v. New Haven, &c. R. Co.*, 51 Conn. 143; 18 Am. & Eng. R. Cas. 170. "A passenger," said the court, in the former of these cases, "in the legal sense of the word, is one who travels in some public conveyance, by virtue of a contract, express or implied, with the carrier, on the payment of fare or that which is accepted as an equivalent therefor. *Pennsylvania R. Co. v. Prince*, 96 Penn. St. 256; *Wharton on Neg.*, § 354." One who pretends

to be a shipper and rides on the car without the company's consent is not a passenger, and, if injured, cannot recover unless he can prove the injury was wilful. *Snyder v. Natchez R., &c. Co.*, 42 La. An. 302; 44 Am. & Eng. R. Cas. 278. In this case the court also held that there is no presumption that one who is on a train is a passenger. Where the evidence is conflicting as to whether a person was a passenger or a trespasser, it is error to withdraw the question from the jury. *Chicago, &c. R. Co. v. Mehlsack*, 181 Ill. 61; 41 Am. & Eng. R. Cas. 60.

² *Toledo, &c. R. Co. v. Brooks*, 81 Ill. 245. So where a boy jumps on a train intending to ride a short distance without paying fare, he is not a passenger. *Muelhausen v. St. Louis R. Co.*, 91 Mo. 332; 28 Am. & Eng. R. Cas. 157. Compare *St. Joseph, &c. R. Co. v. Wheeler*, 35 Kan. 185; 26 Am. & Eng. R. Cas. 173 (boy held to be lawfully on construction train, though there in defiance of orders).

³ *Brown v. Missouri, &c. R. Co.*, 64 Mo. 536.

that he is not the person named therein, and assents to the substitution.¹ So where a person having a pass which contains certain conditions with which the passenger refuses to comply, — as, where there is an indorsement upon the back of it which he is required to sign, but refuses when called upon by the conductor, — he thereupon ceases to be a passenger, if the conductor so elects, and refusing to pay his fare may be ejected from the train.² But where a person rides free at the invitation of an agent of the carrier, although the agent has violated his duty by inviting him, yet, if there is no collusion on his part with the agent to defraud the company, he is not deprived of his rights or remedies as a passenger as to injuries received through the negligence of the company.³ In all cases

¹ Toledo, &c. R. Co. v. Beggs, 85 Ill. 80.

² Elliott v. Western, &c. R. Co., 58 Ga. 454.

³ Wilton v. Middlesex R. Co., 107 Mass. 108; 9 Am. Rep. 11; Pittsburgh, &c. R. Co. v. Caldwell, 74 Penn. St. 421; Washburn v. Nashville, &c. R. Co., 3 Head (Tenn.), 638; Dewire v. Boston, &c. R. Co., 148 Mass. 343; 37 Am. & Eng. R. Cas. 57. A railroad company owes the duty of care in respect to its manner of operating the train, and may be liable to one riding on a freight train without paying fare, by permission of the conductor of the train, for injury from negligence in operating the train, even though the conductor had no authority to permit such person to ride. The obligation of a common carrier to the exercise of care exists not alone when imposed by contract; and a recovery for injury to one being transported, caused by the negligence of the carrier, is not confined to cases of the breach of contract. Undoubtedly, in the ordinary carriage of passengers, there is a contract, express or implied, involving the obligation as a matter of contract to carry safely, and any negligence causing injury to the passenger is a breach of the contract, and gives a right of action upon it. But the same act of negligence which would constitute a breach of contract obligations in the case of the passenger may also be a breach of the duty imposed upon all passengers by the law, upon grounds of public policy, and give a right of action in tort to one injured thereby, if he be not barred of a recovery by his own wrong. It

is not, therefore, important that the plaintiff did not take passage as an ordinary passenger, or that he paid no fare, — Jacobus v. St. Paul, &c. R. Co., 20 Minn. 125; 18 Am. Rep. 360, — nor whether the plaintiff stood in the proper relation to the defendant of a passenger toward whom it owed the peculiar duty which grows out of such relation. Dickson, J., in Creed v. Penn. R. Co., 86 Penn. St. 139; 27 Am. Rep. 693; Second v. St. Paul, &c. R. Co., 18 Fed. Rep. 221; Lucas v. Milwaukee, &c. R. Co., 33 Wis. 41; Wilton v. Middlesex R. Co., 107 Mass. 108; 9 Am. Rep. 11; Gradin v. St. Paul, &c. R. Co., 30 Minn. 217; 11 Am. & Eng. R. Cas. 644.

But where one travels on a freight train in violation of the company's known rules and regulations and of the conductor's orders, he is a trespasser, although invited to get on by a brakeman. Gulf, &c. R. Co. v. Campbell, 76 Tex. 174; 41 Am. & Eng. R. Cas. 100. The same is true though the trespasser had the engineer's permission. Chicago, &c. R. Co. v. Michie, 83 Ill. 427. A baggage-master has no authority to permit persons to ride in his car, and his permission so to ride does not create the relation of carrier and passenger. Reary v. Louisville, &c. R. Co., 40 La. An. 32; 34 Am. & Eng. R. Cas. 277. Whether one who rides on the engine by direction of the company's servant is a passenger is said to be a question for the jury. Lake Shore, &c. R. Co. v. Brown, 123 Ill. 162; 31 Am. & Eng. R. Cas. 61.

where the company is required by law to carry a person free,¹ or where he is riding free by the consent of the company fairly obtained, he is a passenger, and entitled to all rights and privileges as such.² In the case of a free pass, the carrier is under the same

¹ *Austin v. Gt. Western Ry. Co.*, L. R. 2 Q. B. 42.

² *Todd v. Old Colony R. Co.*, 3 Allen (Mass.), 18; 80 Am. Dec. 149. In *Philadelphia R. Co. v. Derby*, 14 How. (U. S.) 468, the plaintiff was riding at the invitation of the president. In this case the plaintiff below was himself the president of another railroad company, and a stockholder in this. He was on the road of defendant by invitation of the president of the company, not in the usual passenger-cars, but in a small locomotive-car used for the convenience of the officers of the company, and paid no fare for his transportation. The injury to his person was caused by coming into collision with a locomotive and tender, in the charge of an agent or servant of the company, which was on the same track and moving in an opposite direction. Another agent of the company, in the exercise of proper care and caution, had given orders to keep this track clear. The driver of the colliding engine acted in disobedience and disregard of these orders, and thus caused the collision. The instructions given by the court below at the instance of the plaintiff, as well as those requested by the defendants and refused by the court, taken together, involve but two distinct points, which are in substance as follows: 1. The court instructed the jury that if the plaintiff was lawfully on the road at the time of the collision, and the collision and consequent injury to him were caused by the gross negligence of one of the servants of the defendants, then and there employed on the road, he is entitled to recover, notwithstanding the circumstances given in evidence, and relied upon by defendants' counsel as forming a defence to the action, to wit: that the plaintiff was a stockholder in the company, riding by invitation of the president, paying no fare, and not in the usual passenger-cars, etc. 2. That the fact that the engineer having the control of the colliding locomotive was forbidden to run on that track at the time, and had acted in

disobedience of such orders, was not a defence to the action. GRIER, J., said: "In support of the objections to the first instruction, it is alleged that 'no cause of action can arise to any person by reason of the occurrence of an unintentional injury, while he is receiving or partaking of any of those acts of kindness which spring from mere social relations; and that as there was no contract between the parties express or implied, the law would raise no duty as between them for the neglect of which an action can be sustained.' In support of these positions, the cases between innkeeper and guest have been cited such as 1 Rolle's Abridgment, 3, where it is said, 'If a host invite one to supper, and the night being far spent he invites him to stay all night, and the guest be robbed, yet the host shall not be chargeable, because the guest was not a traveller;' and Calye's Case, 8 Coke, 63, to the same effect, showing that the peculiar liability of an innkeeper arises from the consideration paid for his entertainment of travellers, and does not exist in the case of gratuitous lodging of friends or guests. The case of *Farwell v. Boston, &c. R. Co.*, 4 Met. (Mass.) 49; 38 Am. Dec. 339, has also been cited, showing that the master is not liable for any injury received by one of his servants in consequence of the carelessness of another while both are engaged in the same service. But we are of opinion that these cases have no application to the present. The liability of the defendants below for the negligent and injurious act of their servant is not necessarily founded on any contract of privity between the parties, not affected by any relation, social or otherwise, which they bore to each other. It is true, a traveller by stage-coach or other public conveyance who is injured by the negligence of the driver has an action against the owner, founded on his contract to carry him safely. But the maxim of *respondet superior*, which by legal imputation makes the master liable for the acts of his servant, is wholly irre-

obligations as to care and vigilance as he is to a passenger for hire; and as to passengers to whom passes are given which are predicated upon any consideration, he cannot absolve himself from liability for

spective of any contract, express or implied, or any other relation between the injured party and the master. If one be lawfully on the street or highway, and another's servant carelessly drives a stage or carriage against him and injures his property or person, it is no answer to an action against the master for such injury, either that the plaintiff was riding for pleasure, or that he was a stockholder in the road, or that he had not paid his toll, or that he was the guest of the defendant, or riding in a carriage borrowed from him, or that the defendant was the friend, benefactor, or brother of the plaintiff. These arguments, arising from the social or domestic relations of life, may in some cases successfully appeal to the feelings of the plaintiff, but will usually have little effect where the defendant is a corporation, which is itself incapable of such relations or the reciprocation of such feelings. In this view of the case, if the plaintiff was lawfully on the road at the time of the collision, the court were right in instructing the jury that none of the antecedent circumstances, or accidents of his situation, could affect his right to recover. It is a fact peculiar to this case that the defendants, who are liable for the act of their servant coming down the road, are also the carriers who were conveying the plaintiff up the road, and that their servants immediately engaged in transporting the plaintiff were not guilty of any negligence, or in fault for the collision. But we would not have it inferred from what has been said that the circumstances alleged in the first point would affect the case, if the negligence which caused the injury had been committed by the agents of the company who were in the immediate care of the engine and car in which the plaintiff rode, and he was compelled to rely on these counts of his declaration founded on the duty of the defendant to carry him safely. This duty does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous. 'The confidence

induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.' See *Coggs v. Bernard*, and cases cited in 1 Smith's Ld. Cas. 95. Where there is any consideration for the gratuitous passage, the person carried is a passenger; as, where a person is carried free in consideration that he sends his freight over the road, as a drover with his cattle. *New York Central R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Smith v. New York, &c. R. Co.*, 24 N. Y. 222; *Pennsylvania R. Co. v. Henderson*, 51 Penn. St. 315; *Cleveland, &c. R. Co. v. Curran*, 19 Ohio St. 1; 2 Am. Rep. 362; *Ohio, &c. R. Co. v. Selby*, 47 Ind. 471; *Graham v. Pacific R. Co.*, 66 Mo. 536; *Flinn v. Philadelphia, &c. R. Co.*, 1 Houst. (Del.) 469; *Indianapolis, &c. R. Co. v. Beaver*, 41 Ind. 496; *Thompson on Carriers of Passengers*, 43-45; *Indianapolis, &c. R. Co. v. Horst*, 93 U. S. 291; *Gillwater v. Madison, &c. R. Co.*, 5 Ind. 540; 61 Am. Dec. 101; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196; 82 Am. Dec. 281; *Nolton v. Western R. Co.*, 15 N. Y. 444; 69 Am. Dec. 623; *Gt. Northern Ry. Co. v. Harrison*, 12 C. B. 576. It is true, a distinction has been taken, in some cases, between simple negligence and great or gross negligence; and it said that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference (if it be capable of definition), as the verdict has found this to be a case of gross negligence. When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'" *Leamer v. New World*, 16 How. (U. S.) 469.

injuries resulting from gross negligence by any notice to that effect printed upon the pass, as such conditions are against the policy of the law.¹ It has been held, however, that when tickets or passes are purely gratuitous, the person receiving may by special agreement assume all risks of the journey incident to the mere negligence of the company.²

Express agents travelling upon a railway train assume the risks incident to being carried in a more dangerous place than other passengers;³ but unless there is a provision in the contract

¹ In the case of drover's tickets, — *Penn. R. Co. v. Henderson*, 51 Penn. St. 316, — they are held to be predicated upon such a consideration that they cannot be called free tickets. So where a person is travelling upon the road for its advantage, as to look up property lost upon its trains or to look for baggage lost or to introduce some improvement upon the cars, — *Railroad Co. v. Stevens*, 95 U. S. 655, — they are not free passengers. *Missouri Pac. R. Co. v. Ivey*, 71 Tex. 409; 37 Am. & Eng. R. Cas. 46; *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239; 26 Am. & Eng. R. Cas. 268; *Pitcher v. Lake Shore, &c. R. Co.*, 61 Hun (N. Y.), 623; *Louisville, &c. R. Co. v. Taylor*, 126 Ind. 126. See also *Lawson v. Chicago, &c. R. Co.*, 64 Wis. 447; 21 Am. Eng. R. Cas. 249. One travelling on a drover's pass, being a passenger, is bound to conform to the regulations of the company just as if he had purchased a ticket. *Little Rock, &c. R. Co. v. Miles*, 40 Ark. 298.

² *Gallin v. Railway Co.*, L. R. 10 Q. B. 212; *Illinois Central R. Co. v. Reed*, 37 Ill. 484; *Kinney v. Central R. Co.*, 34 N. J. L. 513; *Wells v. N. Y. Central R. Co.*, 24 N. Y. 181; *Indiana Central R. Co. v. Mundy*, 21 Ind. 48; *Illinois Central R. Co. v. Reed*, 37 Ill. 484.

³ *Penn. R. Co. v. Woodworth*, 26 Ohio St. 585; *Union Pac. R. Co. v. Nichols*, 8 Kan. 505, 516; 12 Am. Rep. 475. In *Yeomans v. Contra Costa Steam Nav.*, 44 Cal. 71, the plaintiff was agent or messenger for Wells, Fargo, & Co., and was carried under a contract of the express company with the defendant, whereby the defendant agreed to transport the freight and messenger for a fixed monthly compensation. The plaintiff, while on a

car of the defendant company, was injured by reason of the negligence of defendant's servants. It was held that the plaintiff was a passenger and entitled to recover. In *Blair v. Erie R. Co.*, 66 N. Y. 313; 23 Am. Rep. 55, the plaintiff was an express agent on a train in the course of his business, in pursuance of a contract, whereby the railroad company contracted to transport the freight of the express company for a certain consideration, and to transport the money-safes and messengers free of charge. The plaintiff was allowed to recover. In argument of the case the court treated the agent as a passenger, carried without hire. In *Hammond v. Northeastern R. Co.*, 6 Rich. (S. C.) 180; 24 Am. Rep. 467, the plaintiff was a route agent in performance of his duty when injured by the negligence of the defendant's employes. The conditions were precisely similar to those in the last case. The court held the plaintiff entitled to recover, clearly putting it as a case of a passenger, although not in terms calling him such. In *Penn. R. Co. v. Henderson*, 56 Penn. St. 315, the plaintiff's husband was a drover in charge of his cattle on defendant's train, he riding on a drover's pass, directing the conductor of the passenger car attached to stock train to pass the bearer in charge of his stock in certain cars. In an exhaustive opinion the court held the plaintiff entitled to recover for the death occurring by the negligence of defendant's agents. Throughout the whole opinion the decedent is treated as a passenger; numerous other cases are to the same effect. In most of these cases the person injured was employed on the train, the travel being but an incident of the employment. The mail clerk is not in

between the railway company and the express company exempting the former from liability for injuries resulting from the negligence of its servants, it is not exempted from such liability either to the messenger or to one who is temporarily occupying his place.¹ Postal clerks riding upon a postal-car run over a railway are passengers within the legal meaning of the term although they ride free under the mail contract, and passes are issued to them under the contract containing a condition exempting the company from liability for injuries resulting from negligence.²

In the case first cited in the last note, the court said: "The deceased was a postal clerk, and the defendant was a carrier of the mails for the government by contract. It was a part of this contract that the postal clerks should be carried free. In such cases the clerks are passengers and entitled to protection as such.³ The clerk was not travelling upon a free pass. The government officers made requisition for passes under the contract, and the defendant sent one with a condition upon the back of the pass making the recipient agree to waive his right to sue for injuries occasioned by the negligence of the railroad company. This was not a part of the contract between the government and the defendant, nor of the contract between the government and the deceased. There was no basis for such a restriction upon the carrying of the clerk."

This view of the law was sustained upon appeal,⁴ — RUGER, C. J., saying: "The defendant owed the same degree of care to the clerks and mail agents riding in the postal-car, in charge of the mails, as they did to passengers riding upon the train,⁵ and we see no reason for questioning the correctness of the disposition then made of the question.⁶ The pass was a mere voucher issued for the convenience of the agent and the information of the employés of the defendant, and did not in any sense constitute a contract between the defendant

any way responsible for the running of trains. The conductor has no more power over him and no less than over any other passenger on the train. He has his proper place on the train, but that and his regular travel is all that distinguishes him from the other passengers.

¹ Blair v. Erie R. Co., 66 N. Y. 313; 23 Am. Rep. 55.

² Seybolt v. New York, &c. R. Co., 31 Hun (N. Y.), 100, affirmed 95 N. Y. 562; Hammond v. Northeastern R. Co., 6 S. C. 130; 24 Am. Rep. 467; Mellor v.

Missouri Pac. R. Co., 105 Mo. 155. See also *post*, § 365.

³ Blair v. Erie R. Co., 66 N. Y. 313.

⁴ Seybolt v. New York, &c. R. Co., 95 N. Y. 562; 18 Am. & Eng. R. Cas. 162.

⁵ Nolton v. Western R. Co., 15 N. Y. 444; 69 Am. Dec. 623; and Blair v. Erie R. Co., 66 N. Y. 313; 23 Am. Rep. 55.

⁶ The opinion in the case of the Pennsylvania R. Co. v. Price, 96 Penn. St. 256, not only does not conflict with the doctrine of these cases, but cites with approval the Nolton case.

and the person using it; and the agent's acceptance thereof under the circumstances of this case did not indicate an intention to assent to the provisions therein contained, and even if it might be so construed, the want of a consideration for such an agreement rendered it *nudum pactum*. A promise by one party to do that which he is already under a legal obligation to perform, has frequently been held to be insufficient as a consideration to support a contract."¹

In England the same rule prevails. Thus, in a leading case² the plaintiff was a mail agent travelling in the course of his employment upon the defendant's train. The mail and agents were carried free, under the directions of an act of Parliament. The plaintiff was injured by the negligence of the defendant's servants, and it was held to be immaterial that he was carried under a contract with the government. He was a passenger carried by consent of the company, to whom it owed the duty of carrying safely.

In Pennsylvania, under the statute of 1868, which provides that "when any person shall sustain personal injury or loss of life while lawfully engaged or employed in or about the roads, works, depots, and premises of a railroad company or in or about any train or car therein or thereon, of which company any such person is not an employé, the right of action or recovery in all such cases against the company shall be only such as would exist if such person were an employé, provided that this section shall not apply to passengers." It is held that mail agents come within the statute.³ I take it that the effect of this statute is to deprive the mail agent of his *status* as a passenger, and in that view the decision seems clearly right. An employé of the company, riding free *as such*, is not a passenger.⁴ A

¹ *Vanderbilt v. Schreyer*, 91 N. Y. 392.

² *Collett v. London, &c. Ry. Co.*, 16 Q. B. 984.

³ *Penn. R. Co. v. Price*, 96 Penn. St. 256, reversing the judgment of the trial Court, reported in 22 Alb. Law Jour. 391. In *Price v. Pennsylvania R. Co.*, 113 U. S. 218, the Supreme Court of the United States held that a writ of error would not lie from the decision of the Pennsylvania Court.

⁴ In *Hando v. London, &c. Ry. Co.* (Q. B., May 6, 1867), an action was brought by a wife to recover damages for the death of her husband. The deceased was killed by an accident which occurred while he

was travelling in a carriage on the defendants' railway. The engine and train ran off the rails, and after the accident a spring of the engine was found broken, the fracture being quite fresh. Unless this breaking caused the engine to leave the rails, there was no evidence of the cause of the accident. The engine had been carefully examined before starting. At the time of the accident the deceased was a workman at gas-works which the defendants were empowered by act of Parliament to keep up for their own use, and they had works at Battersea and Dover. The deceased was in the regular employ of the defendants, and it was part of his ordinary duty to go from one set of works to the other,

person who, without knowing that it is against the rules of the company for passengers to ride upon a freight train, if he pays his fare and is received by the conductor as a passenger, may be entitled to the rights of a passenger; and such also may be the case where, notwithstanding the rules, it is shown that passengers have been habitually carried upon such trains; but where a person knowing the rules gets upon a freight train, even with the assent of the conductor, and pays no fare, he cannot be regarded as a passenger;¹ nor is a trespasser upon a regular railway train a passenger within the meaning of the term.²

A passenger, as we have seen, is a person who rides upon the company's trains, with its assent, not at the time being in its employ; and any evidence which shows such assent is sufficient to create the relation. But a person who gets aboard a train with the declared or deliberate purpose of not paying his fare, although he gets upon the train openly, or who refuses, when called upon, to pay his fare, is not a passenger, or entitled to the rights or privileges of a passenger, and if injured no recovery can be had by him, except where the negligence producing the injury is gross or wanton.³ But even though a person is a trespasser upon the train, the employes of the company are not justified in forcibly expelling him therefrom while the train is in motion, or in using undue or brutal means for his expulsion.

as occasion required, about once a fortnight. He travelled by the defendants' railway free, and received one shilling for his extra expenses. He was so travelling on the occasion of his death. COCKBURN, C. J., before whom the cause was tried, directed a verdict for the defendants; and a rule having been obtained, pursuant to leave reserved, to enter it for the plaintiff, it was claimed that as there was no negligence shown, but the contrary, the defendants were not liable, because carriers of passengers did not warrant the safety of their passengers; and that even if the defendants would have been liable had the deceased been an ordinary passenger, the relation of master and servant existed between him and the defendants, and the injury occurred in the ordinary course of his duty. The court (COCKBURN, C. J., BLACKBURN, MELLOR, and LUSH, JJ.) were clearly of opinion that the case was not distinguishable from *Morgan v. Vale of Neath Ry. Co.*, L. R. 1 Q. B. 149; Fel-

tham *v. England*, L. C. 2 Q. B. 33; and *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 291, and discharged the rule.

¹ *Houston, &c. R. Co. v. Moore*, 49 Tex. 31; 30 Am. Rep. 98; *St. Louis, &c. R. Co. v. Ledbetter*, 45 Ark. 246; *Eaton v. Delaware, &c. R. Co.*, 57 N. Y. 382. *Contra Sherman v. Hannibal, &c. R. Co.*, 72 Mo. 62; 4 Am. & Eng. R. Cas. 589. And it seems that there is much force in the view of this Missouri case. The conductor is charged with the administration of the company's rules while running the train, and his assent to a passenger's being on the train is the assent of the company. *Creed v. Penn. R. Co.*, 86 Penn. St. 139; 27 Am. Rep. 693. Where the company receives him in the freight train and takes up his ticket, as a matter of course, he is regarded as a passenger. *International, &c. R. Co. v. Irvine*, 64 Tex. 529.

² *Highley v. Gilmer*, 3 Mont. 90.

³ *Highley v. Gilmer*, 3 Mont. 90.

Thus, where a person jumped upon the platform of a baggage car to ride to a place to which the train was being backed, and the baggage-master ordered him off while the train was in motion, and the plaintiff refusing to get off because a pile of wood was so near the track as to make it dangerous for him to do so, whereupon the baggage-master kicked him off, and falling against the wood and then under the train, he was injured, it was held that the evidence was sufficient to authorize the submission of the case to the jury.¹

If the company permits a person to ride upon its trains without payment of fare, upon any consideration, — whether because of the profit it expects to derive from carrying his freight, or to take charge of freight being carried by it,² or in consideration of his rendering certain services upon the train, as, supplying the passengers with ice-water,³ — he becomes a passenger, and is entitled to all the rights and privileges of such. The payment of fare is not necessary to create the relation; it is sufficient that a person is upon the train with the assent of the company, although he is to be carried free.⁴ Indeed, the relation is created before a person takes his place upon a conveyance of the company, and if he is at the station with the intention of taking passage, and has purchased his ticket, he is from that time entitled to all the rights and privileges of a passenger.⁵

¹ *Rounds v. Delaware, &c. R. Co.*, 64 N. Y. 129; 21 Am. Rep. 597.

² *Indianapolis, &c. R. Co. v. Beaver*, 41 Ind. 497; *Little Rock, &c. R. Co. v. Miles*, 40 Ark. 298; 13 Am. & Eng. R. Cas. 10; *Yeomans v. Contra Costa Steam Navigation Co.*, 44 Cal. 71; *Ohio, &c. R. Co. v. Selby*, 47 Ind. 471; *Cleveland, &c. R. Co. v. Curran*, 19 Ohio St. 1; 2 Am. Rep. 362; *Railway Co. v. Stevens*, 95 U. S. 655.

³ *Com. v. Vt. & Mass. R. Co.*, 108 Mass. 7; 11 Am. Rep. 301.

⁴ *Rose v. Des Moines Valley R. Co.*, 39 Iowa, 246. In this case it was held that a railroad company may be liable for causing the death of a person as a passenger, notwithstanding he was at the time riding upon a free pass, upon which was a stipulation signed by himself releasing the company from all liability for injury to his person or property while using the same, if there was negligence on the part of the employés of the company causing the death. See *post*, § 365. But a per-

son fraudulently travelling on a train without paying fare has none of the rights of a passenger; and no recovery can be had of a railroad company, for a personal injury to such person on its train, or for his death caused by mere negligence. *Toledo, &c. R. Co. v. Brooks*, 81 Ill. 245.

⁵ *Central R. Co. v. Perry*, 58 Ga. 461; *Allendar v. Chicago, &c. R. Co.*, 37 Iowa, 264; *Gordon v. Grand St.*, c. R. Co., 40 Barb. (N. Y.) 546; *Dobiecki v. Sharp*, 88 N. Y. 203. See this subject more fully, *post*, §§ 310, 310 a. See also *Weston v. N. Y. Elevated R. Co.*, 73 N. Y. 595, *affirming* 42 N. Y. Super. Ct. 156. In *Rigg v. Midland Ry. Co.*, Part I., 12 Jur. (N. s.) 525, the injury was caused by the deceased while under a temporary infliction caused by himself. He was running arm-in-arm with a companion in a footway by the side of the railroad, to catch the train, and caught his foot in the interstices between the planks of which the footway was made, and both himself and his companion fell over on the rails

One who is on the train temporarily in order to assist an infirm person who is about to take passage on that train, is a passenger for the time being, although he has not purchased a ticket and does not intend to take passage. He is there by implied invitation of the company, and is entitled to insist that the company extend to him the same care as to other passengers. Therefore, if he is injured by leaving a moving train because the company refused to give him a reasonable time in which to get off, he may maintain an action for damages.¹ It is not necessary that a person should be on the train

as the train came in. The deceased was killed, and his companion saved himself with great difficulty. The platform was too narrow for two to walk abreast, and the condition of the parties, who had been drinking freely, prevented the exercise of due care and caution. It was held that the railroad company was not negligent, and no recovery could be had. In *Watkins v. Great Western Ry. Co.*, 37 L. T. (N. S.) 193, a railway porter was standing on a plank in broad daylight thrown across from parapet to parapet of a foot-bridge connecting the two platforms of a station, cleaning a lamp, when the plaintiff, accompanying her daughter to a train, in crossing the bridge struck her head against the plank and was injured, and it was held that the plaintiff could not recover. It was said by DENMAN, J., that the obstruction was one which the plaintiff could have seen if she had not been walking with her eyes toward the ground; that the accident did not happen owing to any breach of duty on the part of the defendant, but solely owing to the unfortunate circumstance that the plaintiff walked with her eyes on the ground instead of looking before her.

¹ *Louisville, &c. R. Co. v. Crunk*, 119 Ind. 542; 41 Am. & Eng. R. Cas. 158; 12 Am. St. Rep. 443; *Doss v. Missouri, &c. R. Co.*, 59 Mo. 27; 21 Am. Rep. 371; *McKone v. Michigan Cent. R. Co.*, 51 Mich. 601; 13 Am. & Eng. R. Cas. 29. But in *Griswold v. Chicago, &c. R. Co.*, 64 Wis. 652; 23 Am. & Eng. R. Cas. 463, it is said that one who is at the station to meet his wife and gets on the train without notice to or permission from the company is not a passenger. In *Little Rock, &c. R. Co. v. Lawton*, 55 Ark.

428; 52 Am. & Eng. R. Cas. 260, a case involving similar circumstances, the court held: 1. That if the employes of the company offer to assist a lady passenger to a seat, her escort has no right to enter the coach for that purpose, and if he does so he is a trespasser, and the company owes him no duty except to refrain from wilful injury. 2. That a person who enters a car to assist a passenger to her seat cannot recover for injuries sustained in leaving the train by reason of the failure of the trainmen to hold the train a reasonable time for him to get off unless they had notice of his intention to do so. 3. That a published notice that persons not having business with the railway company were positively forbidden to enter any of its cars, does not apply to a person who attends a passenger to render needed assistance. The opinion of the court reviews a large number of cases.

It is said that the company is not bound in such a case to give the *quasi* passenger notice that the train is about to start. *Coleman v. Georgia R., &c. Co.*, 84 Ga. 1; 40 Am. & Eng. R. Cas. 690; *Lucas v. New Bedford, &c. R. Co.*, 6 Gray (Mass.), 64; 66 Am. Dec. 406. Particularly where it has no knowledge of his being on the train. *Griswold v. Chicago, &c. R. Co.*, 64 Wis. 652; 23 Am. & Eng. R. Cas. 463. And if the circumstances are such as to make the act of leaving the moving train contributory negligence (they were not so in the Indiana case, *supra*), his recovery is barred. *Central R., &c. Co. v. Letcher*, 69 Ala. 106; 12 Am. & Eng. R. Cas. 115; *Coleman v. Georgia, &c. R. Co.*, 84 Ga. 1; 40 Am. & Eng. R. Cas. 690; *Keokuk Packet Co. v. Henry*, 50 Ill. 264; *Lucas v. New*

in order to be regarded as a passenger. He has the right to stand or walk on the platforms provided at stations for the convenience of passengers while waiting for the train, or while it is stopping at a station for refreshments or other purposes, and can recover, as a passenger, against the company for an injury which he there receives, if the servants of the company fail to exercise due care in the discharge of their duties on the platforms, — as, if they throw sticks of wood from the train, without first ascertaining whether such action will endanger any passenger standing or walking there.¹ So a person who, by mistake, gets on a passenger train other than the one he intended to take passage upon is, nevertheless, a passenger upon the train he is on, and the relation of passenger and carrier exists between him and the company.² So he is a passenger if he is upon a conveyance under the control of the company, being conveyed to the station to take a train. Thus, a person who was injured while riding to a railroad-station with intent to take passage on the train, in a stage run by the company to bring passengers to their trains, was held to be a passenger, and entitled to claim damages for negligence of the driver; although he had not yet bought his ticket, nor made any formal announcement of his purpose to do so.³

By statute in England railway companies are bound to carry by certain trains children under three years of age without charge, and are entitled to half the fare charged for an adult in respect of all children between three and twelve years of age. The plaintiff's mother, carrying in her arms the plaintiff, a child of three years and two months old, took a ticket for herself by one of these trains on defendant's road, but did not take a ticket for the plaintiff; in the

Bedford, &c. R. Co., 6 Gray (Mass.), 64; 66 Am. Dec. 606.

¹ Jeffersonville, &c. R. Co. v. Riley, 39 Ind. 568.

² Columbus, &c. R. Co. v. Powell, 40 Ind. 37; Cincinnati, &c. R. Co. v. Carper, 112 Ind. 26; 31 Am. & Eng. R. Cas. 36; International, &c. R. Co. v. Gilbert, 64 Tex. 536; 22 Am. & Eng. R. Cas. 405; Arnold v. Pennsylvania R. Co., 115 Penn. St. 135; 28 Am. & Eng. R. Cas. 189. Where a passenger, without knowledge of a regulation, takes passage upon a prohibited train, the regulation not appearing on the face of the ticket, he is not a trespasser, though he has no right to a passage

thereon, and must be treated as passenger who has taken the wrong train by mistake, and although he may be refused the right to travel thereon, he cannot be regarded or treated as a trespasser. Lake Shore, &c. R. Co. v. Rosenzweig, 113 Penn. St. 519; 26 Am. & Eng. R. Cas. 489. But if under the circumstances he ought to have been aware of the regulation, and if he refuses to leave the train after discovering his mistake, he becomes a trespasser and may be expelled. Atchison, &c. R. Co. v. Gants, 38 Kan. 608; 34 Am. & Eng. R. Cas. 290.

³ Buffett v. Troy, &c. R. Co., 40 N. Y. 168.

course of the journey an accident occurred through the negligence of the defendant, and the plaintiff was injured. . At the time the mother took the ticket, the defendant's servants asked no questions as to the age of the child, and there was no intention on the part of the mother to defraud the company. It was held that the plaintiff was entitled to recover.¹

But a person who is wrongfully upon the train, — as, a person who refuses to pay his fare, or one who has been expelled from the train for non-payment of fare, but immediately gets on board again, and tenders his fare, — is not a passenger, and, unless the fare is accepted, acquires no right to be carried as such.² Nor is a person who is upon the train as a mere volunteer assistant to a train-hand, mail-agent, or express-messenger,³ or a news-boy who is permitted by the train-hands to ride free to sell papers,⁴ or an employé of the company, who is not employed upon the train, but is permitted to ride free from his home to the place of his employment.⁵ But as to the last proposition, it does not seem to us that it has any foundation in principle as to employés who have not commenced their work for the day, or who are returning after the services of the day are completed. How the mere circumstance that a person is in the employ of the company in a department entirely distinct from the operation of the train, who is permitted to ride free upon the train to and from his work, can deprive him of the *status* of a passenger, is not readily seen. While going to and from his work, *the relation of servant does not exist*. He is merely on his way to take up his position as servant, or is returning after his duty. as servant has ceased, and there is no reason why he should not be

¹ Austin v. Gt. Western Ry. Co., L. R. 2 Q. B. 442. See the same principle applied in a similar case in Massachusetts. Beckwith v. Cheshire R. Co., 143 Mass. 68; 27 Am. & Eng. R. Cas. 192.

² O'Brien v. Boston, &c. R. Co., 15 Gray (Mass.), 20; 77 Am. Dec. 347.

³ Union Pacific R. Co. v. Nichols, 8 Kan. 505; 12 Am. Rep. 475.

⁴ Snyder v. Hannibal, &c. R. Co., 60 Mo. 413; Heming v. Brooklyn City R. Co., 1 Abb. (N. Y.) N. C. 433; Flower v. Penn. R. Co., 69 Penn. St. 210; 8 Am. Rep. 251.

⁵ Kansas Pacific R. Co. v. Salmon, 11 Kan. 83; McQueen v. Central Branch, &c. R. Co., 30 Kan. 689; 15 Am. & Eng. R.

Cas. 226 (riding on a special car); Abell v. Western Maryland R. Co., 63 Md. 433; 21 Am. & Eng. R. Cas. 503; New York, &c. R. Co. v. Vick, 95 N. Y. 267; 17 Am. & Eng. R. Cas. 609; Ryan v. Cumberland Valley R. Co., 23 Penn. St. 384; Little Schuylkill Nav. Co. v. Norton, 24 Ill. 465; Moss v. Johnson, 22 Ill. 633; Russell v. Hudson River R. Co., 17 N. Y. 134; Gilman v. Eastern R. Co., 10 Allen (Mass.), 233; 87 Am. Dec. 635; Tunney v. Midland Ry. Co., L. R. 1 C. P. 291. Compare Rosenbaum v. St. Paul, &c. R. Co., 38 Minn. 173; 34 Am. & Eng. R. Cas. 274 (grader on gravel train with conductor's consent, company held liable to him for injury resulting from defect in track).

treated as a passenger as well as any other person who is riding free upon the train.¹

A person travelling in the conveyance provided by a railroad company for its passengers and not connected with the company in the capacity of servant or agent is to be presumed to be a passenger and to be lawfully there; the burden of proof is on the company to prove that he is a trespasser.² It is otherwise, however, where he is on the train but is not in the coach regularly provided for passengers.³ The relation of passenger and carrier terminates after the arrival of the train at the destination and the passenger has had reasonable time and opportunity to leave the premises or has actually left them. Thus, where a passenger having left his train started across some railroad tracks, not towards the station, and was injured by a passing train, it was held that he was not a passenger when injured, and was not entitled to recover on that basis.⁴

¹ *Fitzpatrick v. New Albany, &c. R. Co.*, 7 Ind. 463; *Gillenwater v. Madison, &c. R. Co.*, 5 Ind. 340; 61 Am. Dec. 101; *Ohio, &c. R. Co. v. Muhling*, 30 Ill. 9; 81 Am. Dec. 336.

² *Louisville, &c. R. Co. v. Thompson*, 107 Ind. 442; 27 Am. & Eng. R. Cas. 88, 329; *Gillingham v. Ohio River R. Co.* (W. Va. 1892), 51 Am. & Eng. R. Cas. 222; *Creed v. Pennsylvania R. Co.*, 86 Penn. St. 139; *Pennsylvania R. Co. v. Books*, 57 Penn. St. 339; 98 Am. Dec. 229; *Bryant v. Chicago, &c. R. Co.*, 53 Fed. Rep. 997. It has been held that the possession of a baggage check and the testimony of the baggage-master that when required by a passenger he puts a check on his baggage and gives him a duplicate therefor is sufficient, in the absence of other evidence, to show that the person possessing the check was a passenger on the car and that he had baggage checked on that occasion. *Davis v. Cayuga, &c. R. Co.*, 10 How. Pr. (N. Y.) 330. But when a steamboat stops at one of its usual stopping-places to take on passengers and freight, there is no presumption that every person who goes on board does so as a passenger, unless he notifies an officer to the contrary so as to relieve the steamboat company of its duty to give such as do not come aboard as passengers proper

time and facilities for getting ashore. *Keokuk Packet Co. v. Henry*, 50 Ill. 364.

³ *Snyder v. Natchez, &c. R. Co.*, 42 La. An. 302; 44 Am. & Eng. R. Cas. 278.

⁴ *Smith v. St. Paul, &c. R. Co.*, 32 Minn. 1; 16 Am. & Eng. R. Cas. 310. See also *Central R. Co. v. Peacock*, 69 Md. 257; *Savannah, &c. R. Co. v. Watson* (Ga.), 12 S. E. Rep. 237. In Massachusetts it is held that leaving a moving train thereby terminates the relation of passenger and carrier within the meaning of the statute. *Com. v. Boston, &c. R. Co.*, 129 Mass. 500; *McKimble v. Boston, &c. R. Co.*, 141 Mass. 463. See also *Creamer v. West End St. Ry. Co.*, (Mass.) 31 N. E. Rep. 391. In *Finnegan v. Chicago, &c. R. Co.*, 48 Minn. 378, plaintiff having gotten on the wrong train, the conductor stopped the train at a point not a station in order that he might get off and walk along the track to a train pointed out by the conductor which would carry him to his destination. It was held that the conduct of the passenger in thus leaving the train, having been entirely voluntary on his part, he ceased to be a passenger on leaving the train, and was not entitled to recover as such for an injury sustained from his falling into a cattle-guard on the track.

SEC. 299. Duties as to Construction and Repair of its Roadway. — In the construction of its road-bed, *the company is bound to exercise the highest degree of care and vigilance, not only that it may be originally made safe and secure for the passage of trains over it during all the varying seasons of the year, but also that it may at all times be maintained, and kept in that condition.*¹ Public policy, in view of the dangerous consequences likely to ensue therefrom, will permit no relaxation of this rule, but holds these companies to strict and active diligence, to see that their roadway and all their appliances are in a safe and proper condition.

In the construction of its bridges over which its trains must pass, the company is bound to exercise the same great care as in the selection and management of its appliances.² As stated by ELLIOTT, C. J., in a recent case in Indiana :³ "The duty of a railroad company engaged in carrying passengers is not always discharged by purchasing from reputable manufacturers the iron rods or other iron work used in the construction of its bridges. The duty of the company is not discharged by trusting, without inspecting and testing, to the reputation of the manufacturers and the external appearance of such materials. The law requires that before the lives of passengers shall be trusted to the safety of its bridges, the company shall carefully and skilfully test and inspect the materials it uses in its bridges. This duty does not end when the materials are put in place, but continues during their use; for the company is bound to test them from time to time to ascertain whether they are being impaired by use or by exposure to the elements."⁴

¹ Hanley v. Harlem R. Co., Edm. Sel. Cas. (N. Y.) 359; Louisville, &c. R. Co. v. Thompson, 107 Ind. 442; 27 Am. & Eng. R. Cas. 88; Searle v. Kanawha, &c. R. Co., 32 W. Va. 370; 37 Am. & Eng. R. Cas. 179; Vicksburg, &c. R. Co. v. Putnam, 118 U. S. 545; 27 Am. & Eng. R. Cas. 291.

² Pershing v. Chicago, &c. R. Co., 71 Iowa, 561; 34 Am. & Eng. R. Cas. 405; Louisville, &c. R. Co. v. Pedigo, 108 Ind. 481; 27 Am. & Eng. R. Cas. 310 (rate of speed while passing over the bridge may be shown); Bedford, &c. R. Co. v. Rainbolt, 99 Ind. 551; 21 Am. & Eng. R. Cas. 466; Toledo, &c. R. Co. v. Conroy, 68 Ill. 560; Grote v. Railway Co., 2 Exch. 251.

³ Louisville, &c. R. Co. v. Snyder, 117 Ind. 425; 39 Am. & Eng. R. Cas. 139-140.

⁴ Louisville, &c. R. Co. v. Snyder, 117 Ind. 425; 37 Am. & Eng. R. Cas. 137, citing Manser v. Eastern Counties Ry. Co., 3 L. T. (N. S.) 585; Texas, &c. R. Co. v. Suggs, 62 Tex. 323; 21 Am. & Eng. R. Cas. 475; Stokes v. Eastern Counties Ry. Co., 2 Fost. & F. 691; Robinson v. N. Y. Central R. Co., 9 Fed. Rep. 877; Hegeman v. Western R. Co., 13 N. Y. 9; 64 Am. Dec. 517; Alden v. N. Y. Central R. Co., 26 N. Y. 102; 82 Am. Dec. 401; Richardson v. Great Eastern Ry. Co., 10 C. P. 486; Ingalls v. Bills, 9 Met. (Mass.) 1; 43 Am. Dec. 346. See also Pittsburgh, &c. R. Co. v. Gilleland, 56 Penn. St. 445;

The railroad company is not, however, an insurer against every possible casualty, but only against such as result in spite of the

94 Am. Dec. 98; *Birmingham v. Railroad Co.*, 14 N. Y. Supp. 13; *New Bedford, &c. R. Co. v. Rainbolt*, 95 Ind. 551; 21 Am. & Eng. R. Cas. 457. In this last case the court held that proof of the injury from the breaking down of the bridge created a presumption of negligence on the part of the company. The court also said that in the absence of proof that the safety of a properly constructed bridge may depend upon the soundness of a single iron rod, it is error to instruct the jury that if the bridge broke down because of a defect in such single rod, which was not discoverable, and the injury occurred therefrom, there could be no recovery. *New Bedford, &c. R. Co. v. Rainbolt*, 99 Ind. 551; 21 Am. & Eng. R. Cas. 467.

In the case of *International, &c. R. Co. v. Halloren*, 53 Tex. 46; 37 Am. Rep. 744; 3 Am. & Eng. R. Cas. 343, by a sudden and extraordinarily heavy rain-fall, about dark, confined to a limited locality, a portion of a railway bed was so undermined that it gave way under the weight of a train, three or four hours afterwards, and a passenger was injured. The railway bed was in safe condition before the rain-fall; a train had safely passed over it two hours before the accident; and it had been inspected between the time of the passage of that train and the time of the accident, and was apparently in safe condition. The defect was not visible at the time of the accident, the train in question was carefully run at half speed at the time in question. It was held that no action would lie against the company, — *BONNER, J.*, saying: "The test of liability is, not whether the company used such particular precaution as is evident after the accident happened might have averted it had the danger been known, but whether it used that degree of care and prudence which very cautious, competent persons would have used under the apparent circumstances of the case to prevent the accident, without reasonable knowledge that it was likely to have occurred. *Bowen v. N. Y. Central R. Co.*, 18 N. Y. 408; 72 Am. Dec. 529. A railroad company is required to so construct its road-bed and track as

to avoid such dangers as could be reasonably foreseen by competent and skilful engineers, as likely to be occasioned from the ordinary rain-falls and freshets incident to the particular section of the country through which it is constructed. But it would not be guilty of such culpable negligence as to make it liable in damages if it failed to provide against such extraordinary floods, or other inevitable casualties caused by some hidden force of nature unknown to common experience, and which could not have been reasonably anticipated by the ordinary engineering skill and experience required in the prudent construction of such railroad. If an accident should happen from such cause on a road-bed and track which had been properly constructed and kept in good repair, when the agents and employes in charge of the train were in the due exercise of that degree of caution and prudence necessary at all times, and when they did not have, from information conveyed to them, or from their own personal observation, reasonable grounds to anticipate impending danger, and consequently did not use such extraordinary precautions as might have otherwise averted it, then the law characterizes it as an act of God, or such inevitable accident as is incident to all human works, and which would relieve the company from liability. Even under the rigid rules of the common law, which made common carriers insurers of the safe delivery of all articles committed to their care, such cause would have excused them. *Shearm. & Redf. on Neg.* (4th ed.), § 270; *Withers v. North Kent Ry. Co.*, 3 H. & N. 969; *Railroad Co. v. Reeves*, 10 Wall. (U. S.) 176; *Livezey v. Philadelphia*, 64 Penn. St. 106; 3 Am. Rep. 578. The undisputed facts in this case show substantially, 1. That the defendant's road was first-class, only three years old, in good order at the place of the accident, and that the ties and iron were sound and good. 2. That in the latter part of the day, and about dark of the day of the accident, an unprecedentedly heavy rain fell in that locality, which was not general, but which caused the embank-

highest degree of reasonable vigilance.¹ While it is bound to construct its road-bed and maintain it and its bridges in a safe condition for the use of its passengers,² yet it is not liable for injuries resulting from defects therein that no reasonable degree of care or vigilance could have detected. Thus, while it is undoubtedly bound to construct them in such a manner as to withstand the effects of ordinary freshets, or, possibly, *extraordinary* freshets, yet it is not responsible for not securing them against *unprecedented* freshets, such as could not have been reasonably foreseen or guarded against.³ In the case

ment to give way under the train as it passed over the place, and thus caused the disaster. 3. That the track at that place was sound and in good condition, as far as could be seen, only one hundred and twenty-five minutes prior to the occurrence, when the north-bound train passed over it. 4. That between that time and the occurrence of the accident, that section of the road embracing the place of the accident was inspected and found and left in good condition, and was still in good condition at the time the wrecked train ran on it, as far as could be seen; had its usual appearance to an engineer who had been running over it ever since the road was built. 5. That the train and engine were in good condition, having been so found, on examination, only one hour before the accident, and were properly manned. 6. That the accident occurred seventy minutes after leaving Palestine, and sixteen miles from that place, when the train was running at about half-speed, on a track which was apparently safe at all times for that rate. 7. That it had rained during the day at Palestine, but not so hard as to make it necessary to give orders in reference to the track. The evidence, as thus disclosed by the record, shows that the defendant company had used a commendable degree of skill, prudence, and vigilance in the construction and management of its road, and that the misfortune to the plaintiff was the result of one of those inevitable accidents of which passengers assume the risk, and for which the law does not hold the company responsible in damages." *Ellet v. St. Louis, & C. R. Co.*, 76 Mo. 518; 12 Am. & Eng. R. Cas. 183; *Gillespie v. St. Louis, & C. R. Co.*, 6 Mo. App. 554.

¹ *Chicago, & C. R. Co. v. Stumps*, 69 Ill. 409; *Gonzales v. N. Y., & C. R. Co.*, 39 How. Pr. (N. Y.) 407; 38 N. Y. 440; 98 Am. Dec. 58; *Reed v. N. Y. Central R. Co.*, 56 Barb. (N. Y.) 493; *Toledo, & C. R. Co. v. Apperson*, 49 Ill. 480; *Kansas, & C. R. Co. v. Miller*, 2 Col. 442.

² *Pittsburgh, & C. R. Co. v. Gilleland*, 56 Penn. St. 445; 94 Am. Dec. 98.

³ *Withers v. North Kent. Ry. Co.*, 27 L. J. Ex. 417; *Gillespie v. St. Louis, & C. R. Co.*, 6 Mo. App. 554. But see *Philadelphia, & C. R. Co. v. Anderson*, 94 Penn. St. 351; 39 Am. Rep. 787, where it was held that the company was liable for injuries resulting to a passenger by the washing of the embankment of a railway by an *extraordinary* freshet, where the nature and formation of the surrounding soil was such that the washout could have been avoided, if proper culverts had been provided, as they should have been, to have carried off such accumulations of water. So the company is liable if the engineer had reason to suspect that the track had been weakened by the storm, but neglected to test it. *Ellet v. St. Louis, & C. R. Co.*, 76 Mo. 518. See also *Kansas Pacific R. Co. v. Miller*, 2 Col. 442. Every railway company in the actual possession and occupation of its line of railway is responsible for the maintenance and preservation in a good state of repair of all its bridges, viaducts, and embankments, so that if any injuries are sustained either by persons travelling along a highway under a bridge or viaduct, or by passengers travelling along the line from the ruinous and insecure state of such bridge or viaduct, the railway company will be responsible for the injury, whether it arose from their own neglect in not providing

last cited, an action was brought for an injury received by the plaintiff while riding over the defendants' road. The case disclosed that the road-bed was constructed some five years prior to the accident, and ran through a marshy country *subject to floods*; that it was constructed on a low embankment composed of a sandy sort of soil likely to be washed away by water, *and that the culverts were insufficient to carry off the water. It was not shown, however, that the soil of the line had been washed away before, or that the water had ever come up to the embankment.* It also appeared that, on the day upon which the accident occurred, an *extraordinary storm*, attended with very violent rain, had been raging for over sixteen hours, and that in consequence of this a stream near to the spot at which the accident occurred had swollen to a torrent and washed away a bridge, and passed

needful reparations, or from original faulty construction of the fabric by their engineer or contractor. *Chester v. Holyhead Ry. Co.*, 2 Exch. 251. If a railway embankment has been injured by some wholly unexpected and extraordinary flood, and the rails give way, and the passengers are injured without any neglect or default on the part of the company, the company is not responsible for the injuries that may be sustained by the passengers. *Withers v. North Kent. Ry. Co.*, 27 L. J. Exch. 417. But every railway company is bound to construct and maintain its embankments and earthworks in such a manner as to be capable of resisting all the violence of the weather, which may be expected at some time or another, though rarely, to occur; and if it fails in this duty it will be responsible in damages for negligence. *Gt. West. Ry. Co. of Canada v. Fawcett*, 1 Moore's P. C. C. (N. s.) 120. No person can be held chargeable for the consequences of a lawful act, which results from *vis major*, and if in spite of the acts of the company the injury would have happened, it is not liable for the injury. Thus, in a recent English case, it was stated for the opinion of the court by an official referee that upon the occasion of a universal rainfall, unprecedented in duration and quantity for many years in the district, there was imminent peril of the defendants' canal bursting; and the defendants, in order to prevent it, raised a sluice by which a large quantity of water escaped

into a neighboring brook and thence into a colliery. The water, having filled up this colliery, flowed into some collieries of the plaintiffs and destroyed their works. It was found that if relief had not been afforded to the canal banks at this time, an inundation must have very shortly ensued, which would have equally destroyed the plaintiffs' works and also caused far greater devastation to property, and probably loss of life, throughout a very wide area; that the course adopted by the defendants was prudent and proper, and the only effectual measure which was possible in the emergency. The plaintiffs claimed in this action, alternately, damage for the defendants' wrongful acts, or compensation under the Defendants' Acts of Parliament, which provided for satisfaction to be made for injury or damage alleged to be sustained by reason of carrying into effect any of the provisions of that act. It was held that the plaintiffs' injury was by the finding due, not to the defendants' wrongful acts, nor to the effect of any of the provisions of the Defendants' Acts of Parliament, but to *vis major*, or an act of God, and that, as in any event the plaintiffs' works would have been equally destroyed, the immediate damage caused by the defendants' own act in raising the sluice was *injuria absque damno* and irrecoverable. *Nichols v. Marsland*, 2 Ex. Div. 1; Q. B. Div.; *Thomas v. Birmingham Canal, &c. Co.*, 43 L. T. Rep. (N. s.) 435.

down with great force upon the line. By midnight the water had worn away the earth under the sleepers, in some places leaving the rails unsupported and exposed, but it did not appear that the water had at any part of the line caused the evil, *or that the condition of the line could be perceived*. The train upon which the plaintiff was injured was the express, and upon the whole went at the ordinary rate of an express train, although there was some evidence that it was being driven at a faster rate at the time when the accident occurred, to make up for lost time. The train had passed over the line safely until the accident occurred, by reason of the undermining of the sleepers and the consequent giving away or settling of the rails, which threw the train down an embankment and seriously injured the plaintiff. The jury returned a verdict for the plaintiff for £1,500 damages, which, upon hearing in Exchequer, was set aside upon the ground that there was no sufficient evidence of negligence on the part of the defendants to sustain it.¹ BRAMWELL, B., said: "It is said that the construction of the line was such as to make it dangerous in a flood, and that, therefore, the defendants' servants must have known that it was dangerous to drive at an express rate of speed. *But negligence must be shown by the plaintiff. It is not enough to show that an accident arose from certain extrinsic or external causes. Where is the evidence of negligence? It is contended on the part of the plaintiff that the company's servants were bound to know the consequences which were likely to follow from the flood. That is not so. They were bound only to know that which could be known by the exercise of ordinary skill and prudence; otherwise they would be made insurers of the safety of the passengers. There was no engineering or other skilled evidence to show that water would wash away the soil of which the embankment was made. So far from there being any evidence to show that there was negligence, there was evidence to*

¹ In an action to recover damages for injuries caused through the derailment of a train, the court instructed the jury that a railroad company is not liable for the results of the accident if the evidence shows that the accident was directly caused by an unprecedented spell of bad weather, and that this bad weather could not have been guarded against by human skill and judgment, but that if the road was out of repair before the bad weather set in, and proper care was not used beforehand to put it in good condition, and the injury resulted

from the bad condition of the road which could have been avoided by proper skill and diligence, the company could not avail itself of the defence that the proximate cause of the accident was the unprecedented bad weather. On appeal it was held that this instruction was not erroneous; it was not open to the objection that it made the company liable for the consequences of the unusual bad weather whether it could have been anticipated or not. *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95; 37 Am. & Eng. R. Cas. 129.

negative the negligence imputed. The very existence of the line for five years, notwithstanding that the district was subject to floods, tended to negative the only negligence that was set up. There was nothing to show that, until the accident occurred, there had been anything to indicate danger, or to warn the company's servants to cease running the trains. *The verdict was wholly unwarranted.*"¹ The track must be in a safe condition so far as human foresight can accomplish that result; but unless *negligence* in some respect contributing to an injury resulting from defects therein can be attributed to the company, it is not liable.² No precise rule of diligence can be stated, but the company is bound to construct its roadway in such a manner that it may resist all action of the weather, from floods or whatever cause arising, that may be expected to occur, although only at long intervals; and as a necessary sequence, if *extraordinary* or unprecedented floods have once occurred, it must redouble its vigilance, and place its embankments in such a condition as to resist others of similar severity or intensity.³ Having

¹ In *Pittsburgh, &c. R. Co. v. Gilleland*, 56 Penn. St. 445; 94 Am. Dec. 98, a similar doctrine was held. See, also, similar in principle, *Blyth v. Birmingham Water Works Co.*, 11 Exch. 781; *Fash v. Third Ave. R. Co.*, 1 Daly (N. Y.), 148.

² *Toledo, &c. R. Co., v. Apperson*, 49 Ill. 480; *Reed v. N. Y. Central R. Co.*, 56 Barb. (N. Y.) 493; *Gonzales v. N. Y. Central R. Co.*, 39 How. Pr. (N. Y.) 407. A passenger cannot be considered guilty of contributory negligence in taking passage over a railroad although he knows the track is not safe. *Citizens' St. R. Co. v. Twinnam*, 111 Ind. 587; 30 Am. & Eng. R. Cas. 616.

³ *Ellet v. St. Louis, &c. R. Co.*, 76 Mo. 518; 12 Am. & Eng. R. Cas. 183; *Ely v. St. Louis, &c. R. Co.*, 77 Mo. 34; 16 Am. & Eng. R. Cas. 342; *Great Western Ry. Co. of Canada v. Fawcett*, 1 Moore's P. C. C. (N. S.) 101. Absolute perfection is neither expected nor required in the track or appliances of a railway, but such a degree of condition and repair as is consistent with the nature of the business, and the risks involved must be observed. When a railroad is first constructed it cannot be expected that its road-bed will be as solid or secure as it will become after having been subjected to the washings of

storms and the repeated additions of gravel and stones constantly made to supply the defects thus from time to time disclosed. So, too, defects may be disclosed by the action of *unusual* storms which could not, in the first instance, have been anticipated; and if in such cases, the company has, in the first instance, made such reasonable provisions for resisting the action of such storms as are usual or known in that section of the country, as the nature of the country and the situation of the road demanded to ensure the safety of travel over it, it cannot be made responsible for an injury resulting from a defect created by an *extraordinary* storm. *International R. Co. v. Halloren*, 53 Tex. 46; 37 Am. Rep. 744. But such a storm having once occurred and disclosed the weak points in the road, the duty is then imposed upon the company of providing against similar consequences from a similar cause, although such a cause may not arise again for many years, or, possibly, ever. If, however, the company has not in the first instance adopted such precautions for carrying off the water of ordinary storms as reasonable prudence required should be made because of the nature of the country, it cannot screen itself from liability because the injury in fact resulted from an unusual or even un-

regard to the high trust imposed in railway carriers and to the disastrous consequences which must follow any relaxation of the strict observance of their duties, the law imposes upon such carriers the duty to exercise all the care, diligence, and skill which are reasonably possible in the construction and maintenance of their road-beds and bridges, and to keep up a constant and vigilant supervision over them in order to preserve them in proper condition. For any injury resulting to passenger from the slightest neglect in the discharge of this high duty, the carrier must respond.¹ The duty is the same as to all carriers regardless of their wealth or poverty. The rule as above stated does not mean that the company must exercise care and

precedented storm. Philadelphia, &c. R. Co. v. Anderson, 94 Penn. St. 351. In this case the location of the road and the nature of the surrounding country was such as to require that provision should be made for carrying off the water of such storms as were known to occur in that vicinity, but the defendants neglected to make any provision therefor, and the court held that they were guilty of negligence, although the defect in the road resulted from an *extraordinary* storm. But in a later case the court held that, where the road had been constructed with culverts sufficient for carrying off the water arising from known or usual storms, the company could not be held responsible for injuries to a schoolhouse, resulting from the insufficiency of such culverts to carry off the water of an *unusual* or extraordinary storm. Baltimore, &c. R. Co. v. Sulphur Springs, 96 Penn. St. 65.

¹ Louisville, &c. R. Co. v. Thompson, 107 Ind. 442; 27 Am. & Eng. R. Cas. 88; International, &c. R. Co. v. Hallören, 53 Tex. 46; 37 Am. Rep. 744; Texas, &c. R. Co. v. Hamilton, 66 Tex. 92; 26 Am. & Eng. R. Cas. 182; Rutherford v. Shreveport, &c. R. Co., 41 La. An. 793; 41 Am. & Eng. R. Cas. 129 (injury caused from decayed ties); Searle v. Kanawha, &c. R. Co., 32 W. Va., 370; 37 Am. & Eng. R. Cas. 179; Littlejohn v. Fitchburg R. Co., 148 Mass. 478; 37 Am. & Eng. R. Cas. 54; Rockwell v. Morrison, 20 Penn. St. 171; Withers v. Railway Co., 3 H. & N. 969; Tyrrell v. Eastern R. Co., 111 Mass. 546; Michaels v. N. Y. Central R. Co., 30 N. Y. 564; Rockwell Third v. Ave. R. Co.,

53 N. Y. 625. As to bridges, see Toledo, &c. R. Co. v. Conroy, 68 Ill. 560. The fact that the outside rail on a curve is lower than the inside one is evidence of negligence, since the most ignorant mechanic knows that the inside rail should be the lower; and if the train was running rapidly round such a curve, no other proof of negligence is necessary. Central R. Co. v. Sanders, 73 Ga. 513; 27 Am. & Eng. R. Cas. 300. Any witness may give his opinion as to what caused the train to run off the track if he states the reasons and facts upon which his opinion is founded. Central R. Co. v. Senn, 73 Ga. 705; 27 Am. & Eng. R. Cas. 304. Nor can the company object to evidence on the part of plaintiff's witnesses that the general condition of that part of the road where the injury occurred had long been poor and that the rails thereon had been in use for many years. Vicksburgh, &c. R. Co. v. Putnam, 118 U. S. 545; 27 Am. & Eng. R. Cas. 291; Missouri Pac. R. Co. v. Collier, 62 Tex. 318.

In the case of Louisville, &c. R. Co. v. Ritter, 85 Ky. 368; 28 Am. & Eng. R. Cas. 167, the train on which plaintiff was being carried collided with a cow on the track, and the shock of the collision caused the derailment of plaintiff's coach. The court held that the company was liable; that it was negligence in not keeping its track and roadway clear of bushes and trees so that the engineer might be able to see obstructions ahead. It was also held that the fact of injury to a passenger creates a presumption of negligence against the company.

make use of the best methods possible only so far as its means will allow. A company cannot allege its poverty as an excuse for its negligence in this respect. If it is too poor to discharge the obligations of a carrier properly, it must not assume the privileges of one.¹

Corporations are bound to the same degree of care in the conduct of their business, and are subject to the same rules of liability for wrongful acts committed by them in the line of their duty, as individuals are, and being liable for the tortious or wrongful acts of their servants or agents, it follows as a natural and legitimate result that they are liable for the *manner* in which their duties are discharged, or, in other words, *for the negligence of their officers, agents, or servants in the discharge of their duties, in whatever department they are employed.* The question of liability for acts claimed to be negligent must depend largely upon the powers and purposes of the corporation, the agencies employed in the conduct of its business, and the consequences of any remissness in the discharge of the duties conferred upon its agents.² The rule is that a degree of care must be observed *commensurate with the character of the agencies employed, and the risk to others from their improper or negligent employment.*³

Thus, while a railroad company is bound to exercise the highest degree of care in the selection of its machinery, cars, and other appliances, and in the construction of its road-bed, and in keeping the same in repair, yet it is not liable for the result of an *accident* which could not have been prevented by the exercise of such care. In other words, *when an injury results from causes that the exercise*

¹ See *Texas Trunk R. Co. v. Johnson*, 75 Tex. 158; 41 Am. & Eng. R. Cas. 122; *post*, pp. 1251, 1252.

² *Philadelphia, &c. R. Co. v. Derby*, 14 How. (U. S.) 468. See also *Daniel v. Metropolitan Ry. Co.*, L. R. 6 H. L. Cas. 45. The result of the decision in this latter case was to establish the principle that where the execution of work, which, if carefully and properly done, need not result in accident to passers-by, is intrusted to skilled and proper workmen, there is no obligation on a railway company, whose line adjoins the work, to take special precautions to avert from their passengers a danger which can only be apprehended on the supposition that the workmen engaged will

do their work negligently, — at all events, if the company have no control over the workmen, and are otherwise not responsible for their acts; and Lord WESTBURY held that it would not affect the doctrine if those proper and skilled workmen were employed directly by the company. *Foy v. London, &c. Ry. Co.*, 18 C. B. (N. S.) 225, *affirmed* L. R. 4 Exch. 117; 38 L. J. Exch. 67. See also *Harrold v. Great Western Ry. Co.*, 14 L. T. Rep. 440; *Adams v. Lancashire, &c. Ry. Co.*, 38 L. J. C. P. 277; *Plant v. Midland Ry. Co.*, 21 L. T. Rep. 836.

³ Wood's Law of Master and Servant, 688, 788.

of the highest degree of reasonable care could not have prevented, it is not liable, as such injuries are the result of inevitable accident.¹

SEC. 300. **Care required in relation to Engines, Cars, etc.,** — The same degree of care is required of the company in the selection of engines, cars, and other appliances for the prosecution of the business as is required in the case of its roadway.² It is not exonerated from liability for injuries resulting from defects in its vehicles, because it purchased them from competent manufacturers, but is responsible for defects therein resulting from the negligence of the manufacturers, precisely the same as it would be if it manufactured them itself.³ It is not responsible for *all* defects therein, but only

¹ *Kansas Pacific R. Co. v. Miller*, 2 Col. 442; *Hegeman v. Western R. Co.*, 13 N. Y. 9; 64 Am. Dec. 516. The rule laid down by MANSFIELD, C. J., in *Christie v. Griggs*, 2 Camp. 79, that a carrier of passengers is bound to provide for their safety "as far as human care and foresight will go" has been considerably modified in the English courts, — *Readhead v. Midland Ry. Co.*, L. R. 4 Q. B. 379, — at least in its application, and the rule of *reasonable care* in view of the circumstances and the mode of conveyance adopted. And in this country, while many of our courts adhere to the rule so far as the mode of expressing it is concerned, — *Indianapolis, &c. R. Co. v. Horst*, 93 U. S. 291; *New Jersey, &c. R. Co. v. Kennard*, 21 Penn. St. 203; *Meier v. Penn. R. Co.*, 64 Penn. St. 225; *Philadelphia, &c. R. Co. v. Derby*, 14 How. (U. S.) 468; *Laing v. Calder*, 8 Penn. St. 479; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304; 2 Am. Rep. 229, — yet practically they have kept pace with the English courts and held such carriers up to the rule of *reasonable* diligence. But the standard of *reasonable* care adopted by our courts generally requires a higher degree of care than seems to be required in England. That is, they require more than such care as an ordinarily prudent man would exercise, if the business was his own; such reasonable care as a prudent man would exercise in view of the nature of the business, and the consequences to life and limb likely to ensue if there is any relaxation in proper vigilance as to the general conduct, or the appliances of the business. As the agencies employed are of the most dangerous character, this rule

demand the highest degree of care which can reasonably be exercised to secure the safety of passengers, without reference to the pecuniary ability of the carrier, short of making him an absolute insurer of the passenger's safety. This is what constitutes *reasonable* care, and seems to be the actual doctrine of our cases, however it is expressed. Thus, while a railway company is not responsible for an injury resulting from a latent defect in its bridges, rails, cars, engines, or other appliances, which has not been discovered by the application of the most approved tests, — *Hegeman v. Western R. Co.*, 13 N. Y. 9; 64 Am. Dec. 517; *Ingalls v. Bills*, 9 Met. (Mass.) 1; 43 Am. Dec. 346; *Meier v. Penn. R. Co.*, 64 Penn. St. 225; 3 Am. Rep. 581, — yet it is liable for an injury resulting from a latent defect in any of these appliances, when it has not tested them by the proper tests, or taken any proper measures to ascertain whether or not they were defective, if by the application of any known test the defect might have been discovered. *Hegeman v. Western R. Co.*, 13 N. Y. 9; 64 Am. Dec. 517. In the one case there has been an exercise of reasonable care, in the other there has not been.

² *Readhead v. Midland Ry. Co.*, L. R. 2 Q. B. 412; *Burns v. Cork, &c. Ry. Co.*, 13 I. R. C. L. 543; *Grote v. Chester, &c. Ry. Co.*, 2 Exch. 251.

³ *Burns v. Cork, &c. Ry. Co.*, 13 I. R. C. L. 543; *Louisville, &c. R. Co. v. Snyder*, 117 Ind. 435; 37 Am. & Eng. R. Cas. 137; *Texas, &c. R. Co. v. Suggs*, 62 Tex. 323; 21 Am. & Eng. R. Cas. 475; *Miller v. Ocean Steamship Co.*, 118 N. Y. 199.

for such as could have been ascertained by the exercise of the highest degree of vigilance,¹ or, in other words, for defects which could have been detected by a reasonable degree of care or skill, either in the course of manufacture or afterwards.² It may assume, under such circumstances, that its appliances are in good condition, *if they appear to be so* upon such inspection and the application of such tests as are reasonable, usual, and practicable.³ In New York a different rule of liability was at one time held, and the company was held to be bound at its peril to provide safe cars, and to be responsible for injuries resulting from defects therein, irrespective of the question of negligence.⁴ But the doctrine of these cases has been overruled, and the doctrine stated *supra* now prevails in that State.⁵ The doc-

¹ *Stokes v. Eastern Counties Ry. Co.*, 2 F. & F. 691; *Manser v. Eastern Counties Ry. Co.*, 31 L. T. (N. S.) 585; *Peyton v. Texas, &c. R. Co.*, 41 La. An. 861; 41 Am. & Eng. R. Cas. 550 (use of defective engine); *International, &c. R. Co. v. Prince*, 77 Tex. 560; 44 Am. & Eng. R. Cas. 294.

² *Readhead v. Midland Ry. Co.*, L. R. 4 Q. B. 379. In this case the court held that the contract made between the company and a passenger is, to take due care to carry him safely, and is not a warranty that the carriage in which he travels shall be in all respects perfect for such purpose; that is to say, free from all defects likely to cause peril, although the defects were such that no skill or foresight could have detected their existence.

³ *Grand Rapids, &c. R. Co. v. Huntley*, 38 Mich. 537; 31 Am. Rep. 321. The fact that a train was twice derailed within a short distance is strong *prima facie* evidence of negligence on the part of the company, and unless rebutted is sufficient to sustain a verdict in plaintiff's favor. *Texas, &c. R. Co. v. Suggs*, 62 Tex. 323; 37 Am. & Eng. R. Cas. 475.

Whether the system of inspecting the appliances of its passenger cars adopted by a railroad company and the manner of its execution are all that the duty of the carrier requires cannot be measured by any rule of law to be applied by the court, but is a question of fact to be determined by the jury after proper instructions from the court as to the degree of care imposed upon the company. *Palmer v. Delaware, &c.*

Canal Co., 120 N. Y. 170; 44 Am. & Eng. R. Cas. 298. Under this rule it is held that the finding of the jury that the defendant company had not used due care in examining the drawhead of a car, the spindle of which broke and caused the injury to plaintiff, should not be disturbed although it is shown that the spindle was a new one, and that in order to examine it it was necessary to pull the car apart, and that such a spindle had never been known to break before by the use made of it in running a train.

⁴ *Alden v. N. Y. Cent. R. Co.*, 26 N. Y. 102; 82 Am. Dec. 401; *Hegeman v. Western R. Co.*, 13 N. Y. 9; 64 Am. Dec. 517.

⁵ *Carroll v. Staten Island R. Co.*, 58 N. Y. 126; *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 290. Mr. Hutchinson in his excellent book on carriers is of the opinion that the Hegeman case is still the rule in New York. Hutchinson on Carr. (2d ed.), § 510. In the Hegeman case (13 N. Y. 9, 64 Am. Dec. 517) where a passenger was injured by the breaking of an axle of a railway car in consequence of latent defects which could not be discovered by the most vigilant external examination, *but which could have been discovered in the process of manufacture by the application of known tests*, it was held that although the car was purchased from a skilled manufacturer the company was liable. In this case, GARDINER, C. J., said: "It has been said that every wayfarer must take the risks incident to the mode of travel he adopts; but these risks

trine at first propounded by the New York court was at one time recognized in Tennessee;¹ but in a later case it has been repudiated

are only those which cannot be avoided by the carrier of passengers by the utmost degree of care and skill in the preparation and management of the means of conveyance. The carrier, in the language of other judges, is bound to use all precautions, as far as human care and foresight will go, for the safety of his passengers. In the application of these principles, it is obvious that the same precautions will not exonerate the carrier of passengers from responsibility in every mode of travel. The foresight and preparation that would suffice to satisfy the rule in one species of navigation or conveyance would not answer in another; and the external examination, which in connection with the reputation of the builder of a stage-coach would and ought to satisfy the scruples of the most cautious person as to the safety and security of a vehicle designed to run from six to eight miles an hour, would not satisfy any reasonable man as to the sufficiency of another, intended to sustain a far greater weight, and to be propelled by steam thirty, forty, or fifty miles in the same time. The charge of the learned judge at the trial assumes and proceeds upon this distinction throughout; and in that part of it where he gives the measure of the responsibility of the defendant, in the strongest terms against him and in favor of the plaintiff, he says that 'although the defendant purchased his axles and cars of extensive and skilful manufacturers, who, in the exercise of their skill, knew of no test and used no test to discover latent defects in axles, yet if there were any tests known to others, and which should have been known and employed by the manufacturers, as men professing skill in their particular business, although the same may not have been used by some others engaged in the same business, defendant was guilty of negligence in not using this test, provided the injury occurred to the plaintiff by reason of a defect which by such test might have been discovered.' The substance of the charge was that although the defect was latent

and could not be discovered by the most vigilant, external examination, yet if it could be ascertained by a known test, applied either by the manufacturer or the defendant, the latter was responsible. In these instructions there was no error. *Ingalls v. Bills*, 9 Met. (Mass.) 1, cited by the defendant's counsel, was the case of a stage-coach, in which the injury was occasioned by the breaking of the axle. The fracture was internal, and surrounded by sound iron one-quarter of an inch thick. The court held that where the accident arises from a hidden and internal defect, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor was not liable for the injury. I concur in that decision, in the particular case presented; but the learned judge did not intimate 'that a sound judgment and the most vigilant oversight' would be evidence, by the adoption of the same methods of examination in the case of a stage-coach and a car for the express train of a railroad. The mode of construction, the purposes to be subserved, and, above all, the probable consequences of a hidden defect, in the two cases are altogether different. It might as plausibly be urged that a chain for agricultural purposes and the cable of a ship of the line should be subjected to the same tests, because both were chains and each manufactured of the same material. Keeping the distinction indicated in view, the charge was sufficiently favorable to the defendant. Two questions were presented for the consideration of the jury: *first*, Was there a test known to and used by others, and which should have been known to a skilful manufacturer, by which the concealed defect in the axle of the car could have been detected? and if so, then *secondly*, Was the injury to the plaintiff the consequence of that imperfection? There was evidence tending to establish these facts which the jury have found; and the question returns, Can the defendant, who neither applied the test nor caused it to be applied by the manufacturer,

¹ *Nashville, &c. R. Co. v. Elliott*, 1 Coldw. (Tenn.) 611; 78 Am. Dec. 506.

and the better doctrine adopted.¹ In the last case cited, the court went on to say: "The legitimate obligation imposed upon the company by its contract with a passenger or employé is, that its engine and apparatus are then suitable, sufficient, and as safe as care and skill can make them, and that the company will be responsible for any injury resulting from defects therein, which might have been discovered by the company or its agents by the proper care and skill in the application of the ordinary and approved tests. If the defects are such that they could not be discovered by the company or its agents after a careful and skilful application of the ordinary and approved tests, then the company cannot be held responsible, although it may appear that the defects might have been discovered by the manufacturers, by applying the proper tests. We hold it unreasonable to assume that the company not only contracts to be

insist that this accident 'could not have been avoided by the utmost degree of care and skill in the preparation of the means of conveyance,' or 'that they used all precautions, as far as human care and foresight would go, for the safety of the plaintiff as one of their passengers'? It seems to me that there can be but one answer to the question. It was said that carriers of passengers are not insurers. This is true. That they were not required to become smelters of iron or manufacturers of cars, in the prosecution of their business. This also must be conceded. What the law does require is that they shall furnish a sufficient car to secure the safety of their passengers, by the exercise of the 'utmost care and skill in its preparation.' They may construct it themselves, or avail themselves of the services of others; but in either case they engage that all that well-directed skill can do has been done for the accomplishment of this object. A good reputation on the part of the builder is very well in itself but ought not to be accepted by the public, or the law, as a substitute for a good vehicle. What is demanded, and what is undertaken by the corporation, is not merely that the manufacturer had the requisite capacity, but that it was skilfully exercised in the particular instance. If to this extent they are not responsible, there is no security for individuals or the public. It is perfectly understood that latent defects may

exist, undiscoverable by the most vigilant examination when the fabric is completed, from which the most serious accidents may occur. It is also well known, as the evidence in this suit tended to prove and the jury have found, that a simple test — that of bending the iron after the axle was formed, and before it was connected with the wheel — existed by which it could be detected. This should have been known and applied by men 'professing skill in that particular business.' It was not known, or, if known, was not applied by these manufacturers. It was not used by the defendant, nor did they inquire whether it had been used by the builders. They relied upon an external examination, which they were bound to know would not, however faithfully prosecuted, guard their passengers against the danger arising from concealed defects in the iron of the axles, or in the manufacture of them. For this omission of duty, or want of skill, the learned judge held, and I think correctly, that they were liable." In a later case in New York, *Alden v. N. Y. Central R. Co.*, 26 N. Y. 102, it was held that the company was liable although the defect could not be discovered by any practicable tests; but this is now repudiated in that State. *McPadden v. N. Y. Central R. Co.*, 44 N. Y. 478.

¹ *Nashville, &c. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27, 42.

responsible for its own negligence, but also for that of the manufacturers.”¹ The court went on to hold that these principles would apply as well to a case where the injured party was an employé as where he was a passenger, it being a part of the company’s duty to provide safe appliances for the use of its employés and servants.² But there is a very clear distinction between the company’s liability to passengers and to its servants on the same train; these latter on entering the service voluntarily assume all the dangers and risks necessarily incident to it. They have a right to require that the company shall use due care to have its machinery, cars, and appliances reasonably safe; but the duty owing to them in this regard is not nearly so great as that due to passengers.³ The rule in reference to the degree of vigilance to be observed was well expressed in an English case previously cited.⁴

This case contains such an excellent and generally accurate statement of the degree of vigilance required from a railway company in

¹ *Nashville, &c. R. Co. v. Jones*, 9 Heisk. (Tenn.) 42. The court overruled the Elliott case and expressed its strong disapproval of the Hegeman case (13 N. Y. 9) as being opposed by all the authority on the subject.

In the case of *Gulf, &c. R. Co. v. Gross* (Tex. App. 1893), 21 S. W. Rep. 186, which was an action by a passenger to recover for injuries received by reason of a defective station-platform, the trial court instructed the jury that: “It was the duty of the defendant company to provide reasonable accommodations at its stations for passengers who travel on its trains. It was its duty to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort for the purpose of boarding its trains.” The court, in referring to this, observed: “It is contended that this charge required the carrier to keep its platform and approaches in safe condition, and thereby required a degree of diligence not demanded by law. We think there is merit in this contention. The law does not require common carriers to keep their platforms and approaches thereto in safe condition. They are not insurers as to the safety of the passenger in this respect. The effect of this charge is to make them so, and for this

reason we reverse the judgment.” It may be questioned, however, whether the appellate court was not guilty in this case of too severe refinement.

² *Nashville, &c. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27.

³ This principle is very clearly set out in the opinion of McKINNEY, J., in *Nashville, &c. R. Co. v. Elliott*, 1 Coldw. (Tenn.) 616; 78 Am. Dec. 506. This case, though overruled in 9 Heisk. (Tenn.) 27 on a single point, is still authority for the principle of the text. An employé being carried without fare to his home after his day’s work is a passenger, and entitled to the observance of the duties attending that relation. *Abell v. Western Maryland R. Co.*, 63 Md. 433; 21 Am. & Eng. R. Cas. 503. Compare *N. Y. Central R. Co. v. Vick*, 95 N. Y. 267; 17 Am. & Eng. R. Cas. 609; *McQueen v. Central Branch R. Co.*, 30 Kan. 689; 15 Am. & Eng. R. Cas. 226.

⁴ *Manser v. Eastern Counties Ry. Co.*, 6 H. & N. 899. See *Oliver v. N. Y. & Erie R. Co.*, 1 Edm. Sel. Cas. (N. Y.) 589, where an injury arose from a defective wheel which had been cracked, but the crack not discovered, and the prostration of a defectively constructed bridge, and the court held that the defendant was guilty of negligence.

reference to its cars, machinery, and appliances, that we give the main portion of it here. It was a case in which an action was brought by the plaintiff to recover damages for injuries sustained by him while travelling on the defendant's railway, as he alleged, from the negligence of the company. It arose from an imperfect weld in the formation of a wheel,—in this case the driving-wheel. It appears in this case that driving-wheels are usually formed in the first instance with a thickness of about two and one-fourth inches. They are allowed to run some time, and then ground down or returned for the purpose of making them again smooth; and this operation is performed about three times. Ultimately, the thickness of the wheel is reduced from about two and one-half or two and one-fourth inches to about one and one-fourth. If it happens to be below one and one-fourth it is considered worn out, and should not be continued in use. About three times a wheel may be returned; or it may be re-turned only twice, but with three different thicknesses. Before it is used the first time it should be hammered all round and all over to test its soundness, and to ascertain, as far as it is possible to ascertain, if it be perfect, whether it will ring, and is sound in every part.¹ This wheel had been so tried before it

¹ *Carriers should exercise the care and prudence of a very cautious person.* Taylor v. Grand Trunk R. R. Co., 48 N. H. 304; Seymour v. Chicago, &c. R. R. Co., 3 Biss. (U. S. C. C.) 43; Union Pacific R. R. Co. v. Hand, 7 Kan. 380; Bowen v. N. Y. Central R. R. Co., 18 N. Y. 408; Philadelphia, &c. R. R. Co. v. Derby, 14 How (U. S.) 486; Brown v. N. Y. Central R. R. Co., 34 N. Y. 404; Virginia, &c. R. R. Co. v. Sanger, 15 Gratt. (Va.) 230. They are not required to go beyond the usual known tests, which have been demonstrated by the best experience to be generally sufficient to detect defects in the carriages, rails, &c.; and if such tests are fairly applied, it would be impossible to say that they have been negligent or remiss in their duty. If a rail is apparently without flaw, and in response to the usual tests employed to ascertain whether it is sound or not, still appears to be so, it would be exceedingly unjust to hold the company responsible for an injury resulting from its breaking, because it was in fact unsound. This would impose upon carriers the duty of

employing unknown and most extraordinary measures to ascertain whether their rails were sound or not, and would impose such hazards upon railway companies that they could not afford to prosecute their business. Therefore the better rule seems to be that, if the company has exhausted the best usual known methods and tests in ascertaining whether its roadway, rails, carriages, etc., are in a sound and safe condition, and continues this diligence or vigilance at reasonable periods during their use, it has done all that can reasonably be required of it. Stokes v. Eastern Counties Ry. Co., 2 F. & F. 691; Peoria, &c. R. R. Co. v. Thompson, 56 Ill. 138; Hegeman v. Western R. R. Co., 13 N. Y. 9; Beers v. Housatonic, &c. R. R. Co., 19 Conn. 566. The statement of the rule of diligence frequently met with in the cases, that the *utmost* care and vigilance is required, is inaccurate, and is never applied. It is intended simply to mean that the utmost "*practicable care and diligence*" must be used, consistent with the mode of transportation." Meier v. Pennsylvania R. R. Co., 64 Penn. St. 225; Fuller v. Talbot

was used. It had run many thousands of miles, and had been reduced one-fourth or one-half an inch of its thickness. But although the wheel had been tested by the universal hammering in the first instance, it had not been subjected to that test after it had been reduced in thickness by wear. The wheel was defective, it gave way, and hence the accident. The cause was tried in London before the Lord Chief Baron, when the jury returned a verdict for the plaintiff, for £2,000 damages.

CHANNELL, B., said: "His lordship, after stating the nature of the action, said: 'With respect to the law there can be no doubt that in point of law the defendants are bound to provide carriages and other appliances which shall present every reasonable prospect of safety. *They are bound to guard against every source of danger that they can foresee. . . . They are not liable for any cause of danger that cannot be foreseen by the exercise of reasonable care and caution in preparing for the journey; and if, therefore, the entire cause of accident was this defective weld, which was not known, and could not, by any reasonable skill, care, or prudence, be discovered,* then the defendants are entitled to your verdict.' The law in that respect was laid down as favorably to the company as the company had a right to expect. That was his lordship's observation at the commencement of the summing up; at the end of the summing up, in substance, that direction is repeated, his lordship saying, it is important that every attention should be paid to the machinery, 'in order that the lives of the passengers may be placed in as much safety as possible.' He goes on to say: '*The company, however, are not bound to do that which is impossible; they are not bound to see that which is invisible, but they are bound to take every precaution.*'¹ It is entirely, gentlemen, for

23 Ill. 357; Pittsburgh, &c. R. R. Co. v. Thompson, 56 Ill. 138.

¹ The company is not an insurer, but is only liable for negligence in respect to the condition of its road-bed, cars, and other appliances. *McPadden v. N. Y. &c. R. R. Co.*, 44 N. Y. 478; *Keith v. Pinkham*, 43 Me. 501; *Ingalls v. Bills*, 9 Met. (Mass.) 1; *Sawyer v. Hannibal, &c. R. R. Co.*, 37 Mo. 240; *Maury v. Talmage*, 2 McLean (U. S.), 157; *Sullivan v. Philadelphia, &c. R. R. Co.*, 30 Penn. St. 234; *Meier v. Penn. R. R. Co.*, 64 id. 225; *McClary v. Sioux City, &c. R. R. Co.*, 3 Neb. 45; *Fairchild v. California Stage Co.*, 13 Cal. 599; *Burns v. Cork, &c. Ry.*

Co., 13 Ir. C. L. 543; *Ford v. London, &c. Ry. Co.*, 2 F. & F. 730; *Pym v. Great Northern Ry. Co.*, 2 F. & F. 619; *Readhead v. Midland Ry. Co.*, L. R. 2 Q. B. 412; *Ingalls v. Bills*, 9 Met. (Mass.) 1; *Crofts v. Waterhouse*, 3 Bing. 319. There is a plain distinction between the liabilities of carriers of goods and of passengers. In *Aston v. Heaven*, 2 Esp. 533, which was the case of an injury to a passenger, *Eyre, C. J.*, after carefully pointing out the law as to the liability of carriers of goods to make good all losses except those happening from the act of God or the king's enemies, and the reason for it, says: "I am of opinion the cases of

you to decide whether in your judgment they have done everything which their situation in providing conveniences for passengers re-

losses of goods by carriers and the present are totally unlike." Again, "There is no such rule in the case of the carriage of persons. This action stands on the ground of negligence alone." In *Christie v. Griggs*, 2 Camp. 79, Sir JAMES MANSFIELD says: "There is a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was liable at all events. But he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that *as far as human care and foresight could go, he would provide for their safe conveyance.*" In *Crofts v. Waterhouse*, ante, the observations attributable to BEST, C. J., clearly show that he did not think there was any warranty on the part of the carrier of passengers; and PARKER, J., in the same case, says: "A carrier of goods is liable at all events. . . . *A carrier of passengers is only liable for negligence.*" In *Grote v. Chester, &c. Ry. Co.*, 2 Exch. 251, where the accident arose from the breaking down of one of the bridges of the railway, the case turned on what would or would not be negligence for which the company were answerable. PARKER, B., said: "It seems to me the company would still be liable for the accident unless he (the engineer) also used due and reasonable care and employed proper materials in the work." But there is nothing in the report to indicate that the court supposed there was any warranty of the safety of the bridge. In *Ford v. London, &c. Ry. Co.*, 2 F. & F. 730, the plaintiff was injured by the tender of the train being thrown off the line, and one of the causes was alleged to be the defective tire of one of the wheels of the tender. ERLE, C. J., in his direction told the jury: "The action is grounded on negligence. Negligence is not to be defined, because it involves some inquiry as to the degree of care required, and that is the degree which the jury think is reasonable to be required from the parties, considering all the circumstances. The railway company is bound to take reasonable care to use the best precautions in known practical use for securing the safety of their

passengers." There the defect was in the tire of a wheel of the tender of the train by which the plaintiff travelled. And no suggestion that a warranty of its soundness existed was made in the case. In *Stokes v. Eastern Counties Ry. Co.*, 2 F. & F. 691, an accident happened in consequence of the breaking of the tire of the rear wheel of the engine. The tire broke from a latent flaw in the welding. The trial lasted six days; and the questions mainly were, whether the flaw was not visible, and whether by the exercise of care it might not have been detected. The Lord Chief Justice commences a full direction to the jury by saying, 2 F. & F. 693: "The question is, whether the breaking of the tire resulted from any negligence in the defendants, or their servants, for which they are responsible." The latent defect in the tire was admitted to be the cause of the accident; but the jury having found, in answer to specific questions, that there was no evidence that the tire was negligently welded, and that the defect had not become visible, and having in other respects negatived negligence, the verdict was entered for the defendants. Undoubtedly the carrier of goods by sea, like the carrier of goods by land, is bound to carry safely, and is responsible for all losses, however caused, whether by the unseaworthiness of the ship or otherwise; and it does not appear to be material to inquire, when he is subject to this large obligation, whether he is also subject to a less one. In the case of *Lyon v. Mells*, 5 East, 428, it was stated by the court that the carrier of goods is bound to have a seaworthy ship, but this only as part of his general liability. It was admitted in that case by the attorneys for both parties that the liability of the carrier in all its breadth is merely a liability for all losses, however happening, except by the act of God and the king's enemies. In *Burns v. Cork, &c. Ry. Co.*, 13 Ir. Rep. C. L. (N. S.) 543, the court said that the averments in the defendant's plea were all consistent with gross and culpable negligence, and on that ground gave judgment for the plaintiff. The judgment, however, plainly shows

quired of them, and whether there was any deficiency, or whether they entirely and perfectly discharged that duty. If they entirely performed it, I think they are entitled to your verdict. If they did not, if there was anything that might reasonably be required of them under the circumstances which in your judgment they did not perform, I think they would be liable, and it would be entirely for you to say what damages the plaintiff would be entitled to in the event of your thinking him entitled to your verdict.' Now, it is impossible, I think, that the rule could be laid down more correctly than it was, both at the commencement and the conclusion of his lordship's summing-up. But there were particular passages in the course of the summing-up which were excepted to. This passage was excepted to. Mr. Bramwell, an engineer, had been called on the part of the plaintiff, and in the course of his cross-examination he said: 'I know of no mode of discovering the defect; if the tire be struck, that may or may not detect it.' Now, it is quite clear, looking at the cross-examination of Mr. Bramwell, and of all the other witnesses, what was meant to be stated was this: there was no test that, was absolutely fixed,—no test that, in every instance, would turn out to be sure and successful; but it cannot be contended a test ought not to be adopted, if it is a useful one and may reasonably be expected to bring about the result, because it is not absolutely fixed. Now, the particular remark that was objected to was this: 'In all probability, if this tire had undergone the process, not merely of ringing it with a hammer to see whether it was sound, but of hammering it all round and all over, the defect would have been discovered,¹ because there can be no doubt in regard to a bell

that the court did not mean to declare that there is an absolute undertaking that the vehicle shall be free from defects. The language is, "*free from defects so far as human care and foresight can provide, and perfectly roadworthy.*" The court refers with approbation to the language of Sir JAMES MANSFIELD and ALDERSON, J., which shows that they were disposed to adopt the views of those learned judges, and to place the liability, not on a warranty, but on the obligation to exercise care and foresight.

¹ The test adopted in this case is the one usually employed by railway companies, and seems to be the best which is known; and that being so, if applied in a

given case there would seem to be no ground for holding the company chargeable with negligence, and the same rule applies as to all other recognized tests for discovering other defects. There is no question but that a railway company is required to use reasonable care in all such matters, and the question as to whether it has been guilty of negligence in any of these respects is for the jury. *Hegeman v. Western R. R. Co.*, 13 N. Y. 9; *Baltimore, &c. R. R. Co. v. Wightman*, 29 Gratt. (Va.) 431; *McElroy v. Nashua, &c. R. R. Co.*, 4 Cush. (Mass.) 400; *Virginia, &c. R. R. Co. v. Sanger*, 15 Gratt. (Va.) 230. In *Stokes v. Eastern Counties Ry. Co.*, 2 F. & F. 691, 693, 694, Chief Justice

which is now silent (but which we heard for some time as if the whole material of the clock at Westminster were perfect), it was cracked, but continued to strike, and nobody was aware of it. Somebody observed, on a rainy day, when the bell was struck and the water trickled down, it had a tremulous motion on each side, and the vibrations were not perfectly equal. The man called somebody to watch it, and then they discovered that the bell was cracked. So that there can be no doubt that merely going to a tire and striking it with a hammer will not tell you.' That is the substance of my lord's observation. It was an observation founded on experience, — that the test of the hammer upon the tire would enable you to see whether the tire would ring where it was cracked in one part. But what was contended for on the part of the plaintiff was, the tire should have been hammered all over; and there was a body of evidence and an important witness to that point. There was

COCKBURN thus expressed himself: "You are entitled to expect at the hands of a railway company all that skill, care, and prudence can do to protect the public against danger and accidents, but you must carry that principle into application as reasonable men. . . . If you are of opinion that the flaw or crack had become *visible* prior to the accident; that upon careful examination — not with the aid of scientific authorities and scientific instruments, but on an *ordinary, reasonably proper and careful* examination, such as all feel ought to be made before the engines are used on which the safety of a whole train might depend — this flaw might have been discovered; and that either the examination did *not* take place, or if it did, and the flaw was discovered, but the man, with careless disregard of his own safety and of others whose lives and limbs might be involved, treated all this with supine and reckless indifference, then undoubtedly there is negligence established, for which the company are and ought to be responsible." In *Ford v. London, &c. Ry. Co.*, 2 F. & F. 732, Chief Justice ERLE, in summing up the case to the jury, said: "The action is grounded on negligence. *The railway company is bound to take reasonable care, to use the best precautions in known practical use for securing the safety and convenience of the passen-*

gers." See also *Pym v. Great Northern Ry. Co.*, 2 F. & F. 621, per Chief Justice COCKBURN, to the same effect. In *Ingalls v. Bills*, 9 Met. (Mass.) 1, 15, HUBBARD, J., says: "Carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against; and if an accident happens from a defect in the coach which might have been discovered and remedied upon the most careful and thorough examination of it, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense." This extract from the judgment of HUBBARD, J., was adopted by the court in *Readhead v. Midland Ry. Co.*, as accurate.

abundant evidence to show, when the tire had been re-turned, as it is called, if it had been hammered all over, in all probability this defect would have been discovered.

"It appears that there is nothing in my lord's observations that can warrant any objection on the score of misdirection. . . . A witness had said, 'it should have been hammered all round.' My lord goes on to explain what is meant by that: 'What he means by that, I suppose, is, that they should not merely strike it with a hammer to see whether it would ring, which, no doubt, a cracked piece of metal would, but they should have hammered it all round to ascertain; and certainly, as the iron becomes less and less, no doubt that is a sort of care which should be taken, because by the hammering you may stumble upon some particular spot that is defective. One of the witnesses for the defendants told us to-day that there was a thickness as of a piece of paper—a thickness over the imperfection in the weld, and if you came to hammer there, there is no doubt, I think, that you would discover that.' Now, my lord certainly expresses his own opinion; if the weld had been reduced to this thinness, as appeared from one of the defendants' witnesses, in his judgment, if it had been hammered all over, the defect would have been discovered. Though my lord expresses that opinion, he does not withdraw it from the consideration of the jury, but he goes on to say: 'You must judge for yourselves.' I

¹ The question as to whether the company has been guilty of negligence or not, is for the jury in all cases where there is any conflict of evidence. *Metropolitan Ry. Co. v. Jackson*, L. R. 3 App. Cas. 193; *Freemonth v. London, &c. Ry. Co.*, 10 C. B. N. S. 89; *Gagg v. Vetter*, 41 Ind. 228; *Hawley v. Northern Central R. R. Co.*, 17 Hun (N. Y.), 115; *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 9; *Casey v. N. Y. Central, &c. R. R. Co.*, 78 N. Y. 518; *Kansas Central R. R. Co. v. Fitzsimmons*, 22 Kan. 686; *Central Branch Union Pacific R. R. Co. v. Hatham*, 22 id. 41; *Houston, &c. R. R. Co. v. Miller*, 51 Tex. 270; *Abbett v. Chicago, &c. R. R. Co.*, 30 Minn. 482; *Simmons v. New Bedford, &c. R. R. Co.*, 97 Mass. 361; *French v. Taunton Branch R. R. Co.*, 116 Mass. 537; *Craig v. N. Y., &c. R. R. Co.*, 118 Mass. 431; *Tyrell v. Eastern R. R. Co.*, 111 Mass. 546; *Cohen v. Eureka, &c. R. R. Co.*, 14 Nev. 376; *Macon, &c. R. R. Co. v. Winn*,

26 Ga. 250; *Webb v. Portland, &c. R. R. Co.*, 57 Me. 117; *Memphis, &c. R. R. Co. v. Whitfield*, 44 Miss. 466; *Baltimore, &c. R. R. Co. v. State*, 29 Md. 420; *Kennayde v. Pacific R. R. Co.*, 45 Mo. 255; *Huyett v. Philadelphia, &c. R. R. Co.*, 23 Penn. St. 373; *Key v. Penn. R. R. Co.*, 65 id. 269; *Lehigh Valley R. R. Co. v. Hall*, 61 id. 361; *Detroit, &c. R. R. Co. v. Van Steinberg*, 17 Mich. 99; *Indianapolis, &c. R. R. Co. v. Evans*, 88 Ill. 63; *Baltimore, &c. R. R. Co. v. Boteler*, 38 Md. 568; *McNamara v. North Pacific R. R. Co.*, 50 Cal. 581; *Catawissa R. R. Co. v. Armstrong*, 52 Penn. St. 782; *Johnson v. West Chester, &c. R. R. Co.*, 70 Penn. St. 357. But where the facts are admitted, or not disputed, the question is for the court. *Goldstein v. Chicago, &c. R. R. Co.*, 46 Wis. 404; *Sioux City, &c. R. R. Co. v. Staut*, 17 Wall. (U. S.) 657; *Penn. R. R. Co. v. Rathget*, 32 Ohio St. 66; *Cleveland, &c. R. R. Co. v. Crawford*, 24 Ohio St.

have no doubt, gentlemen, that if not all of you, a great many of you, must have the means of judging upon that subject quite as well as any of the witnesses, and probably much more than myself.' That was an opinion certainly given by my lord as to a point that arose in the course of the evidence, — an opinion in which few would disagree; but whether it be right or wrong is not the question we have to determine. The matter was not submitted to the jury as a matter of law; it was not decisive of the evidence; but the question was left to the jury that they might exercise fully and freely their judgment upon the subject. Now, the only other passage that was objected to was a passage to this effect: 'I cannot help saying, in passing, that it appears to me, before an old tire is ever sent to be re-turned, and put in use for the purposes of a leading wheel, it ought really to

631; *Lewis v. Baltimore, &c. R. Co.*, 38 Md. 588; *Payne v. Reese*, 100 Penn. St. 301. If during the progress of the trial, it appears, from the undisputed evidence, that the plaintiff himself has been guilty of some act or omission materially contributing to the injury, the court will generally direct a verdict for the defendant. *Gonzales v. N. Y., &c. R. Co.*, 38 N. Y. 440; *Donaldson v. Milwaukee, &c. R. Co.*, 21 Minn. 293; *Penn. R. Co. v. Weber*, 76 Penn. St. 157; *Penn. R. Co. v. Ogier*, 35 id. 60; *Phila., &c. R. Co. v. Hassard*, 75 id. 367; *Central R. Co. v. State*, 29 Md. 420; *Baltimore, &c. R. Co. v. Shipley*, 31 Md. 368; *McMahon v. Baltimore, &c. R. Co.*, 39 Md. 438; *Baltimore, &c. R. Co. v. Fitzpatrick*, 35 Md. 32; *Carlin v. Chicago, &c. R. Co.*, 37 Iowa, 316; *Fleming v. Western Pac. R. Co.*, 49 Cal. 253; *Sioux City, &c. R. Co. v. Staut*, 17 Wall. (U. S.) 657. In *Hathaway v. East Tennessee, &c. R. Co.*, 29 Fed. Rep. 489, the rule is stated to be that the question of negligence should go to the jury: 1. When the facts, which, if true, would constitute negligence, are controverted. 2. When such facts are not disputed, but there may be a fair difference of opinion as to whether the inference of negligence should be drawn. 3. When the facts are in dispute and the inferences to be drawn therefrom are doubtful. See the subject discussed at some length in 16 Am. & Eng. Ency. Law, pp. 463 *et seq.*

There are matters connected with the

operation of railways so intimately blended with human experience that the courts will take judicial notice of them, — as, the power and speed with which they are operated, and the danger involved in certain acts relating thereto; consequently, if, by the undisputed facts, the plaintiff is shown to have done, or omitted to do, certain acts which human experience teaches are negligent, and which must essentially have contributed to the injury, it will either direct a verdict for the defendant or order a nonsuit. *Penn. R. Co. v. Rathgeb*, 32 Ohio St. 66; *Chaffee v. Boston, &c. R. Co.*, 104 Mass. 108; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.), 441; *Allyn v. Boston, &c. R. Co.*, 105 Mass. 77; *Lake Shore, &c. R. Co. v. Miller*, 25 Mich. 274; *Cleveland, &c. R. Co. v. Crawford*, 24 Ohio St. 631; *Thurber v. Harlem, &c. R. Co.*, 60 N. Y. 326; *Denville v. Southern Pac. R. Co.*, 5 Cal. 388; *Wyatt v. Gt. Western Ry. Co.*, 6 B. & S. 709; *Chicago, &c. R. Co. v. Duney*, 26 Ill. 255; *Steele v. Central R. Co.*, 43 Iowa, 109; *Berry v. Central R. Co.*, 40 id. 564; *Central, &c. R. Co. v. Dixon*, 42 Ga. 327; *Harvey v. Eastern R. Co.*, 116 Mass. 269; *Richmond, &c. R. Co. v. Morris*, 31 Gratt. (Va.) 200; *Ohio, &c. R. Co. v. Schiebe*, 44 Ill. 460; *Knight v. Pontchartrain R. Co.*, 23 La. An. 462; *Galveston, &c. R. Co. v. Gierse*, 51 Tex. 189; *Nelson v. Atlantic, &c. R. Co.*, 68 Me. 593; *Quinn v. Ill. Cent. R. Co.*, 51 Ill. 495; *Bancroft v. Boston, &c. R. Co.*, 97 Mass. 275; *Beers v. Housatonic*

be hammered all over; because there may be (and this is an illustration of it) a wheel that has performed thousands of miles with perfect safety, which has apparently got the best character that a wheel can have, but it turns out to have been ground down until you came to within, according to the case of the defendants, a surface not thicker than paper, that separated you from an imperfect weld. You are quite as well able to judge as I am. If that were accurately tested by hammering over every part of it, you would say whether that would not certainly be discovered. If there was nothing but the thickness of a piece of paper to separate it, it might not be visible to the eye, but it must be ascertainable by a hammer, which would certainly give a different sound when you came to that spot.' Again my lord expresses an opinion in which I entirely concur, and it appears to me to have been correct upon the evidence. But my lord did not express his opinion at all to the contrary, or fetter the jury; the question was left fully and freely to them to exercise their own judgment upon.¹ It appears to me there is no ground whatever for saying there was any misdirection of which the defendants have a right to complain, and it really was hardly insisted on that there was no evidence to go to the jury; it is enough to say, the evidence of Mr. Bramwell, the evidence of Sir C. Fox, the evidence of Mr. Braithwaite, and the evidence of Mr. May, formed a strong case on the part of the plaintiff to go to the jury, which my lord could not have refused to leave to them. I am clearly of opinion that, had he done so, the plaintiff would have had good ground for excepting that the evidence had not been submitted to the jury as it ought to have been. Then, as to the case of the verdict being against the weight of evidence, no doubt there was a strong body of evidence on the part of the defendants. No doubt

R. Co., 19 Conn. 566; *Frost v. Gd. Trunk R. Co.*, 10 Allen (Mass.), 387; *Baltimore, &c. R. Co. v. Wilkinson*, 30 Md. 224; *Chicago, &c. R. Co. v. Mills*, 91 Ill. 39.

¹ The court defines the rules or standard of care which should be observed, and the jury are to say whether according to such standard the defendant has been guilty of negligence. *Baltimore, &c. R. Co. v. State*, 36 Md. 366; *Detroit, &c. R. Co. v. Steinberg*, 17 Mich. 118; *Metropolitan Ry. Co. v. Jackson*, 2 C. P. Div. 125; *Memphis, &c. R. Co. v. Whitfield*, 44 Miss. 466; *Brennan v. Fair Haven, &c. R. Co.*, 45

Conn. 284; *O'Flaherty v. Union R. Co.*, 45 Mo. 70; *Railroad Co. v. Gladman*, 15 Wall (U. S.) 401; *Schierhold v. North Beach, &c. R. Co.*, 40 Cal. 447; *Sleeper v. Sandaon*, 52 N. H. 224; *Eckert v. L. I. R. Co.*, 43 N. Y. 502; *Filer v. N. Y. Central R. Co.*, 49 N. Y. 47; *Mayo v. Boston, &c. R. Co.*, 106 Mass. 271; *State v. Manchester, &c. R. Co.*, 52 N. H. 563; *Wilton v. Middlesex R. Co.*, 107 Mass. 508; *Crissey v. Hestonville R. Co.*, 75 Penn. St. 83; *Pittsburgh, &c. R. Co. v. Caldwell*, 74 id. 421; *East Saginaw, &c. R. Co. v. Bohn*, 27 Mich. 503.

many witnesses were called, witnesses of experience and respectability, and one would not necessarily be dissatisfied if the jury had found upon the evidence a verdict for the defendants. On the other hand, there was strong and positive evidence on the part of the plaintiff. I cannot say the jury have come to a wrong conclusion. I am not called on to say I should have found the same verdict myself.¹ I can see no ground for expressing any judicial dissatisfaction

¹ If there is *any* evidence of negligence which would support a verdict against the defendant, the question will not be withdrawn from the jury. In *Filer v. N. Y. Central R. Co.*, 49 N. Y. 50, ALLEN, J., said: "Ordinarily the question of negligence is one of mixed law and fact, and it is the duty of the court to submit the same to the jury with proper instructions as to the law. *What is proper care* is sometimes a question of law, when there is no controversy as to the facts, but where there is evidence tending to prove negligence on the part of the defendant, and the question arises whether the plaintiff has by his own fault contributed to the injury, it is ordinarily for the jury. If the evidence is of such a character that a verdict for the plaintiff would be clearly against evidence, the question is one of law and should be decided by the court." This rule is concise and accurate. It is not enough that there is *some* evidence of negligence upon the part of the defendant, if it is so slight that a verdict predicated upon it ought not to stand; but upon the other hand, if it is of such a character that a verdict predicated upon it would be sustained, it should be permitted to go to the jury. *Baulec v. N. Y. Central R. Co.*, 59 N. Y. 336; *Tuomey v. Ry. Co.*, 3 C. B. N. s. 146; *Colton v. Ward*, 8 C. B. N. s. 568; *McMahon v. Lennard*, 6 H. L. Cas. 970; *Avery v. Bowden*, 6 E. & B. 973. That negligence is a mixed question of law and fact, see *Trow v. Vt. Central R. Co.*, 24 Vt. 487; *Karle v. Kansas City R. Co.*, 55 Mo. 476; *North Penn. R. Co. v. Robinson*, 44 Penn. St. 175; *Wright v. Malden, &c. R. Co.*, 4 Allen (Mass.), 283; *Greenleaf v. Dubuque, &c. R. Co.*, 33 Iowa, 52; *Fernandes v. Sacramento City R. Co.*, 52 Cal. 45; *Cleveland, &c. R. Co. v. Terry*, 8 Ohio St. 470; *Johnson v. Winona, &c. R. Co.*, 11 Minn. 296;

Bannon v. Baltimore, &c. R. Co., 24 Md. 108; *Baltimore, &c. R. Co. v. Breinig*, 25 id. 378; *Greenleaf v. Ill. Central R. Co.*, 29 Iowa, 14. A mere scintilla of evidence is not sufficient to sustain the burden of proof. Before the evidence is left to the jury, there may be in every case a preliminary question for the presiding judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly find a verdict for the party producing it, upon whom the burden of proof is imposed. *Cotton v. Wood*, 8 C. B. N. s. 568; *Railroad Co. v. Goodman*, 62 Penn. 329; *Tourtellot v. Rosebrook*, 11 Met. (Mass.) 460; *Loose v. Buchanan*, 51 N. Y. 476; *McCully v. Clarke*, 40 Penn. 399; *Hammack v. White*, 11 C. B. N. s. 588; *Holmes v. Mather*, L. R. 10 Ex. 261; *Ellis v. Ry. Co.*, L. R. 9 C. P. 551; *Burton v. Railroad Co.*, 4 Harr. (Del.) 252. Judges are not required to submit a case to the jury merely because *some* evidence has been introduced by the party having the burden of proof, unless the evidence is of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. *Ryder v. Wombwell*, L. R. 4 Ex. 39. Before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. If the evidence is such that the court would consider it proper to set aside a verdict based upon it, the case should not be submitted to the jury, but a non-suit should be ordered, or the jury should be directed to find for defendant. *Pleasants v. Fant*, 22 Wall. 120; 16 Am. & Eng. Ency. Law, p. 467; *Com'rs, &c. v.*

with the verdict of the jury. I would refer to one witness as a witness of very considerable importance — Sir Charles Fox — who gave evidence having a most material bearing upon the case. He was engaged largely in the manufacture of wheels of all descriptions, and he was asked whether he adopted any process to test the tire. He was asked, 'Do you hammer it?' and he says: 'The process upon which I have manufactured all my wheels has been this, to let all the different parts of the work be done by piecework, so that if a man found a defective bar he did not get paid for bending. If a man had to bend a defective bar, or bend a good bar, and bent it improperly, we did not pay for them, so that every man was looking back through the whole process of the manufacture up to the last; and then we have a gentleman to whom we pay 300 *l.* a year to examine every wheel.' So that this gentleman kept a person in his employ at a considerable salary for no other purpose than to test wheels when they were made. He says they are tapped with a hammer, and when he is asked how tires are tested, he says no defect would be passed over with the hammer. No witness pretended

Clark, 94 U. S. 278; *Giblin v. McMullen*, L. R. 2 P. C. App. 317, 335; *Improvement Co. v. Munson*, 14 Wall. (U. S.) 442; *Pleasants v. Fant*, 22 id. 120; *Parks v. Ross*, 11 How. (U. S.) 373; *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 637; *Hickman v. Jones*, 9 id. 201. Where a person seeks to charge a railway company with negligence in not seasonably removing a car which incumbered a highway crossing, and in consequence of which an accident occurred to the plaintiff, an instruction by the court that if the jury should find that the servants of the company honestly believed they could not move the car without help, and that they exercised ordinary care and prudence in that judgment, they are not guilty, is sufficiently favorable to the defendants, and furnishes no ground of exception. *Paine v. Grand Trunk R. R. Co.*, 58 N. H. 611. In an action against a railroad company for injury to a horse caused by its foot being caught between the rail and the planking at a street-crossing, the evidence was conflicting. It was proved by plaintiff upon the trial that the plank was so placed that there was a space of a little more than three and one-quarter inches

between the plank and the rail, which space was for the passage of the flange of the car-wheels; and the evidence of the plaintiff showed that two and one-quarter inches was all which was required for that purpose, and hence the space was one inch wider than it should have been; and this caused the horse's hoof to get into the open space and to be caught by the toe-calk under the rail. It also appeared from plaintiff's evidence that the plank was from one-quarter to three-eighths of an inch higher than the top of the rail. The court at trial nonsuited plaintiff on the ground that there was no evidence of negligence on the part of defendant in constructing the crossing. It was held error. The case is within the rule that it is a matter of right in the plaintiff to have the issue of negligence submitted to the jury when it depends upon conflicting evidence or on inferences to be drawn from circumstances in regard to which there is reason for a difference of opinion among intelligent men. *Wolfkiel v. Sixth Ave. R. R. Co.*, 38 N. Y. 49; *Weber v. N. Y. Central, &c. R. R. Co.*, 58 id. 451; *Hart v. Hudson River R. R. Co.*, 80 id. 622; *Payne v. Troy & Boston R. R. Co.*, 83 N. Y. 572.

to say it was an absolute and positive test, but there is no excuse for not adopting it, if it can be reasonably expected to produce a satisfactory result. This was the universal process adopted by this gentleman at a considerable cost and expense. He is asked this question: 'Have you found any returned to you after being passed by you as complete?' 'We guaranteed all the wheels we made for twelve months, and having turned out 20,000 wheels for several years, I think the whole amount of our guarantee has been twenty-four.' Now, the wheel in question had been reduced a considerable size; it was reduced to a small thinness; it was blocked and returned, and if this process had been adopted, not to hammer any one part to see whether it would ring, but to hammer it all over, as was the universal practice on the part of Sir Charles Fox, a practice carried out at a considerable expense, it was for the jury to say whether the defect might not have been discovered. I repudiate the notion altogether that a process ought not to be adopted, because of necessity you would not arrive at a positive test. It seems to me there is no ground for saying the verdict is against the weight of evidence, and that a new trial should be granted. Therefore, having at my lord's request gone carefully through the evidence, I repeat the opinion I was prepared to give when the rule was moved, that the verdict ought to stand."¹

¹ POLLOCK, C. B., in the same case, said: "I entirely agree with the rest of the court on the subject of refusing the rule why there should not be a new trial. When Mr. Bovill moved this rule, he certainly took a very strong view of the case on the part of the defendants. It appeared to me it was desirable that the matter should be looked into with very great care, in order that no mistake might be made. I am very much obliged to my learned brothers who have taken the trouble of going through the short-hand writer's notes which Mr. Bovill furnished us with. A very strong statement made by Mr. Bovill, I own rather startled me. I certainly did not recognize in his statement of the matter anything like what I remember to have been said in the course of the trial. According to his statement, certainly, at one time, there was no evidence whatever to support the view that had been presented to the jury, as he said, under the authority of the Bench. On

turning to the evidence, certainly it appeared there was abundant material for the remark that was presented to the jury by me, but which was left entirely to them, not at all pressing my opinion upon them, but stating, it appeared to me that any person conversant with machinery, and the ordinary business connected with such matters, would probably be far better able to judge than I was of the point. There was much other important matter upon which the jury might have decided, and very likely did decide, the case; but as far as this point was concerned, the question was this: about the nature of the accident there was no doubt whatever; it arose from an imperfect weld in the formation of a wheel,—that was the driving-wheel. A driving-wheel is formed in the first instance with a thickness of $2\frac{1}{2}$ inches; it is allowed to run some time, and is then ground down, or re-turned, for the purpose of making it again smooth, and this operation is performed about three times; ulti-

The rules stated in this case seem to us to be accurate, particularly when coupled with another rule, that the mere fact that the vehicle

mately the thickness of the wheel is reduced from $2\frac{1}{2}$ or $2\frac{1}{4}$ to $1\frac{1}{2}$; if it happens to be below $1\frac{1}{2}$ they consider it is worn out, and do not continue it in the service. About three times is the number of times that a wheel may be re-turned, or twice it may be re-turned, so that it is put into use with three different thicknesses. Now, the first time, before it is used at all, it is hammered all over. I cannot understand the expression, but the expression in the evidence was, 'hammered all round;' which I apprehend to be testing with the hammer, not merely whether it will ring, but whether it is sound in every part. Now, if it be worth while to do that when the wheel is first in its state of newness, in order to test it by applying the hammer to every part of it, to see whether it be sound or not, it surely must be worth while, every time you take away from it a quarter or half an inch of its thickness, in order to prepare it for a fresh journey. That was the question the jury had to decide; and I agree with my learned brothers that the law was laid down correctly, and as favorably for the defendants as it could be. The question then would be, — *Did they use any reasonable precaution in order to discover whether the wheel in its last condition was fit for service?* Why, it appeared to be perfectly clear upon the evidence that, though they had tested the wheel by the universal hammering in the first instance of applying it to the purposes of a locomotive, it had never been subjected to it since; and an imperfect weld, which may be imperceptible to the hammer when the wheel is $2\frac{1}{2}$ inches thick, may be quite perceptible when the wheel is reduced to $1\frac{1}{2}$. Therefore it was a question for the jury. There was evidence that they actually applied the test when the wheel was new; there was evidence that they had not applied it when the wheel was turned the first time, and when it was turned the second time; and I think it is no answer in fact or law to say that the test is not decisive. It might have escaped the discovery notwithstanding the test had been applied, because at the time of the accident all parties were per-

fectly agreed that it was an imperfect weld, which gradually came to the surface at the time of the accident. The witnesses for the plaintiff said, in their judgment it was apparent that the thinness of paper had been worn through. By the evidence of the witnesses for the defendants, the thickness was no more than the thickness of a bit of paper; and the question is whether, if it had been hammered, it would not have disclosed by the sound, immediately, that there was some imperfection below, and that it was not sound. Under these circumstances I perfectly concur in the opinion expressed by my learned brothers, that there should be no rule in this case." *Hegeman v. Western R. R. Co.*, 13 N. Y. 9; *Ingalls v. Bills*, 9 Met. (Mass.) 1; *Scott v. Ohio, &c. R. R. Co.*, 13 Leg. Int. (Penn.) 336; *Meir v. Penn. R. R. Co.*, 64 Penn. St. 225. In *Robinson v. N. Y. Central R. R. Co.*, 20 Blatchf. (U. S. C. C.) 338, it was held that the presumption of negligence arising from the bursting of a boiler may be overcome by proof of the application of every test recognized by experts as necessary, and that it need not be shown that every known test was applied. In *McPadden v. N. Y. Central R. R. Co.*, 44 N. Y. 478, 4 Am. Rep. 705, the train on which the plaintiff was riding was proceeding westward from Brockport, when two cars were thrown from the track by a broken rail, and he was injured. The train had stopped at Brockport and had there met a train coming east. At the trial the witnesses all concurred in the belief that the rail was broken in consequence of the coldness of the weather. The rail appeared to be perfectly sound. A track-walker had been over the road at the point where the accident occurred just before the eastward train had passed over, and found the track in good order, but he had no time to examine it again before the westward train reached the point. The conductor and engineer of the eastward train testified that they felt no jar or jolt, as they would have done had the rail been displaced or broken. The engineer of the westward train (the engine of which kept the

was defective *prima facie* raises a presumption of negligence.¹ There seems to be an inconsistency in holding the company up to a more rigorous rule of liability as to cars than prevails in reference to the track over which the cars are propelled. If it be said that the reason results from the fact that the cars are *manufactured*, and therefore the company is bound, at its peril, to know of the existence of latent defects, it may be answered that the same is true of the track. It is manufactured, so to speak, and the same rule should apply to that as applies to the cars.

In the selection of rails and other materials of which its track is composed, as well as in the construction of its roadway and bridges, the company is bound to exercise the highest degree of reasonable care, and to apply all those tests usually applied, or which are known, for ascertaining their suitableness; and having done that, and keeping up the same degree of vigilance in ascertaining whether it subsequently becomes defective, it is not responsible for injuries resulting from defects *in spite of such vigilance*.² It must exercise the highest degree of reasonable care in all respects involving the

track) testified that he discovered no break or displacement when his engine passed the point; and the conductor testified that he could feel the jolt when a rail was displaced, that he was in the last car and judged that there was no broken rail within three feet of the last car. The plaintiff's counsel requested to go to the jury on the question whether the rail was broken before it was reached by the westward train carrying plaintiff. The court denied this request. The plaintiff excepted; the court then, on motion of the defendant, non-suited the plaintiff. The General Term granted a new trial, and the defendant appealed. The Court of Appeals sustained the non-suit, overruling *Alden v. N. Y. Central R. Co.*, 26 N. Y. 102; 82 Am. Dec. 401.

¹ *Frink v. Potter*, 17 Ill. 406; *Ingalls v. Bills*, 9 Met. (Mass.) 1; 43 Am. Dec. 346; *Dawson v. Manchester, &c. Ry. Co.*, 5 L. T. N. S. 682; *Brignoli v. Chicago, &c. R. Co.*, 4 Daly (N. Y.), 182; *Deyo v. N. Y. Central R. Co.*, 34 N. Y. 9; 88 Am. Dec. 418. It has been held that an accident resulting from the misplacement of a switch; by "some evil-disposed person," not connected with the company, the company being chargeable with no fault, is an

inevitable accident for which the company is not responsible. *Frink v. Potter*, 17 Ill. 406; *Deyo v. N. Y. Central R. Co.*, 34 N. Y. 9; 88 Am. Dec. 418.

² *Nashville, &c. R. Co. v. Messino*, 1 Sneed (Tenn.), 220; *Deyo v. N. Y. Central R. Co.*, 34 N. Y. 9. In *Frink v. Potter*, 17 Ill. 406, where a passenger was injured by the breaking of an axle from the effect of frost, the court held that, if the defendant was guilty of *any*, even the slightest negligence in not providing against such a result, it was liable. This is equivalent to holding that, if by the exercise of any reasonable precaution the result could have been averted, the defendant was bound to exercise such precaution, and failing to do so, was liable for negligence. See also *Dawson v. Manchester, &c. Ry. Co.*, 5 L. T. N. S. 682; *Toledo, &c. R. Co. v. Apperson*, 49 Ill. 480; *Reed v. N. Y. Central R. Co.*, 56 Barb. (N. Y.) 493; *Gonzales v. N. Y. Central R. Co.*, 39 How. Pr. (N. Y.) 407. But see *McPadden v. N. Y., &c. R. Co.*, 44 N. Y. 478, 4 Am. Rep. 705, where it was held that the breaking of a rail by frost or extreme cold does not impose liability upon the company for the consequences.

safety of passengers, and if guilty of *any, even the slightest negligence*, it is responsible for all injurious consequences.¹

In reference to its boilers and engines, the company is only bound to apply such tests as are known and usual to ascertain their soundness, and is not responsible for an injury occurring by a defect not ascertainable by such tests;² but the jury may infer negligence from the very fact of its proving defective, and may give to this presumption more force than to the evidence of those whose negligence presumably caused the injury.³ And the same rule prevails as to rails and other appliances of the business. From the fact that a rail breaks and produces an injury, negligence may be inferred; but this presumption may be overcome by showing that the rails were properly tested before they were laid, and that they were properly laid and spiked to sound and sufficient ties.⁴ It is not enough for the company to show that the rail was free from defects and of sufficient size and weight, but it must also show that it was properly laid,⁵ and that sufficient space was left for the expansion or contraction of the rails under the extremes of heat and cold incident to the climate.⁶ Having established due care in these respects, for an injury resulting from the breaking of a rail by frost,⁷ or other cause over which it had no control and by reasonable watchfulness could not have prevented, it is not responsible. The same rules apply to bridges. It is not enough to show that they were erected by a contractor who was skilled in the business, but it must be shown that they were

¹ Gaynor v. Old Colony R. Co., 100 Mass. 208; McPadden v. N. Y. Central R. Co., 44 N. Y. 478. The fact that the vehicle or track is defective and an injury results, is *prima facie* evidence of negligence. Brignoli v. Chicago, & C. R. Co., 4 Daly (N. Y. C. P.), 182.

² Robinson v. N. Y. Central, & C. R. Co., 9 Fed. Rep. 877.

³ Robinson v. N. Y. Central R. Co., 20 Blatch. (U. S. C. C.) 388.

⁴ Cleveland, & C. R. Co. v. Newell, 75 Ind. 542; Brignoli v. Chicago, & C. R. Co., 4 Daly (N. Y. C. P.), 182; Pittsburgh, & C. R. Co. v. Williams, 74 Ind. 462; Michigan, & C. R. Co. v. Lantz, 29 Ind. 528.

⁵ Cleveland, & C. R. Co. v. Newell, 75 Ind. 542; 8 Am. & Eng. R. Cas. 377; 23 Am. & Eng. R. Cas. 492.

⁶ In Reed v. N. Y. Central R. Co.,

56 Barb. (N. Y.) 493, the rails were laid with spaces of only one-fourth of an inch between them, when it was shown that the usual expansion is from three-eighths to one-half an inch, and it was held that the jury were warranted in finding that the defendant was negligent. Retaining a badly worn and battered "U" rail next to a "T" rail at a curve in the track, whereby an old rail was broken by a train going at the rate of not more than twenty miles an hour, was held to be evidence of gross negligence. Taylor v. Grand Trunk R. Co., 48 N. H. 304. And evidence that the car-wheels are of a too narrow gauge for the track, and therefore liable to be battered by defective rails, is evidence of gross negligence. Holyoke v. Grand Trunk R. Co., 48 N. H. 541.

⁷ McPadden v. N. Y. Central R. Co., 44 N. Y. 478; 4 Am. Rep. 705.

built of sound and proper materials, with abutments and supports of sufficient size and strength, and that the company, since their completion, has exercised over them that degree of watchfulness, care, and supervision, which the risks and dangers of its business demanded.¹ It is not enough to excuse the company from liability, that its carriages, engines, rails, bridges, roadway, and other appliances were made or built by manufacturers or persons of known skill, etc. In view of the duty which it owes to the public in respect to the sufficiency of these appliances, it cannot shirk its liability for actual defects therein by showing that it substituted the care and skill of such persons for its own. It is bound to examine and test such appliances by all the best known and recognized tests, and ascertain for itself their suitableness;² and if the defect could have been discovered by any known test, it is liable for an injury resulting therefrom.³

¹ *Oliver v. N. Y., &c. R. Co.*, 1 Edm. (N. Y.) 589. The construction of a new bridge in place of an old one, in a different manner, amounts to an admission that the former bridge was improperly built, but it is not evidence that the bridge was improperly constructed, or that the injury resulted from such defect. *Kansas, &c. R. Co. v. Miller*, 2 Col. 422.

² *Sharpe v. Gray*, 9 Bing. 459; *Francis v. Cockerell*, L. R. 5 Q. B. 184, 501; *Louisville, &c. R. Co. v. Snyder*, 117 Ind. 435; 37 Am. & Eng. R. Cas. 137; *Hoffman v. N. Y. Central R. Co.*, 16 Barb. (N. Y.) 353.

³ *Warren v. Fitchburg R. Co.*, 8 Allen (Mass.), 227. In *Hegeman v. Western R. Co.*, 16 Barb. 353, HARRIS, J., says: "The judge further charged that, as to the materials of which the axle was made, if they were not of a proper quality, or wrought in a proper manner, and the defects were of that character that they could have been discovered upon a vigilant examination by a person of competent skill, either at the time of the construction or afterwards, then the defendant was responsible for the consequences. He also charged that the defendant was responsible for all defects in the axle which might have been discovered and remedied, to the same extent as if the defendant had manufactured said axle in its own workshop and by its immediate

agents. The charge takes the position that the defendant was responsible for any defect in the axle, whether of materials, workmanship, or otherwise, which were known, or might have been discovered by the manufacturer upon a vigilant and careful examination at the time of construction or afterwards. In other words, the defendant was made surety for the skill and extraordinary care and vigilance of the manufacturers; and if, in fact, a defect existed or happened at the time of construction, which could have been detected by the manufacturer, though such defect was secret at the time the defendant purchased and used the axle, and not discoverable, still the defendant would be liable for the want of care on the part of the manufacturer. In my opinion this position cannot be sustained unless we are prepared to hold that railroad companies shall be held liable for all defects, whether discoverable or not; thus making them warrantors of the roadworthiness of their cars, &c. The manufacturers of the axle and the car were not the servants or agents of the defendant; they pursued an independent business, and for any want of care or skill, or for negligence, they were liable. It would, in my opinion, be very dangerous to establish the rule that he who purchases and uses an article manufactured by a mechanic shall be responsible for any injury to third persons in consequence of a

Not only must railway cars be sound and safe, but they must also be provided with all the usual appliances required to ensure their safe operation. Thus, as bell-ropes are the means through which accidents may be signalled to the engineer, and the stopping of the train ensured, a railway company is required to have them on its cars, and is liable for the consequences of an injury which might have been averted if a bell-rope had been upon the car; but it cannot be made liable because of the absence of this appliance, where its absence had no connection with the accident.¹ So too, the company is required to have suitable brakes upon its cars, and in suitable repair, and if it runs its cars without suitable brakes or when they are out of repair, and an accident occurs which could have been averted if they had been provided or in repair, liability attaches for the resulting injuries.² So too, it is the duty of a railway company to light its cars and depots, so that passengers can protect themselves against dangers which could not otherwise be averted; and if an injury should result to a passenger through its neglect to light its cars, — either from an accidental act of another passenger, or from a purposed act, as, if he should be attacked by another passenger, — the company would doubtless be liable therefor.

defect in the article, not discoverable by the purchaser and user. Such a principle would be far-reaching, and it is not possible now to consider and fix a limit to the cases to which it would apply. It goes entirely beyond the rule making every one responsible for his own negligence and the negligence of his servants and agents. In *Stevens v. Armstrong*, 6 N. Y. 435, it was held by this court that to render one person liable for the negligence of another, the relation of master and servant or principal and agent must exist between them. In the present case, it is argued that the charge of the judge is not in conflict with the case just cited; that it does not make the defendant liable for the negligence of the manufacturer, but for its own neglect in not doing, or causing to be done, what human care and foresight could have done to discover and remedy the defect in the construction of the car in question. Does not this proposition involve the responsibility of the defendant for any want of care or for any neglect in the manufacturer, though such want of care or neglect could not be

detected after the car was completed and when it was put in use? As I understand the judge, he made the defendant liable for any defect happening during the construction of the car and axle which could have been detected by the manufacturer, though it could not be detected by the defendant after the car and axle were completed. I agree that *the defendant should be held to the exercise of the utmost care and diligence*. I think in *Ingalls v. Bills*, 9 Met. (Mass.) 1, the proper distinction was made and the true principles were established. In that case, decided in 1845, all the English cases were reviewed and the American cases referred to, and I shall content myself with this reference to that case, adopting the reasoning of the court there and applying it to the present case. I think the learned judge erred in the rule of responsibility, and that there should be a new trial."

¹ *Mobile R. R. Co. v. Ashcroft*, 48 Ala. 16; 49 id. 305.

² *Costello v. Syracuse, &c. R. R. Co.*, 65 Barb. (N. Y.) 92; *Ill. Central R. R. Co. v. Baches*, 56 Ill. 379.

SEC. 301. Ordinary Care: Reasonable Care, etc.: Relative Obligations of Carriers and Passengers.—It is the duty of every person to exercise ordinary care to prevent injury either to the persons or property of others which may be injured by a failure upon his part to discharge this duty.¹ Ordinary care may be defined to be such care as men of ordinary prudence, sense, and discretion usually exercise under the same circumstances in the conduct of their own business or affairs;² and the degree of care to be observed, or rather the question as to what constitutes ordinary care, depends upon the consequences likely to ensue from a careless performance of the act, and therefore varies in amount and degree according to the peculiar circumstances of each case.³ The degree of diligence required from railway companies, as well as persons generally, was well expressed by EARL, J., in a New York case:⁴ "The degree of care which a person owing diligence must exercise depends upon the hazards and dangers which he may expect to encounter, and upon the consequences which may be expected to flow from his negligence. Railroad companies whose cars are drawn by steam at a high rate of speed, are held to the greatest skill, care, and diligence in the manufacture of their cars and engines, and in the management of their roads, because of the great danger from their hazardous mode of conveyance, to human life, in case of any negligence. But the same degree of care and skill is not required from carriers of passengers by stage-coaches,⁵ and for the same reason is not required from the carriers upon street-cars drawn by horses. The degree of care required in any case must have reference to the subject matter and must be such only as a man of ordinary prudence and capacity may be expected to exercise under the same circumstances." "The law," said STAPLES, J.,⁶ "in tenderness to human life and limb, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs, every imputation of such negligence." They must use all the means reasonably in their power to prevent accident, and it is not necessary, in order to charge them with liability, either to allege or prove great negligence.⁷ "They are bound to the most exact care

¹ *Holly v. Boston Gas-light Co.*, 8 Gray (Mass.), 132; *White v. Winnisimmet Ferry Co.*, 7 Cush. (Mass.) 155.

² *Shaw v. Boston, &c. R. Co.*, 8 Gray (Mass.), 45.

³ *Fletcher v. Boston, &c. R. Co.*, 1 Allen (Mass.), 9; 79 Am. Dec. 695. See 16 Am. & Eng. Ency. Law, pp. 398 *et seq.*, Article on *Negligence*.

⁴ *Unger v. Forty-Second Street R. Co.*, 51 N. Y. 497.

⁵ *Hegeman v. Western R. Co.*, 13 N. Y., 9; 64 Am. Dec. 517.

⁶ *Baltimore, &c. R. Co. v. Wightman*, 29 Gratt. (Va.) 431; 26 Am. Rep. 384.

⁷ DAVIS, J., in *Seymour v. Chicago, &c. R. Co.*, 3 Biss. (U. S.) 43.

and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of passengers.”¹ GRIER, J., in a case before the United States Supreme Court² thus states the rule: “When carriers undertake to convey persons by the powerful, but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. *Any negligence in such cases may well deserve the epithet of gross.*” The law does not require railway companies to use all the care and diligence the human mind can conceive, nor such as will render the transportation of passengers free from all possible peril. Thus, it does not require for either passenger or freight trains, steel rails and iron or granite cross-ties, because such ties are less liable to decay, and consequently are safer than those made of iron or wood. Nor upon freight trains, although passengers are carried upon it, is the company required to have air-brakes, bell-pulls, and a brakeman upon each car; *but it does require everything necessary to the security of the passengers upon either, and reasonably consistent with the business of the carrier and the means of conveyance employed.* This rule applies, irrespective of any distinction between different kinds of trains. There is no reason for relaxing the rule, where the passenger is carried upon a freight train.³ But under the rule as we have stated it, a passenger who takes passage upon a freight train, accepts and takes it, *acquiescing in all the usual incidents and conduct of a freight train, managed by prudent and competent men,*⁴ and failing in any of these respects, it is liable for an injury received by a passenger. But it is not liable for an inevitable accident, or one which occurs in spite of such reasonable care.⁵

A higher degree of care is, from prudential reasons, required where “life or limb” is endangered than where the consequences only fall

¹ Virginia, &c. R. R. Co. v. Sanger, 15 Gratt. (Va.) 230.

² Philadelphia, &c. R. R. Co. v. Derby, 14 How. (U. S.) 486.

³ Indianapolis, &c. R. R. Co. v. Horst, 93 U. S. 291; Edgerton v. New York, &c. R. R. Co., 39 N. Y. 227; Dunn v. Grand Trunk R. R. Co., 58 Me. 187; Hazard v. Chicago, &c. R. R. Co., 1 Biss. (U. S. C. C.)

503; Dillaye v. New York, &c. R. R. Co., 56 Barb. (N. Y.) 30.

⁴ Shoemaker v. Kingsbury, 12 Wall. (U. S.) 369; Hazard v. Chicago, &c. R. R. Co., 1 Biss. (U. S. C. C.) 503; Eaton v. Delaware, &c. R. R. Co., 57 N. Y. 382.

⁵ Brunswick, &c. R. R. Co. v. Gale, 56 Ga. 322; Kansas, &c. R. R. Co. v. Miller, 2 Col. 442.

upon property, because the former cannot be restored, while the latter can be.¹ It is for this reason that the highest degree of reasonable care is required from railway companies in the carrying of passengers, and all the appliances employed therein. By this, it is not meant that they are required to exercise "superhuman" care and vigilance, or the "very utmost" care, but such care in view of the circumstances as a reasonably prudent man would exercise, in view of the consequences likely to ensue from a relaxation of such care and vigilance;² and the degree of care to be exercised does not

¹ Cayzer v. Taylor, 10 Gray (Mass.), 274.

² Fuller v. Naugatuck R. R. Co., 21 Conn. 557; Hulsekamp v. Citizen's R. R. Co., 37 Mo. 537; Toledo, &c. R. R. Co. v. Baddley, 54 Ill. 19; Johnson v. Winona, &c. R. R. Co., 11 Minn. 296; Taylor v. Grand Trunk R. R. Co., 48 N. H. 304; Meir v. Penn. R. R. Co., 64 Penn. St. 225; Union Pacific R. R. Co. v. Hand, 7 Kan. 380; Jeffersonville, &c. R. R. Co. v. Hendricks, 26 Ind. 228; Brown v. N. Y. Central R. R. Co., 34 N. Y. 404; Mississippi, &c. R. R. Co. v. Miller, 40 Miss. 45; New Orleans, &c. R. R. Co. v. Bailey, 40 id. 395. Reasonable care is such care as the circumstances require, and may be said to be a shifting quantity. In the case of a railway company carrying passengers, it is the highest degree of care and skill as to all its appliances. Railroad Co. v. Varnell, 98 U. S. 479; Penn. R. R. Co. v. Ray, 102 id. 451; Jamison v. San Jose, &c. R. R. Co., 55 Cal. 593; George v. St. Louis, &c. R. R. Co., 34 Ark. 613; Pittsburgh, &c. R. R. Co. v. Pillow, 76 Penn. St. 510; Mackoy v. Missouri, &c. R. R. Co., 18 Fed. Rep. 236; Delaware, &c. R. R. Co. v. Dailey, 37 N. J. L. 526; Baltimore, &c. R. R. Co. v. Wightman, 29 Gratt. (Va.) 431; Brunswick, &c. R. R. v. Gale, 56 Ga. 322. A carrier of passengers is not an insurer; nor is he bound to take every possible precaution against danger, but he is bound to use such care as is consistent with the nature and extent of the business in which he is engaged, in providing safe and suitable means of transportation, as well as in the management of the same, and in making such reasonable arrangements as a prudent man would make to guard against all dangers, from

whatever source arising, which may naturally, and according to the usual course of things, be expected to occur. Simmons v. New Bedford Company, 97 Mass. 361, 368. Any violence must be provided against, which might reasonably be anticipated, or naturally be expected to occur, in view of all the circumstances. ALLEN, J., in Putnam v. Broadway, &c. R. R. Co., 55 N. Y. 114; Flint v. Norwich & N. Y. Trans. Co., 34 Conn. 554. In Bowen v. N. Y. Central R. R. Co., 18 N. Y. 408, it is said that the precautions to be taken must be such as would be dictated by the utmost care and prudence of a very cautious person. Deyo v. N. Y. C. R. R. Co., 34 N. Y. 11; Maverick v. Eighth Ave. R. R. Co., 36 id. 381. *That the negligence or misconduct of a third party contributed to the injury is no excuse.* The results of such acts as can reasonably be anticipated, must be guarded against as much as those of any other cause. Eaton v. Boston & Lowell R. R. Co., 11 Allen (Mass.), 500; McElroy v. Nashua & L. R. R. Co., 4 Cush. (Mass.) 400; Pittsburgh, &c. R. R. Co. v. Hinds, 53 Penn. 512. In the case in 97 Mass. *supra*, the injury was occasioned by the fall of a small boat, which was suspended over a portion of the deck where it was proper for passengers to be. The fall was occasioned, in part at least, by the carelessness of the people in the boat. In Cleveland v. N. J. Steam Boat Co., 5 Hun (N. Y.), 523, the negligence complained of consisted in starting the boat before the barrier at the gangway was properly secured. The passage-way was about nine feet wide, and the provision made by the company for its closing, was a portable gate, resting at each end on the top in a

in any measure depend upon the financial ability of the company, but it is bound, regardless of its pecuniary ability, to provide, so far

staple, and at the outside at each end were placed stanchions, which prevented swinging, and on the top of the whole was placed a top rail secured by slides of iron. When the gates, stanchions, and top rail were all in their places, and secured as provided to be secured, there was no doubt about their sufficiency. When the boat started, the gate was set in its place, but the stanchions, which at each end prevented its swinging outward, were not put in; nor was the top rail put on, which would keep the gate and stanchions in their places, and prevent the gate being lifted out, or pressed out by bending. In this condition the boat proceeded about twenty feet, being, at the point of the passage-way, from six to ten feet from the pier, when, by a sudden rush or crowd of the passengers, the gate was thrown or pressed open and the plaintiff thrust into the water. MERWIN, J., said: "It is clear to me that the officers of the defendant were guilty of negligence. No one would say they were not negligent, if the gate had not been placed in at all. Is it varied much by saying it was placed in, in a defective or deceptive manner? I think not. But it may be suggested that the sudden crowd or rush was not reasonably to be anticipated, and therefore the company not liable for not providing for it. The very object of barriers of this kind is to prevent the results of such commotions. Vessels are liable to be crowded, especially at gangways, at the time of starting. The fact that the company provided barriers of such character, shows that they anticipated their necessity and use, and appreciated the importance of a strong, well-secured gate. The failure to use the appliances provided, seems to me a reckless disregard of the safety of the passengers." In *Dougan v. Champlain Trans. Co.*, 56 N. Y. 1, the proof of negligence was the omission to inclose the space between the rail and the deck, so as to preclude the possibility of slipping under it. Such an accident was not likely to occur, and never had before, and there was no evidence that such danger would be apprehended by a reasonable, prudent

person, and the boat had been run as it was for a number of years. On these grounds the court held there was no proof of negligence to go to the jury. In the *Crocheron Case*, 56 N. Y. 656, not fully reported, it appears that upon each step of the main stairway of the boat, was put a brass plate, or covering, which was corrugated save where it turned over the edge of the step, and there it was left smooth and slippery. Upon this the plaintiff slipped, and was injured. The stairs were so fixed on the best boats. They had been long in use on defendant's boat, and no injury was ever caused before; and there was evidence that that was the best covering in use. It was held no negligence. Such injury evidently could not have been reasonably expected. In *Cornman v. Railway Co.*, 4 H. & N. 781, the defendant, a railway company, had on its platform, standing against a pillar which passengers passed in going to and from the trains, a portable weighing-machine, used for weighing passengers' baggage, and the foot of which projected about six inches above the level of the platform. It was unfenced, and had stood in the same position without accident for about five years. The plaintiff, being at the station on Christmas day inquiring for a parcel, was driven by the crowd against the machine, caught his foot in it and fell over it. It was held no evidence of negligence, the machine being in a situation where it might be seen, and the accident being one which could not have been reasonably anticipated. In *Brown v. European, &c. R. R. Co.*, 58 Me. 384, a child, nine years old, jumped on to a draw-bridge while it was being closed. A nonsuit was granted on the ground of contributory negligence of the plaintiff. This was affirmed, the court saying there was no negligence on the part of the defendant, although there was no one there to keep people off till the closing of the draw, it being in the day time. In *Crafter v. Railway Co.*, L. R. 1 C. P. 300, the staircase leading from a railway station to a highway, had, at the edge of each step, a strip of brass, which had originally been roughened, but had

as human foresight and skill can accomplish that result, a safe road-bed, cars, and machinery, and careful, skilled, and reliable employes, suited to the nature and exigencies of its business.¹ But railway companies are not required, for the sake of making their road absolutely free from danger, to incur expenses which would render the operation of the road impracticable.² They are, however, independently of their pecuniary ability to do so, required to guard against dangers arising from defects in their roadway, cars, engines, etc., so far as human foresight and prudence can reasonably do so.³ The relation is measurably contractual. There is an implied condition in the contract with each passenger that the company is provided with a safe and sufficient road-bed, that its cars are stanch and roadworthy, that the servants in charge are tried, sober, and competent men, and that, so far as human care and foresight can reasonably do so, they have guarded against every apparent danger which can beset

become, from constant use, worn and slippery. The staircase was about six feet wide, a wall on each side, but no hand-rail. It was otherwise unobjectionable. The plaintiff, a frequent traveller, in ascending from the station, slipped and fell. It was held no evidence of negligence against the company, the staircase having been long used without accident, and there being nothing unusual or improper in the construction; nothing to cause danger to a person walking with ordinary circumspection. The question in this class of action is, was the accident one that could have been reasonably anticipated; and if so, could it have been avoided by the best of care? If so, the company is liable. If not, it is not liable, as it would be unreasonable to hold the company responsible for injuries which could not reasonably have been anticipated.

¹ *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304; *Sullivan v. Philadelphia, &c. R. R. Co.*, 30 Penn. St. 234; *Hicks v. Pacific R. R. Co.*, 64 Mo. 430. In *Illinois, &c. R. R. Co. v. Phillips*, 49 Ill. 234, the court say: "Railroad companies must, in the exercise of their franchises, provide good and safe machinery, constructed of proper materials, and free, so far as known and well-recognized tests can determine, from defects; and must exercise care and vigilance in examining it

and keeping it in proper repair and safe condition; and must employ skilful and experienced servants. While they are not liable in general for injuries that may result from using their franchises, which skill and experience are unable to foresee and avoid, nor for acts of persons not in their employment and over whom they have no control, they are responsible for injuries that result from a failure to exercise judgment and skill in the selection of material, in the construction of their machinery, or in the use of it upon their roads." It is their duty to use upon their trains, whether for carrying passengers or freight; all improvements in machinery, or in the construction of cars, etc., commonly used by other companies; and the failure to use such an improvement is negligence, for which it is liable to a person injured if it is shown that the improvement would have contributed in any material degree to prevent the injury. *Costello v. Syracuse, &c. R. R. Co.*, 65 Barb. (N. Y.) 62. See also *Forbes v. Atlantic, &c. R. R. Co.*, 76 N. C. 454, where this rule was adopted as to improved brakes.

² *Pittsburgh, &c. R. R. Co. v. Thompson*, 56 Ill. 138; *Wheaton v. North Beach, &c. R. R. Co.*, 36 Cal. 590.

³ *Meier v. Penn. R. R. Co.*, 64 Penn. St. 225; *Knight v. Portland, &c. R. R. Co.*, 56 Me. 234.

the passenger;¹ and this rule applies to all classes of trains upon which the company *has consented to carry the passenger*.² The responsibility both of common carriers of goods for hire and of com-

¹ *Sullivan v. Philadelphia, &c. R. R. Co.*, 30 Penn. St. 234; *Hegeman v. Western R. R. Co.*, 13 N. Y. 9. In *Black v. Carrollton, &c. R. R. Co.*, 10 La. An. 33, it was held that there is an implied condition that a passenger shall not be in jeopardy by the slightest fault of the company. *Meier v. Penn. R. R. Co.*, 64 Penn. St. 225. A railway company is not liable for unforeseen accidents and misfortunes which care and vigilance could not have provided against or prevented. It does not warrant the absolute safety of its passengers. Its undertaking as to them goes no further than this, that as far as human care and foresight can reasonably go, it will provide for their safety. When everything has been done that reasonable prudence can suggest, an accident may happen. *Croft v. Waterhouse*, 11 Moore, 137; 3 Bing. 321; *Sharp v. Grey*, 2 M. & S. 620; 9 Bing. 460; *Harris v. Costar*, 1 C. & P. 637; *Lamb v. Lyon*, Hay, 61. They are bound to furnish good vehicles and skilful servants. *Farrish v. Reigle*, 11 Gratt. (Va.) 697; *Peck v. Neil*, 3 McLean (U. S.), 22; *Sayles v. Western Stage Co.*, 4 Iowa, 547; *Ingalls v. Bills*, 9 Met. (Mass.) 1. But they are not liable for casualties that could not have been foreseen or averted by such a degree of care as is consistent with the circumstances; *McKinney v. Niel*, 1 McLean (U. S.), 540; nor for a mere accident that is in no measure chargeable to negligence on their part. *Farrish v. Reigle*, *ante*; *Stockton v. Fray*, 4 Gill (Md.), 406; *Ingalls v. Bills*, *ante*; *McClenahan v. Brock*, 5 Rich. (S. C.) 17. Thus, where a passenger in an omnibus was injured by the bursting of a lamp, it was held that the burden was on the owners, to show that the fluid used was a safe and proper article. *Wilkie v. Bolster*, 3 E. D. S. (N. Y. C. P.) 327. So where a coach was overturned, it was held that this was *prima facie* evidence of negligence. *Ware v. Gay*, 11 Pick. (Mass.) 106; *Boyce v. California Stage Co.*, 25 Cal. 460; *Fairchild v. California Stage Co.*, 13 id. 599. So where the plaintiff was injured by the breaking of the axle of a railway car, it was held *prima facie* evidence of negligence, and the company introducing no evidence to overcome the presumption, a recovery was upheld. *Dawson v. Manchester R. R. Co.*, 5 L. T. (N. S.) 682. The company is bound to keep the railway itself in good travelling order and fit for use, and to provide roadworthy engines and carriages, skilful drivers and engineers, and all things necessary for the safe conveyance of such passengers. But the company is not bound at its peril to provide a roadworthy carriage, and will not be responsible to a passenger, if the defect in the carriage is such that it could neither be guarded against in the process of construction nor discovered by subsequent examination. *Redhead v. Midland Ry. Co.*, L. R. 2 Q. B. 412; s. c. (Exch. Ch.) id. 4 Q. B. 379; *Meier v. Penn. R. R. Co.*, 64 Penn. St. 225; *Fairchild v. California Stage Co.*, 13 Cal. 599; *Ware v. Gay*, 11 Pick. (Mass.) 106; *Ficken v. Jones*, 28 Cal. 618; *Tennery v. Pippinger*, 1 Phil. (Penn.) 543; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181; *Brehm v. Gt. Western R. R. Co.*, 34 Barb. (N. Y.) 256; *Edgerton v. N. Y. & Harlem R. R. Co.*, 39 N. Y. 227; *Sullivan v. Phila., &c. R. R. Co.*, 30 Penn. St. 234; *Stockton v. Frey*, 4 Gill (Md.), 406; *Yonge v. Kenny*, 28 Ga. 111; *Illinois Cent. R. R. Co. v. Phillips*, 55 Ill. 194; *Memphis, &c. R. R. Co. v. Whitfield*, 44 Miss. 466; *Bishop v. Stockton*, 1 West. L. J. 203; *Maury v. Talmadge*, 2 McLean (U. S.), 157; *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126; *Croghan v. New York, &c. R. R. Co.* (N. Y.) 18 Alb. Law J. 70. Nor will the company be liable because of a defective condition of its appliances if the injury did not result therefrom, and would have happened equally if they had been in proper condition. *Hill v. New Orleans, &c. R. R. Co.*, 11 La. An. 292.

² *Indianapolis, &c. R. R. Co. v. Horst*, 93 U. S. 291.

mon carriers of passengers for hire, notwithstanding some important differences between them, rests for its foundation upon the common law; and the liability of each class of carriers where it is not affected by some special contract arises from a duty implied by law, although the law will raise a contract as springing from that duty.¹ Formerly it was usual to declare against common carriers, either of goods or passengers, setting forth the custom of the realm; but this method of declaring is supplanted by the modern mode of declaring either in case for breach of duty, or on the contract arising out of the duty so implied by law.² In a leading case,³ Lord HOLT, in defining his fifth sort of bailment, says, first: "If it [the delivery of goods] be to a person of the first sort [that is, one who exercises a public employment], and he is to have a reward, he is bound to answer for the goods at all events; and this is the case of the common carrier, common hoyman, master of a ship, etc. . . . The law charges this person, thus intrusted to carry goods, against all events but the acts of God and the enemies of the king. For though the force be never so great, as, if an unreasonable number of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs oblige them to trust these sort of persons, that they may be safe in their ways of dealing; for else, these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And *this is the reason the law is founded in, upon that point.*" In a later case,⁴ Chief Justice BEST, in treating upon the same subject, said: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for reward — *namely, that of*

¹ Brotherton v. Wood, 3 Brod. & B. 54; Ansell v. Waterhouse, 6 M. & S. 385.

² Dale v. Hall, 1 Wils. 281. This case changed the mode of declaring.

³ Coggs v. Bernard, 2 Ld. Raym. 913;

¹ Smith's Ld. Cas. (8th ed.) 189.

⁴ Riley v. Horne, 5 Bing. 220.

taking all reasonable care of it — the responsibility of an *insurer*.” This judgment is cited with approbation by STORY, J.,¹ and has been generally considered truly to express the reasons upon which the policy of the law with regard to common carriers of goods has been founded. The liability of a common carrier of goods is therefore that of an insurer, arising out of the policy of the law, which superadds such a responsibility to that springing merely out of a contract to carry for reward, namely, “*the taking all reasonable care of the goods delivered to be carried.*” The policy of the law with regard to common carriers of goods for hire, and the reasons assigned for it by Lord HOLT and Chief Justice BEST, appear to have no application to the case of carriers of passengers for hire; and hence it may be stated that “a carrier of passengers is not, properly speaking, a common carrier; he does not warrant the safety of the passengers at all events, but only that, so far as human care and foresight can reasonably be required to go, their safe conveyance will be provided for.”² His liability, however, like that of the carrier of goods, arises out of the duty implied by law, and the declaration may be either in case for the breach of such duty, or on the contract springing from it, as was said by HOLROYD, J.:³ “Therefore, although the law will raise a contract with a common carrier to be answerable *for the careful conveyance of his passenger*, nevertheless he may be charged in an action upon the case for a breach of his duty;” and the law does not superadd any liability beyond that of providing for “*the careful conveyance of his passengers.*” In a case often cited,⁴ which was an action against a stage-coach proprietor by a passenger injured by the overset of the coach, BEST, C. J., said: “This action cannot be maintained unless *negligence* be proved. . . . The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also with lights by night. *If there be the least failure in any one of these things*, the duty of the coach-proprietors is not fulfilled, and they are answerable for any injury or damage that happens. But with all these things, and when everything has been done that human prudence can suggest for the security of the passengers, an accident may happen. . . . If, having exerted proper skill and care, he from accident gets off the road, the proprietors are not answerable for what happens

¹ Story on Bail., § 491.

² Smith's Merc. Law (7th ed.), 282.

³ Ansell v. Waterhouse, 6 M. & S. 393.

⁴ Croft v. Waterhouse, 8 Bing. 319, 321.

from his doing so." And PARK, J., in the same case, said: "A carrier of goods is liable in all events except the act of God or the king's enemies. *A carrier of passengers is only liable for negligence.*" So, in a leading case upon this subject¹ it was contended that coach-owners were liable in all cases except where the injury happens from the act of God or the king's enemies; but EYRE, C. J., held that cases of loss of goods by carriers were totally unlike the case before him. In those cases the parties are protected, but as against carriers of persons, the action stands *on the ground of negligence* alone. In a later case² the accident arose from the breaking of an axle-tree, and Sir JAMES MANSFIELD said: "If the axle-tree was sound as far as the human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was answerable at all events; but he did not warrant the safety of passengers. His undertaking as to them went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered." Thus it will be seen that the test in case of a carrier of passengers is, has he, "as far as human foresight can reasonably go, provided for their safe conveyance"? Of course, this includes care and foresight in the making and procuring, as well as in using, the carriage.

But without stopping to discuss this point, because it is generally immaterial, it may be said that the same duty arises and is imposed by the law, in reference to any person *whom the company has consented to receive upon its trains*, whether any compensation has been paid for the service or not.³ The right which a passenger by railway

¹ *Aston v. Heaven*, 2 Esp. 583.

² *Christie v. Griggs*, 2 Camp. 81.

³ GRIER, J., in *Philadelphia, &c. R. R. Co. v. Derby*, 14 How. (U. S.) 468. In *Brennan v. Fairhaven, &c. R. R. Co.*, 45 Conn. 284, the plaintiff, a boy ten years of age, was riding free on the front platform of a horse-railroad car, with the knowledge of the conductor and driver, the latter having requested him to hand in a package at a place they were to pass. Before quite reaching the place for stopping for this purpose, the plaintiff jumped off the platform and fell under the car and was badly hurt. A printed notice was posted conspicuously in the car forbidding passen-

gers to stand upon, or get on or off at the front platform, or to get on or off the car when in motion, and declaring that the company would not be responsible for any accident happening thereby. In an action against the company for the injury, the court below found that it was caused by the careless driving and management of the car; that the plaintiff in getting off under the circumstances used as much care as could be expected from a person of his age, and that no contributory negligence on his part was proved. It was held, on a motion of the defendants for a new trial, 1. That the conclusion of the court upon the question of negligence was

has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely. It suffices to enable him to maintain an action for negligence if he was being carried by the railroad company voluntarily, although gratuitously, and as a mere matter of favor to him.¹ The carrier does not, by consenting to carry a person gratuitously, relieve himself of responsibility for negligence. When the assent to his riding free has been legally and properly given, the person carried is entitled to the same degree of care as if he paid his fare.² BLACKBURN, J., states the rule thus: "The right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely."³ The presumption of law is that persons riding upon trains of a railroad carrier which are palpably not designed for the transportation of persons, are not lawfully there, and if they are permitted to be there by the consent of the carrier's employés, the presumption is against the authority of the employés to bind the carrier by such consent. But such presumption may be overthrown by special circumstances; and where the railroad company would derive a benefit from the presence of drovers upon its cattle trains, and may have allowed its employés in charge of such trains to invite or permit drovers to accompany their cattle, the presumption against a license to the person thus carried may be overthrown.⁴ So upon the other hand, the passenger is bound

one of fact which could not be reviewed by this court. 2. That it was within the scope of the authority of the conductor and driver to receive and let off the plaintiff as a passenger, and that it did not alter the case that the conductor did not require him to pay fare. 3. That even if the driver was not authorized to deliver the package nor to employ the plaintiff to do it, yet evidence that he requested him to carry it in was admissible on the question of negligence to show that he knew that the plaintiff was on the car and was intending to get off at the place in question. 4. That the averment that "the defendants so negligently managed the car as to run it upon and over the plaintiff," was sufficient to admit proof that the negligence consisted in not stopping the car at the proper time. 5. That even if the plaintiff was to be regarded as a tres-

passer in the car, that fact would not necessarily defeat his right of action. 6. That a special duty devolved upon the conductor and driver in view of the fact that the plaintiff was so young, to see that the rule forbidding him to stand on the front platform or get off from it was observed by him.

¹ Philadelphia, &c. R. R. Co. v. Derby, 14 How. (U. S.) 468; Steamboat New World v. King, 16 id. 469.

² Todd v. Old Colony, &c. R. R. Co., 3 Allen (Mass.), 18.

³ Austin v. Great Western Ry. Co., 15 Weekly Rep. 863.

⁴ In Eaton v. Delaware, &c. R. R. Co., 57 N. Y. 382, it is held that the conductor of a freight train has no authority to consent to the carrying of a person upon a caboose attached to such train, but designed for the accommodation of em-

to conduct himself, while upon the trains, in a prudent manner, and if he unnecessarily or negligently exposes himself to danger and as

ployés, and in such case the presumption is that the person carried is not lawfully there. On the other hand, this presumption may be overthrown by the special circumstances, as in the case of *Ohio & Miss. R. R. Co. v. Muhling*, 30 Ill. 9, where the plaintiff was riding on a construction train, and in the cases of *Ryan v. Cumberland Valley R. R. Co.*, 23 Penn. St. 384, and *Gillshannon v. Stony Brook Co.*, 10 Cush. 228, where the plaintiff was riding on a gravel train. Where a drover riding on an engine, in an action for negligence of the railroad company causing an injury to him, claims that he was riding on the engine by the consent of the engineer, to look after his cattle, as was customary, and the defendant claims that it was contrary to orders for anybody to ride on an engine, the question to be left to the jury to determine is, whether the defendant had, notwithstanding its rules for the government of its employés, by its conduct held out its employés to the plaintiff as authorized under the circumstances to consent to his being carried on the train with his cattle. *Waterbury v. New York Central & Hudson River R. R. Co.*, 17 Fed. Rep. 671. *ALVEY, J.*, in *Baltimore City Passenger R. R. Co. v. Kemp*, 61 Md. 619, 48 Am. Rep. 136, says: "A common carrier of passengers, who accepts a party to be carried, owes to that party a duty to be careful, irrespective of contract; and the gravamen of an action like the present is the negligence of the defendant. The right to maintain the action does not depend upon contract, but the action is founded upon the common-law duty to carry safely; and the negligent violation of that duty to the damage of the plaintiff is a tort or wrong which gives rise to the right of action. *Brotherton v. Wood*, 3 B. & B. 54. If this were not so, the passenger would occupy a more unfavorable position in reference to the extent of his right to recover for injuries than a stranger; for the latter, for any negligent injury or wrong committed, can only sue as for a tort, and the measure of the recovery is not only for the actual suffering endured, but for

all aggravation that may attend the commission of the wrong; whereas in the case of a passenger, if the contention of the defendant be supported, for the same character of injury the right of recovery would be more restricted. The principle of these actions against common carriers of passengers is well illustrated by the case of a servant whose fare has been paid by the master; or the case of a child for whom no fare is charged. In both of the cases mentioned, though there is no contract as between the carrier and the servant, or as between the carrier and the child, yet both servant and the child are passengers, and for any personal injuries suffered by them, through the negligence of the carrier, it is clear they could sue and recover; but they could only sue as for a tort. The authorities would seem to be clear upon the subject, and leave no room for doubt or question." In the case of *Marshall v. York, &c. Ry. Co.*, 11 C. B. 655, in discussing the ground of action against a common carrier, *JEKVIS, C. J.*, said: "But upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely." And in the same case *Mr. Justice WILLIAMS* said: "The case was, I think, put upon the right footing by *Mr. Hill*, when he said that the question turned upon the inquiry whether it was necessary to show a contract between the plaintiff and the railroad company. His proposition was, that this declaration could only be sustained by proof of a contract to carry the plaintiff and his luggage for hire and reward to be paid by the plaintiff, and that the traverse of that part of the declaration involves a traverse of the payment by the plaintiff. I am of opinion that there is no foundation for that proposition. It seems to me that the whole current of authorities, beginning with *Govett v. Radnidge*, 3 East, 62, and ending with *Pozzi v. Shipton*, 8 Ad. & El. 963, establishes that an action of this sort is, in substance, not an action of contract, but an action of tort against the company

a consequence is injured, he cannot recover redress from the company, although it was also negligent, because in such a case the fault is mutual.¹ But in order to prevent a recovery, the negligence of the passenger must have been such as to amount to a want of ordinary care.² The fact that the passenger did not know that his act was careless will not avail him, *as he was bound to know*.³ A passenger is not bound to keep his seat during the whole trip.⁴ In the case last cited, the passenger stood up to look out of a window, and leaning against the door, which had been improperly secured, he fell out and was injured. COCKBURN, C. J., said: "The passenger did nothing more than that which came within the scope of his enjoyment while

as carrier." And in the subsequent case of *Austin v. Great West. Ry. Co.*, L. R. 2 Q. B. 442, BLACKBURN, J., in delivering his judgment in that case, said: "I think that what was said in the case of *Marshall v. York, &c. Ry. Co.*, 11 C. B., 655, was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." And to the same effect, and with full approval of the authorities just cited, are the cases of *Foulkes v. Met. Dis. Ry. Co.*, 4 C. P. Div. 267; and the same case on appeal, 5 C. P. Div. 157; and *Fleming v. Manchester, &c. Ry. Co.*, 4 Q. B. Div. 81. The case of *Brotherton v. Wood*, 3 B. & B. 54, is a direct authority upon the question. A passenger may, without doubt, declare for a breach of contract where there is one; but it is at his election to proceed as for a tort where there has been personal injury, suffered by the negligence or wrongful act of the carrier or the agents of the company; and in such actions the plaintiff is entitled to recover according to the principles pertaining to that class of actions as distinguished from actions on contracts. *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181; *Stockton v. Frey*, 4 Gill. (Md.), 401; *Baltimore, &c. R. R. Co. v. Blacher*, 27 Md. 277.

¹ *Brennan v. Fairhaven, &c. R. R. Co.*, 45 Conn. 284; *Willis v. Long Island R. R. Co.*, 34 N. Y. 670; *Hickey v. Boston, &c. R. R. Co.*, 14 Allen (Mass.), 427; *Quinn v. Illinois Central R. R. Co.*, 51 Ill. 495;

Pennsylvania R. R. Co. v. Langdon (Penn.), 37 Leg. Int. 172; *Harper v. Erie R. R. Co.*, 32 N. J. L. 88; *Spooner v. Brooklyn City R. R. Co.*, 31 Barb. (N. Y.) 419; *Deyo v. N. Y. Central R. R. Co.*, 34 N. Y. 9; *Kentucky, &c. R. R. Co. v. Dills*, 4 Bush (Ky.), 593; *Higgins v. Hannibal, &c. R. R. Co.*, 36 Mo. 418; *Southern R. R. Co. v. Kendrick*, 40 Miss. 374; *Maxfield v. Cincinnati, &c. R. R. Co.*, 41 Ind. 269; *Farlow v. Kelly*, 11 Am. & Eng. R. R. Cas. 104; *Dale v. Del. & Lack. R. R. Co.*, 73 N. Y. 468. As, by riding in the baggage-car in violation of the company's rules. *Penn. R. R. Co. v. Langdon*, 92 Penn. St. 21; *Peoria, &c. R. R. Co. v. Lane*, 83 Ill. 438; *Houston & Texas R. R. Co. v. Clemmons*, 55 Texas, 88; *Kentucky Central R. R. Co. v. Thomas*, 79 Ky. 160. Where a passenger, after having escaped, returned to a burning train to get his valise, and was injured, it was held that he had no remedy against the company. *Hay v. Gt. Western Ry. Co.*, 81 U. C. Q. B. 456. Crawling under a train to get into the station from an incoming train, *Memphis, &c. R. R. Co. v. Copeland*, 61 Ala. 376, or getting on to moving train, are acts negligent *per se* *Holden v. Great Western Ry. Co.*, 30 U. C. C. P. 39.

² *Houston, &c. R. R. Co. v. Gorbett*, 49 Tex. 573; *Mackoy v. Missouri, &c. R. R. Co.*, 18 Fed. Rep. 236.

³ *Penn. R. R. Co. v. Henderson*, 43 Penn. St. 449; *Southern R. R. Co. v. Kendrick*, 40 Miss. 374.

⁴ *Gee v. Metropolitan Ry. Co.*, L. R. 8 Q. B. 161.

travelling, without committing imprudence. In passing through a beautiful country, he is certainly at liberty to stand up and look at the view; not in a negligent, but in the ordinary manner of people travelling for pleasure." A passenger has no right to leave his seat to incur a known and obvious danger, but the question whether he was negligent or not, is for the jury. In an English case,¹ a passenger left his seat several times and closed the door of the coach, which was insufficiently fastened. The fourth time he made the attempt, he fell out and was injured, and the court held that there could be no recovery. But in a recent case in this country it has been held that if a door is left open in a car, through the negligence of the employés or otherwise, whereby the passengers suffer inconvenience, and neither the conductor nor brakeman is present to shut it, it is not such negligence on the part of a passenger, even though the car is dark, in a careful and prudent manner to attempt to do so, as to preclude him from recovering for an injury received while making the attempt. Thus, where a passenger was injured in attempting to shut a door in a dark and crowded car, upon which he was a passenger, while it was passing through a tunnel, to keep out the smoke and cinders which were being sent into the car in considerable volume, so as to greatly incommode the passengers, it was held that his act was not *per se* negligent, and that the question whether it was so or not, was properly submitted to the jury.²

¹ Adams v. Lancashire, &c. Ry. Co., L. R. 4 C. P. 739.

² Western Maryland R. R. Co. v. Stanley, 61 Md. 266. In Park v. O'Brien, 23 Conn. 338, the court say: "The question as to the existence of negligence or want of ordinary care is one of a complex character. The inquiry not only as to its existence, but whether it contributed with negligence on the part of another to produce a particular effect is much complicated. As to both, they present, from their very nature, a question not of law, but of fact, depending upon the peculiar circumstances of each case, which circumstances are only evidential of the principal fact, — that of negligence or its effects, — and are to be compared and weighed by the jury, the tribunal whose province it is to find facts, not by any artificial rules, but by the ordinary principles of reasoning; and such principal facts must be found by them before the court can take cognizance

of it and pronounce upon its legal effect." In the case of the Detroit, &c. R. R. Co. v. Van Steinburg, 17 Mich. 99, COOLEY, C. J., says: "It is a mistake to say, as is sometimes said, that where the facts are undisputed, the question of negligence is necessarily one of law. This is generally true only of that class of cases where a party has failed in the performance of a clear legal duty. When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of those conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ." See Sioux City, &c. R. Co. v. Stout, 17 Wall. (U. S.) 657.

It would be preposterous to hold that where the company has failed to discharge its duty to look out for the comfort of its passengers, the latter must submit to the discomforts, because there are no employes in the car to remedy it. Any person who has ever passed through a long and narrow tunnel, in a railway car, even with the doors, windows, and ventilators closed, can readily imagine what discomfort passengers must be subjected to in making the passage with the doors open; and we believe the court was fully justified in holding that the plaintiff had a right under such circumstances to attempt to close the door, exercising such care and prudence as the circumstances demanded. COCKBURN, C. J., lays down the rule on such matters thus:¹ "If the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience." It seems, however, that it is the duty of passengers to call upon the conductor or brakeman to remedy such inconveniences, if either of them is present,² but if they are not present, then a passenger may do so, acting with due caution. Passengers passing from car to car *unnecessarily* do so at their own risk, and are bound to know that it is dangerous to do so;³ but if a passenger is directed to do so by the conductor or brakeman, or is in search of a comfortable place to sit or stand, the trains being crowded, he is not necessarily guilty of such negligence as precludes him from recovering for an injury received while so doing, but the question is for the jury.⁴

SEC. 302. Degree of Care Required from Railway Companies. — For injuries resulting from *latent* defects in any of the appliances used by the company in the prosecution of its business of carrying passengers, which could not have been discovered by any known tests, a railroad company cannot be held responsible if it has used reasonable diligence in respect to such appliances. It may be well to say here, that the various expressions found in the cases as to the degree of care to be observed by a railway company in reference to the condition of its roadway, bridges, carriages, engines, etc., after all, resolve themselves into the simple rule, that *it must use reasonable*

¹ In *Gee v. Metropolitan Ry. Co.*, L. R. 8 Q. B. 161.

² *Adams v. Lancashire, &c. Ry. Co.*, L. R. 7 C. P. 739.

³ *McIntyre v. N. Y. Central R. Co.*, 34 N. Y. 287.

⁴ *McIntyre v. N. Y. Central R. Co.*, 47 Barb. (N. Y.) 523.

care, and that the degree of care to be exercised must be commensurate with the nature of the business and the possible dangerous consequences to the lives and limbs of passengers, if it is remiss in the performance of this duty; and the question whether it has exercised such care or not is for the jury. To say that it must use the "*utmost*" care, "*extraordinary care*," etc., means that it must use such a degree of care as reasonably prudent men would use in view of the perils incident to a relaxation of such reasonable vigilance.¹ "The *utmost* care and vigilance is required on the part of the carrier," says the court in a Pennsylvania case,² and continuing adds, "This rule does not require the utmost degree of care which the human mind is capable of imagining, but it does require that the highest degree of *practicable* care and diligence should be adopted." Thus the court lowered its standard of care in such cases to *practicable* care, and then continued, "Railway passenger carriers are bound to use *all reasonable precautions* against injury to passengers; and these precautions are to be measured by those in known use in the same business which have been proved by experience to be efficacious. *The company are bound to use the best precautions known to practical use.*"³ In Illinois, the rule that railway companies are required to do all that human care and vigilance can do, both in providing safe coaches, machinery, tracks, and roadway, and keeping the same in repair, was

¹ Meier v. Penn. R. Co., 64 Penn. St. 225; Cragen v. New York, & C. R. Co., 51 N. Y. 61; 10 Am. Rep. 559.

² In Meier v. Penn. R. Co., 64 Penn. St. 225.

³ The authorities are unanimous in holding that a carrier of passengers is under obligations to its passengers to exercise the utmost care and diligence to secure their safety. This duty has been variously expressed. Thus it is said they are bound to exercise "all possible skill and care, and all possible foresight," Topeka City R. Co. v. Higgs, 38 Kan. 375; 34 Am. & Eng. R. Cas. 529; must do "all that human care, vigilance, and foresight can," Jamison v. San José, &c. R. Co., 55 Cal. 593; 3 Am. & Eng. R. Cas. 350. In approaching a dangerous place carrier "is bound to use highest degree of care and prudence, and utmost skill and forethought," to avoid accident. Coddington v. Brooklyn, &c. R. Co., 102 N. Y. 66; 26 Am. & Eng. R. Cas. 393; "extraordinary care and

caution," extraordinary diligence is the measure of care which carriers owe to their passengers, Raymond v. Burlington, &c. R. Co., 65 Iowa, 152; 18 Am. & Eng. R. Cas. 217; Georgia R. Co. v. Homer, 73 Ga. 251; 27 Am. & Eng. R. Cas. 186; "greatest possible care," Philadelphia, &c. R. Co. v. Boyer, 97 Penn. St. 91; 2 Am. & Eng. R. Cas. 172; "safety of passengers must be provided for as far as human foresight can go," Kellow v. Central Iowa R. Co., 68 Iowa, 470; 21 Am. & Eng. R. Cas. 485; Pershing v. Chicago, &c. R. Co., 71 Iowa, 561; 34 Am. & Eng. R. Cas. 405; Little Rock, &c. R. Co. v. Niles, 40 Ark. 298; 13 Am. & Eng. R. Cas. 10; Louisville, &c. R. Co. v. Pedigo, 108 Ind. 481; 37 Am. & Eng. R. Cas. 310; Louisville, &c. R. Co. v. Ritter, 85 Ky. 368; 28 Am. & Eng. R. Cas. 167; Bedford, &c. R. Co. v. Rainbolt, 99 Ind. 551; 21 Am. & Eng. R. Cas. 472 (injury caused by bridge giving away).

repudiated quite early in the history of railway litigation in that State, and the rule adopted that they must do all that human care, vigilance and foresight "can reasonably do, consistently with the mode of conveyance and the practicable operation of the road."¹ In a Michigan case,² CAMPBELL, J., lays down the rule in such matters thus: "If they exercise their functions in the same way with prudent railway companies generally, and furnish their road and run it in the customary manner, which is generally found and believed to be safe and prudent, they do all that is incumbent upon them." This practically means that if the company exercises such care and vigilance as a prudent man under like circumstances would exercise, it has discharged its duty; otherwise it would be meaningless, and would call upon the jury to say what railroad companies were prudently managed, and what were not. In a New Hampshire case,³ the judge in the court below charged the jury as follows: "The burden of proof is upon the plaintiff to show that the accident occurred under such circumstances that the defendants were liable for the consequences. The defendants are not insurers and are not liable if they have been in no fault, but they are liable for the smallest negligence. They must provide a good track; and if there be the least failure in this, they are answerable for any injury which may happen in consequence. *The defendants are bound to use the highest degree of care which a reasonable man would use.* This does not mean the highest degree of care which the human mind is capable of imagining, or in other words that care enough must be taken to render the passenger perfectly safe; such a rule would require so great an expenditure of money, and the employment of so many hands. The defendant must use such a degree of care as is practicable short of incurring an expense which would render it altogether impossible to continue the business. The law does not require such particular precaution as it is apparent after the accident might have prevented the injury, but such as would be dictated *by the utmost care and prudence of a very cautious person* before the accident, and without knowledge that it was about to occur. The defendants must use the highest degree of practicable care and diligence that is consistent with the mode of transportation

¹ Pittsburgh, &c. R. R. Co. v. Thompson, 56 Ill. 138. See also Tuller v. Talbot, 23 Ill. 357; to the same effect, Conway v. Ill. Central R. R. Co., 50 Iowa, 465; Chicago, &c. R. R. Co. v. Scates, 90 Ill. 586.

² Grand Rapids, &c. R. R. Co. v. Huntley, 38 Mich. 537.

³ Taylor v. Grand Trunk R. R. Co., 48 N. H. 304.

adopted. They are not obliged to use every possible preventive that the highest scientific skill might have suggested. It is said that they must use the best precautions in known practical use to secure safety, the most approved modes of construction and machinery in known use in the business; but this doctrine must be taken with the qualification that they are not obliged to introduce improvements if the expense of introducing them is much greater in proportion than the increase of safety thereby attained."¹ But in whatever

¹ The verdict was set aside by the Supreme Court, not because of its disapproval of the general statement of the rule as to the degree of care to be observed by railway companies, but because the rule was misleading as to the comparison of the degree of care and skill to be used with the means of the company. Said BELLOWS, J.: "The objection most urged is the statement that defendants must use such a degree of care as is practicable, short of incurring an expense which would render it altogether impossible to continue business. This is substantially the language of Judge REDFIELD, in 2 Redf. on Railways (3d ed.), 187, and is apparently based upon the idea that the rule calling for the utmost degree of care, vigilance, and precaution must be understood not to require such a degree of vigilance as will be wholly inconsistent with the mode of conveyance adopted, and render it impracticable. This is the doctrine of *Tuller v. Talbot*, 23 Ill. 357, where it is also said that this rule does not require the utmost degree of care which the human mind is capable of inventing, as such a rule would involve the expenditure of money and the employment of hands so as to render it perfectly safe, and would prevent all persons of ordinary prudence from engaging in that kind of business. But the rule *does* require that the highest degree of practicable care and diligence should be used that is consistent with the mode of transportation adopted. To the general views thus expressed we perceive no objection. Indeed, it is quite manifest, we think, that in fixing upon the measure of the obligation of common carriers by railway to the travelling public, it is proper to consider how far it is reasonably practicable for them to

go, in view of the expenditures that might be required; and, looking at the subject as a whole, we think it could never have been intended to fix upon a measure of care that would render it practically impossible to continue this mode of transportation. At the same time, the standard of care and diligence for a particular railroad cannot be made to depend upon its pecuniary condition or the amount of its earnings; but having undertaken to carry passengers in that mode, its duty is to provide a track, rolling-stock, and all other agencies suited to the nature and extent of the business it proposes to do, and the measure of its care and diligence is not to fluctuate with the changes in its revenues. A direction to the jury, therefore, that should make the degree of care required turn upon the pecuniary means of this particular road would be erroneous. The part of the charge particularly objected to is the direction that 'defendants must use such degree of care as is practicable, short of incurring an expense which would render it altogether impossible to continue the business.' This might, and probably would, be understood to require of the defendants all practicable care to the extent of their means, which would make the ability of the corporation the measure of the care and diligence required; and that obviously is not the true test, and judging from other parts of the instructions, it was not so intended. Still, the terms used are so explicit that there is reason to fear that the jury may have been misled, and induced to require as a standard a higher degree of care and diligence than the law actually demands. It would be quite likely to be so if it appeared that the corporation was receiving a large income from this business, beyond the ex-

language it is expressed the rule seems to be that a carrier of passengers is bound to use *reasonable* care in the construction, purchase, or repair of all the appliances of his business, and in its operation; and the question as to what is reasonable care is to be determined in view of the risk and danger to life and limb involved in the carrying of passengers by that mode of conveyance. This is virtually the rule in England,¹ and any other rule would seem to be absurd, and unjust not only to passengers, but also to the company.

penses. If, on the other hand, it appeared that the receipts did not equal the running expenses, the jury might feel at liberty to exact a lower degree of care and diligence. In respect to common highways, it has been decided in this State that the standard by which their sufficiency is to be tested is not to be expanded or contracted by the wealth or poverty of the town — *Winship v. Enfield*, 42 N. H. 197, 208, — and we think the same rule is applicable to the proprietors of railroads. They are bound to keep them in suitable repair, and to operate them with suitable care and diligence, considering the character and extent of the use to which they are applied. As before remarked, the passage under consideration is in terms much like the passage in 2 Redfield on Railways, 187; but upon a close examination of his statement it will not be found that the author intended to announce the doctrine that the degree of diligence was to be measured by the revenues of the particular railroad, but that in fixing a general standard of care and diligence there should not be so much required as to render this mode of conveyance impracticable. The objection to the passage in question now before us is the danger that the jury may have understood that the defendants were bound to use all practicable care and skill to the extent of their means; and as we do not know that their means were not understood to be ample, we cannot be sure that the jury were not misled. The jury in this case have found that there was gross negligence, and it might, perhaps, be urged that this finding shows that no harm was done by the instructions in question. We think, however, that in determining what was gross negligence the jury would naturally

and properly be influenced by the degree of care and diligence which they supposed the law required; and, if that standard was carried too high, they might also come to a wrong conclusion as to what was gross negligence. We therefore are constrained to hold that, in respect to the particular direction under consideration, the charge was erroneous."

¹ *Richardson v. Great Eastern Ry. Co.*, L. R. 10 C. P. 490; *Payne v. Great Northern Ry. Co.*, 2 F. & F. 619; *Wyborn v. Great Northern Ry. Co.*, 1 id. 162; *Metropolitan Ry. Co. v. Jackson*, 3 App. Cas. 193. As to passengers, railway companies are not strictly common carriers, and are only liable for want of due care. *Redhead v. Midland Ry. Co.*, L. R. 4 Q. B. 379; *Bird v. Great Northern Ry. Co.*, 28 L. J. Exchq. 3. In *Birkett v. Whitehaven, &c. Ry. Co.*, 730, B. took a ticket from Workington to Carlisle from the Whitehaven Junction Railway Company. In order to arrive at the platform at the station at Maryport the trains pass over the line of the Maryport and Carlisle Railway. On that line is a self-acting switch used for shunting carriages into a siding. The switch and siding were the property of the Maryport and Carlisle Railway Company, but used exclusively by the Whitehaven Junction Railway Company. The switch is about four yards from a gate which is on the line of the Whitehaven Junction Railway Company, a servant of which company was in the habit of occasionally looking over the gate to see that the switch was in proper order. It was proved that all switches are liable to get out of order. A train of the Whitehaven Junction Railway coming slowly up to the station, in consequence of the points being turned

An English case¹ of much importance, relating to the responsibility of a carrier for an injury caused to a passenger, seems to us to embody the true rule. The question in that case was as to the effect of a latent defect upon the common-law duty devolving upon the carrier of passengers to exercise care, diligence, and skill.² In that case the accident occurred by the breaking of the tire to a wheel, owing to a flaw in the wheel caused by an air-bubble. There was evidence to the effect that such a defect would sometimes occur in spite of the greatest care on the part of the manufacturer; and that it was impossible to discover it in the process of manufacture or afterwards, either by inspection or otherwise. LUSH, J., who tried the case, left it to the jury, directing them that if the action was occasioned by a latent defect in the wheel, such that no care or skill on the part of the defendants could detect it, the verdict should be for the defendants. The jury gave a verdict for the defendants and subsequently the judgment was sustained in Queen's Bench, and their judgment was affirmed by the Court of Exchequer Chamber.³ But in giving his judgment, BLACKBURN, J., expressed his opinion that, although carriers of passengers were not insurers, like common carriers of goods, they were bound, at their peril, to supply carriages reasonably fit for the journey; and that it was not enough that they made every reasonable effort to secure that result, if the carriage was in fact not sufficient.⁴

the wrong way, ran into the siding and came in collision with some coal-trucks, whereby B. was killed. The judge left it to the jury to say whether there was negligence on the part of the Whitehaven Junction Railway Company. The jury found that there was. It was held that the question was properly left to the jury and that there was evidence of such negligence. *Sharp v. Grey*, 9 Bing. 457; *Ford v. Ry. Co.*, 2 F. & F. 691; *Skinner v. London, &c. Ry. Co.*, 3 Exchq. 787; *Burns v. Ry. Co.*, 13 Ir.Ch. 543.

¹ *Redhead v. Midland Ry. Co.*, L. R. 2 Q. B. 412.

² *Cockle v. London, &c. Ry. Co.*, L. R. 5 C. P. 457; *Whittaker v. Manchester, &c. Ry. Co.*, 22 L. J. N. S. 545; *Praeger v. Bristol, &c. Ry. Co.*, 23 L. T. N. S. 366; *Harold v. Gt. Western Ry. Co.*, 14 L. T. N. S. 440; *Richardson v. Gt. Eastern Ry. Co.*, L. R. 10 C. P. 486.

³ L. R. 4 Q. B. 379; *Caldwell v. New*

Jersey Steamboat Co., 56 Barb. (N. Y.) 425.

⁴ See upon this question, *Pittsburgh, &c. R. R. Co. v. Thompson*, 56 Ill. 138; *Hegeman v. Western R. R. Co.*, 13 N. Y. 9; *McPadden v. N. Y. Central R. R. Co.*, 44 N. Y. 478, where it was held that the company could not be held chargeable for an injury *resulting from a defect not discoverable by human prudence and caution*. See also, to same effect, *Crogran v. New York & Harlem R. R. Co.*, 18 Alb. L. J. 70; *Ingalls v. Bills*, 9 Met. (Mass.) 1. But he is bound to exercise the highest degree of reasonable care in the selection of his vehicles and appliances, and to properly inspect them and apply such tests to ascertain their soundness as are usually applied or as are known by men of the highest prudence and caution, and those skilled in such matters. *Nashville, &c. R. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27. And if the manufacturer was guilty of neg-

In the Exchequer Chamber, however, the judges were unanimously of opinion that there is no contract, either of general warranty or insurance, such as exists between the carrier of goods and their owner, or of a limited warranty as to the vehicle being sufficient, entered into by the carrier of passengers, and that the contract of such a carrier, and the obligation which is imposed upon him, is to take *due care* to carry a passenger. As we have seen, however, the words "due care" have been held to imply the exercise of reasonable skill and foresight. The above case does a good deal to indicate the degree and kind of negligence which will render a carrier liable, in case of an injury to his passengers, and a later case¹ makes this subject still clearer. In that case, which was an action brought by the plaintiff against the defendant, who had been admitted, on payment of money, to a building erected by the defendant as a grand stand at a race meeting, and where, in consequence of negligence and impropriety of the construction of the stand it fell, and the plaintiff was injured, HANNEN, J., in delivering the judgment of the court, said: "The nearest analogy to this case is afforded by that of carriers of passengers. The carrier is paid for providing the means of transporting the passenger from place to place. The defendant received payment for providing the means of supporting the spectator at a particular place. This distinction does not appear to give rise to any difference in principle between the contract to be implied in the one case and the other, as to the safety of the means for carriage or support. In the present case it is not found that the defendant was himself wanting in due care, and no power to draw inferences of fact is given to the court; and if it were, we should not be able to draw the inference that the defendant was personally guilty of any want of care. He employed competent and proper persons, who had efficiently executed similar work on previous occasions. The circum-

ligence in the selection of materials for or in their construction, the decided weight of authority sustains the position that the carrier will be liable the same as though he had himself manufactured them. *McPadden v. New York, &c. R. R. Co.*, 44 N. Y. 478; *Illinois Central R. R. Co. v. Phillips*, 49 Ill. 234; *Bissell v. New York, &c. R. R. Co.*, 25 N. Y. 442; *Meier v. Pennsylvania R. R. Co.*, 64 Penn. St. 225; *Pittsburgh, &c. R. R. Co. v. Nelson*, 51 Ind. 150. As to the Scotch law, see Bell's Com., 6th ed., p. 153.

¹ *Francis v. Cockerell*, L. R. 5 Q. B. 184 Exch. Ch. 501. See also *Richardson v. Great Eastern Ry. Co.*, L. R. 10 C. P. 486; *Farish v. Reigle*, 11 Gratt. (Va.) 697; *Stokes v. Eastern Counties Ry. Co.*, 2 F. & F. 691; *Peoria, &c. R. R. Co. v. Thompson*, 56 Ill. 138; *Hegeman v. Western R. R. Co.*, 13 N. Y. 9; *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282; *Frink v. Potter*, 17 Ill. 406; *Dougan v. Champlain Trans. Co.*, 56 N. Y. 1.

stance that the defendant did not himself survey, or employ any one to survey, the stand after it was erected, does not in itself establish the charge of negligence, *for it does not appear that the defect was such as could have been discovered on inspection*; and even if it had been, it cannot be laid down as necessarily a want of care not to inspect, although it would, in some circumstances, be evidence from which a jury might properly find that due care had not been taken. It becomes necessary, therefore, for us to consider whether the contract by the defendant, to be implied from the relation which existed between him and the plaintiff, was that due care had been used, not only by the defendant and his servants, but by the persons whom he employed as independent contractors to erect the stand. . . . Unless, therefore, the presumed intention of the parties be that the passenger should, in the event of his being injured by the breach of the manufacturer's contract, of which he has no knowledge, be without remedy, the only way in which effect can be given to a different intention is, by supposing that the carrier is to be responsible to the passenger, and to look for his indemnity to the person whom he selected, and whose breach of contract caused the mischief. But not only do we think that, when the reasons of justice and convenience on the one side and on the other are weighed, the balance inclines in favor of the plaintiff, but we are also of opinion that the weight of authority is on the plaintiff's side."¹

¹ See *Christie v. Griggs*, per Sir JAMES MANSFIELD, 2 Camp. 81; *Crofts v. Waterhouse*, per BEST, C. J., 3 Bing. 321; *Sharp v. Grey*, 9 Bing. 459, per ALDERSON, B.; *Grote v. Chester & Holyhead Ry. Co.*, 2 Exch. 251; *Brazier v. Polytechnic Institution*, 1 F. & F., per WIGHTMAN, J., 508. In *Richardson v. Gt. Eastern Ry. Co.*, L. R. 10 C. P. 486, it appeared that in the course of a journey from Peterborough to London, a truck which had been received from another railroad, laden with coal, broke down in consequence of the fracture of an axle, and caused a collision of the freight train with a passenger train in which the plaintiff was riding as a passenger, whereby the plaintiff was injured. The truck which broke down belonged to another company, whose duty it was to keep it in repair. The course of business at the junction was that every truck, before coming on to the defendants' line, underwent some kind of

an examination as to its fitness for travel. This particular truck, when submitted to such examination, was found to have a defective spring, and a serious crack in one of its main timbers, and it was accordingly taken upon a siding and detained there four or five days for the purpose of having a new spring put on. This was done by the company owning the truck. The truck (which had not been unloaded) was then sent on, with a direction chalked on it by a servant of the company owning it that it should "stop at Peterborough for repairs when empty." Upon a minute examination of the truck after the accident, it was found that the fore-axle, which was three and a half inches thick, had across it, near the wheel, an old crack an inch and a quarter deep, which was admitted to have been the sole cause of the breakdown. There was conflicting evidence as to whether or not, regard being had to the extent of the traffic at

The law according to the great weight of authority seems to be that *the carrier is bound to use the most exact diligence, and is answerable for any negligence, however slight.* And this is true, not only of a default which is due to the carrier himself, but of any default of those employed by him, or of those from whom he has purchased anything which he uses in the conveyance of passengers, and which, from a want of skill in its construction, may cause injury to any of the carrier's passengers.¹ Consequently, a railway company which carries passengers is as responsible for the state of the rails, the condition of the plant, and the like, as it is for the safe construction of the carriages.² And where an accident happens to a passenger upon the line, by reason of the carriage breaking down or running off the rails,³ or by mismanagement in driving, so that the train is run against the permanent buffers at a terminus,⁴ there is *prima facie*

the junction, it was possible to have discovered this defect in the axle by any practicable examination at the junction, and the following questions were submitted to the jury. 1. Would the defect in the axle which was the cause of the accident have been discovered or discoverable upon any fit and careful examination of it to which it might have been subjected? 2. Was it the duty of the defendants to examine this axle by scraping off the dirt and looking minutely at it, — so minutely as to enable them to see the crack, and so to prevent or remedy the mischief? 3. If that was not their duty upon the first view of the truck, did it become their duty so to do when, upon having discovered the defects [*i. e.*, the spring, and the crack in the main timber], they ordered it to be repaired, and it remained four or five days on their premises for the purpose? The jury answered the first question in the affirmative, and the second in the negative; and to the third question they answered, "It was their duty to require from the wagon company [the company owning the truck] some distinct assurance that it had been thoroughly examined and repaired." The learned judge thought the last answer immaterial, and directed a verdict for the defendants, reserving leave to the plaintiff to move to enter a verdict for him for an agreed sum if upon the facts and findings of the jury the court should be of opinion that the defendants were guilty of negli-

gence. Upon these findings the plaintiff was held to be entitled to a verdict; for although it might not have been the duty of the defendants themselves to cause the truck to be properly examined and repaired upon its arrival at the junction, nevertheless it was somebody's duty to do it, and the defendants were guilty of culpable negligence in not satisfying themselves that a proper examination had taken place before they allowed the truck to proceed. Thompson on Carriers of Passengers, 217. This case illustrates the doctrine that the carrier owes the same duty to passengers as to the examination, etc., of cars received from another railroad company and run over its line by it, as it owes them in respect to its own cars; and this must necessarily be the rule, else railway companies would be induced to use borrowed appliances, rather than their own.

¹ Daniel v. Metropolitan Ry. Co., L. R. 3 C. P. 216, 591; Philadelphia, &c. R. Co. v. Derby, 14 How. (U. S.) 468; McGuire v. The Golden Gate, 1 McAll. (U. S.) 104; Taylor v. Grand Trunk R. Co., 48 N. H. 304.

² Pym v. Great Northern Ry. Co., 2 F. & F. 619; Great Western Ry. of Canada, 1 Moore, P. C. N. s. 106; Grote v. Chester & Holyhead Ry. Co., 2 Exch. 251.

³ Dawson v. Manchester, &c. Ry. Co., 5 L. T. N. s. 682.

⁴ Burke v. Manchester, &c. Ry. Co., 22 L. T. Rep. 442.

evidence from which the jury may infer negligence.¹ But this rule only applies where the accident is of such a nature that it appears that the wrongful act or negligence which produced it was that of the carrier himself, or of some person for whose act he is responsible, and does not apply where it may have been caused by the act of a stranger.² Nor does it apply where the defects causing the injury are visible, and were seen by or known to the passenger,³ nor where the injury resulted from some voluntary act of the passenger himself "combined with some alleged deficiency in the carrier's means of transportation or accommodation."⁴

In this country, so far as the question has been decided, the rule appears to be that a railway company is not responsible for defects in its vehicles, etc., which might have been discovered in the process of manufacture, by the application of known tests, but which are not discoverable by any examination which the company could reasonably make afterwards.⁵ But while it may be true that the rule adopted in England and the States referred to, that, if a carrier of passengers purchases his vehicles from reputable manufacturers, giving them such examination as is practicable and usual among prudent carriers using similar vehicles, he is not responsible for defects not discoverable on such examination, although they might have been discovered in the process of manufacture, is fully adequate to protect the interests of the travelling public, and more in consonance with the idea universally admitted, that such carriers are not to be regarded as insuring the absolute safety of their appliances, it is a rule which admits of very serious question. There is much force in

¹ *Pittsburgh, &c. R. Co. v. Williams*, 74 Ind. 462; *New Orleans, &c. R. Co. v. Allbritton*, 38 Miss. 242; *Toledo, &c. R. Co. v. Baggs*, 85 Ill. 80; *Carpue v. London, &c. Ry. Co.*, 5 Q. B. 749. See the question as to the presumption of negligence as arising from the fact of injury discussed more at length, *post*, § 325 *n*.

² *Curtis v. Rochester, &c. R. Co.*, 18 N. Y. 534.

³ 1 *Shear. & Red. on Neg.*, § 280; *Railroad Co. v. Mitchell*, 11 Heisk. (Tenn.) 406; *Miller v. St. Louis, &c. R. Co.*, 5 Mo. App. 471; *Le Barron v. East Boston Ferry*, 11 Allen (Mass.), 312.

⁴ *Thompson on Carriers of Passengers*, 214; *Higgins v. Hannibal, &c. R. Co.*, 86 Mo. 418; *Southern R. Co. v. Kendrick*,

40 Miss. 374; *Pennsylvania R. Co. v. Henderson*, 43 Penn. St. 449; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304; 2 Am. Rep. 229; *Seymour v. Chicago, &c. R. Co.*, 3 Biss. (U. S.) 43.

⁵ *Nashville, &c. R. Co. v. Jones*, 9 Heisk. (Tenn.) 27, 42; *overruling* 1 *Coldw. (Tenn.)* 611; *Grand Rapids, &c. R. Co. v. Huntley*, 38 Mich. 537; 31 Am. Rep. 321; *Michigan Central R. Co. v. Coleman*, 28 Mich. 440; *Michigan Central R. Co. v. Dolan*, 32 Mich. 510; *Ft. Wayne, &c. R. Co. v. Gildersleeve*, 38 Mich. 138. *Compare*, however, *Pittsburgh, &c. R. Co. v. Nelson*, 51 Ind. 150; *Ingalls v. Bills*, 9 Met. (Mass.) 1; *McGuire v. Golden Gate*, 1 McAll. 104; *Hegeman v. Western R. Co.*, 18 N. Y. 9; 64 Am. Dec. 517. /

the statement of CAMPBELL, J.,¹ that "the law does not contemplate that railroad companies will in general make their own cars or engines, and they purchase them in the market of persons supposed to be competent dealers, just as they buy other articles. All that they can reasonably be expected to do is to purchase such cars and other necessities as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them." But there is more force in the argument that if a railway company sees fit, either upon grounds of economy or otherwise, to purchase its cars and appliances in the market, instead of manufacturing them itself, it must be regarded as taking the risk of any defects therein which could have been discovered by it by the application of known and usual tests if it had manufactured them itself, and that the diligence of the manufacturers cannot be substituted for the diligence of the carriers. There can be no injustice in requiring these companies to respond in damages for injuries resulting from such defects, especially as they have it in their power to provide by contract with the manufacturers for their own indemnity against the consequences of any insufficiency in that respect.² This rule imposes a high degree of care and vigilance upon railway companies, but it does not impose upon them a greater burden in this respect than public policy, in view of the nature of the business, demands, nor is it unreasonable or unjust either to the companies or the public. It would be impracticable and disastrous to permit any relaxation of vigilance on the part of these companies by permitting them, by purchasing their appliances, to shield themselves from the consequences of defects therein, by saying: "I bought the defective appliance of a reputable manufacturer, and he, and not myself, is the party to be blamed." Perfection, either in its road-bed or appliances, is not expected, nor is perfect skill or care, nor an excessiveness of caution which would render the operation of the road impracticable required, but the law and public policy both require such a reasonable degree of care and vigilance as the nature of the business and the possible dangers incident thereto require.³ The degree of diligence to be observed does not depend upon the pecuniary ability or

¹ In *Grand Rapids, &c. R. Co. v. Huntley*, 38 Mich. 537; 31 Am. Rep. 321.

² *Frances v. Cockerell*, L. R. 5 Q. B. 184, 501; *Louisville, &c. R. Co. v. Snyder*, 117 Ind. 435; 37 Am. & Eng. R. Cas. 137.

³ *Michigan Central R. Co. v. Coleman*, 28 Mich. 440; *McPadden v. New York, &c. R. Co.*, 44 N. Y. 478; 4 Am. Rep. 705. In the latter case the company was held not liable for an injury resulting from the breaking of a rail by extreme cold.

capacity of the carrier, but the same degree of care and vigilance is imposed upon each and every railway corporation which employs the dangerous agency of steam to propel its trains, whether its treasury is in a good or bad condition, or whether it is a weak or a strong corporation, or whether it operates a long, or a short line. By undertaking to carry passengers by the use of the dangerous elements involved, a railway company impliedly contracts to carry its passengers safely, so far as reasonable care and prudence can secure that result; and a passenger is never bound to inquire as to the financial ability of the corporation to keep its roadway and other appliances in repair, or as to the length of its line or the number of trains which it runs. Each and every railway company is under an equal legal obligation to its passengers in this respect, and irrespective of the amount of its business, or its financial ability, a passenger has a right to presume from the very fact that it runs its trains that it has discharged its duty.¹ That would be a very singular and unjust rule, which graduated the degree of care to be observed by a railway company to the length of its purse, and of its line, and the number of trains which it runs; and the law recognizes no such distinction.²

SEC. 303. Injuries resulting from Passenger putting himself voluntarily in a dangerous Position.³ — Railroad companies are only bound to exercise due care that a passenger is not injured through their fault, and are not required to exercise such a supervision over him as absolutely prevents his being injured by his own fault.⁴ In other

¹ See, however, Wharton on Negligence, 640.

² *Texas Trunk R. Co. v. Johnson*, 75 Tex. 158; 41 Am. & Eng. R. Cas. 122; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304; 2 Am. Rep. 229, where this question is considered.

³ As to passengers riding on platform, see *post*, § 308.

⁴ See *Malcolm v. Richmond, &c. R. Co.*, 106 N. C. 63; 44 Am. & Eng. R. Cas. 379, where text is quoted with approval. In a case where a stock-drover was riding on an engine with several others when another engine suddenly came in sight around a curve, and all the others jumped off but the decedent, who remained and was killed, the court charged the jury that if the defendant's employes were negligent, and the decedent was rightfully riding on the engine, the plaintiff could

recover; and this was held under the pleadings to be erroneous, as it disregarded the question of the contributory negligence of the decedent. *Wabash, &c. R. Co. v. Shacklet*, 105 Ill. 367; 12 Am. & Eng. R. Cas. 166. A passenger, on the station to which he was going being announced, and after the car had entered the station, left his seat and stood inside the closed door of the car, for the purpose of hastening his departure therefrom. While he was so standing, the car came in collision with another car, and the passenger was thrown down and injured. It was held, in an action by him against the company, that the question whether he was in the exercise of reasonable care was for the jury. *Bardeen v. Boston, &c. R. Co.*, 121 Mass. 426; *Worthen v. Grand Trunk R. Co.*, 125 Mass. 99.

words, if a passenger voluntarily puts himself in a dangerous position he cannot claim indemnity from the company. Thus, if a passenger allows his hands or arm to protrude out of a window beyond the outer surface of the car, it is held to be negligence *per se*, which prevents a recovery for any injury received thereby.¹ In an early

¹ At the crossings of public roads, or wherever cattle are in the habit of straying or known to be liable to stray upon the track, it is the duty of the company to use the utmost vigilance to keep them off, and in all such places to erect cattle-guards, put up fences, or station watchmen for that purpose; and a failure to do so is negligence, rendering them liable to passengers for all injuries occasioned thereby. *Wright v. Penn. R. Co.*, 3 Pittsb. (Penn.) 116; *Cumberton v. Irish Northwestern Ry. Co.*, 3 Ir. Rep. C. L. 603. At the intersection of a railway and highway, the railway company placed a gate consisting of a pole about thirty-five feet long, which, when trains were passing, was swung from one side of the highway to a post on the other. As a train was approaching the crossing, a heavy runaway team dashed against the pole which was swung across the highway, and broke it or loosened it from its fastening. The pole swung obliquely across the track, and the whole or a part of it was driven into one of the cars which had not slackened its speed. It was held, in an action against the company by a passenger in the car for injuries received from the pole, that evidence of the above facts would warrant a jury in finding that the accident was caused by the defendant's negligence. *Tyrrell v. Eastern R. Co.*, 111 Mass. 546.

Passenger having Elbow Projecting out of Window. — In *Pittsburgh, & C. R. Co. v. McClurg*, 56 Penn. St. 294, where an injury was sustained by a passenger from protruding his elbow out of the car-window, it was held that the thoughtless or imprudent protrusion of his elbow from the car-window was negligence *per se*, which would relieve the company from liability although the injury was caused by passenger's arm coming in contact with a car standing on a switch of defendant's road. The court overruled *Laing v. Colder*, 8 Penn. St. 479, where a

passenger was allowed to recover under similar circumstances, no notice of the proximity of the side of the bridge having been given; and *New Jersey, & C. R. Co. v. Kennard*, 21 Penn. St. 203, where the question was left to the jury. And the view as expressed in 56 Penn. St. 294, *supra*, is that of the decided majority of the adjudged cases. See *Georgia Pac. R. Co. v. Underwood*, 90 Ala. 49; 8 So. Rep. 116; 44 Am. & Eng. R. Cas. 367; *Indianapolis, & C. R. Co. v. Rutherford*, 29 Ind. 82; *Morel v. Miss. Valley Ins. Co.*, 4 Bush (Ky.), 536; *Louisville, & C. R. Co. v. Sickings*, 5 Bush (Ky.), 1; *Favre v. Louisville, & C. R. Co.* (Ky. 1891), 16 S. W. Rep. 370 (hand protruding); *Pittsburgh, & C. R. Co. v. Andrews*, 39 Md. 329; 17 Am. Rep. 568; *Todd v. Old Colony R. Co.*, 3 Allen (Mass.), 18; 7 id. 207; *Holbrook v. Utica, & C. R. Co.*, 12 N. Y. 236; *Coleman v. Second Ave. R. Co.*, 114 N. Y. 609; 39 Am. & Eng. R. Cas. 456; *Dun v. Seaboard, & C. R. Co.*, 78 Va. 645; 49 Am. Rep. 388; 16 Am. & Eng. R. Cas. 363; 17 Reporter, 699; *Richmond, & C. R. Co. v. Scott*, 88 Va. 958; 14 S. E. Rep. 763; 52 Am. & Eng. R. Cas. 405 (slightest voluntary projection of arm will bar recovery — evidence in this case held to show no projection); *Carrico v. West Va. R. Co.*, 35 W. Va. 389; 14 S. E. Rep. 12. So where a boy sits on the front platform of a crowded street-car, his feet resting on the lower step, and his knees protruding several inches beyond the line of the car, and his knees are struck and injured by a mortar box placed by employes a few inches from where the car must pass, it was held that the boy was guilty of contributory negligence, and that a non-suit should be ordered. *Butler v. Pittsburgh, & C. R. Co.*, 139 Penn. St. 195; 21 Atl. Rep. 500.

The Supreme Court of Alabama, in *Georgia Pac. R. Co. v. Underwood*, 90 Ala. 49; 8 So. Rep. 116, after reviewing

case in Pennsylvania, the arm of a passenger was broken while he was travelling on a railroad-car. The accident occurred while the

these cases goes on to say: "Against this array of adjudged cases, and to the converse of the proposition stated, there is believed to be in reality but one authority. That is the case of *Spencer v. Milwaukee, &c. R. Co.*, 17 Wis. 487; 84 Am. Dec. 758, which takes the position, and supports it with vigor, that it is not negligence *per se* for a passenger to project his arm out of the window of the car in which he is riding. Another case frequently cited and relied on to support this view is that of *Chicago, &c. R. Co. v. Pondrom*, 51 Ill. 333; 2 Am. Rep. 306. The conclusion in that case, however, was rested on the doctrine of comparative negligence, a doctrine which, if not peculiar to Illinois, certainly is not recognized in our jurisprudence, and while the protrusion of the passenger's arm from the window of a moving car was admitted to be negligence, the judgment was allowed to stand because plaintiff's negligence was held to be less than that of the defendant. In the case of *Quinn v. South Carolina R. Co.*, 29 S. C. 381; 7 S. E. Rep. 614, the ruling of the Supreme Court of South Carolina that the inquiry of negligence *vel non* in projecting the arm from the car-window was for the jury, proceeded, it seems, from a construction of the Constitution of that State under which, and not from a consideration of general principles of law, the court felt impelled to submit the whole question of contributory negligence to the jury. A like conclusion was reached in Louisiana with respect to a passenger on a street-railway. *Summers v. Crescent City R. Co.*, 34 La. An. 139; 44 Am. Rep. 419. But, as Mr. Bishop observes: "Steam-power is more difficult of control than horse-power, so the same negligent act of the passenger, such as voluntarily and unnecessarily riding on the platform of the car, is regarded as somewhat more recriminatory in the former than in the latter." *Bish. Non-Cont. Law*, § 1116. And the whole doctrine of this case, as also the Wisconsin case, *supra*, is repudiated by Mr. Wood in the following language (quoting pp. 1107-1108): "The reasons upon which the adjudged cases base the doctrine, appear to

be eminently sound. Windows are not provided in cars that passengers may project themselves through or out of them, but for the admission of light and air. They are not intended for occupation, but for use and enjoyment without occupation. No possible necessity of the passenger can be subserved by the protrusion of his person through them. Neither his convenience nor comfort require that he should do so. It may be, doubtless is, true that men of ordinary prudence and care habitually lean upon or rest their arms upon the sills of windows by which they ride. But this is a very different thing from protrusion beyond the outer edge of the sills, and beyond the surface of the car."

According to the foregoing decisions the protrusion of the limbs of the passengers, even to the minutest distance, out of the windows of the car will be regarded as necessarily, and under all circumstances, such contributory negligence on the part of the passenger as will deprive him of all right to claim compensation from the carrier for injuries which may be occasioned thereby, however careless the latter may have been in guarding against such accidents. A different rule has been laid down in some of the States, and the question as to whether such a position on the part of the passenger was negligent or not is said to be for the jury to determine from all the circumstances of the case. (Such a holding, it is well known, is practically equivalent to saying that it is not negligence.) *New Jersey R. Co. v. Kennard*, 21 Penn. St. 203; *Spencer v. Milwaukee, &c. R. Co.*, 17 Wis. 487; 84 Am. Dec. 758; *Chicago, &c. R. Co. v. Pondrom*, 51 Ill. 333; 2 Am. Rep. 300; *Dahlberg v. Minneapolis, &c. R. Co.*, 32 Minn. 404; *Barton v. St. Louis, &c. R. Co.*, 52 Mo. 253; 14 Am. Rep. 418; and *Summers v. Crescent City R. Co.*, 37 La. An. 139; 44 Am. Rep. 419; *Moakler v. Willamette Valley R. Co.*, 18 Oreg. 189; 41 Am. & Eng. R. Cas. 135; *Quinn v. South Carolina R. Co.*, 29 S. C. 381; 7 S. E. Rep. 614; *Thompson on Carr. of Pass.*, 258. In *Winters v. Hannibal, &c. R. Co.*, 39 Mo. 486, where a passenger's elbow protruding

car was passing over a bridge, which was so narrow that the plaintiff's hand, lying outside of the car-window, was caught by the bridge, and the arm was broken. In this case the court held that merely suffering the hand to remain outside the window was not necessarily negligence which would bar a recovery.¹ In a late case in Louisiana,² it was held to be *per se* negligence for a street-railway company to have two tracks so near together that a passenger's arm projecting a few inches from a car-window may be hit by a passing train; and that it is not necessarily negligent for a passenger to allow his arm to project from a car-window. But the line of reasoning adopted in this case fails to convince us that the doctrine held is either just or proper. Any person possessed of sufficient intelligence to ride upon a street-car must know that the vehicle in which he is riding cannot turn from the rails upon which it runs; and is constantly passing other vehicles, which are liable to pass very near to it so as to render it unsafe, except with the utmost watchfulness upon his part, to allow any portion of his body to protrude beyond the outer surface of the car; and it makes no difference in this respect

from a car-window was hit by a portion of a wrecked car which had not been seasonably removed, it was held that the company was liable. See also *Miller v. St. Louis R. Co.*, 6 Mo. App. 471. But the better rule, both upon authority and upon reason, is, that the passenger being endowed with intelligence which enables him to foresee and to avoid danger, the exercise of at least ordinary prudence is required on his part to escape it; and if by his failure to exercise these faculties for his own preservation, a misfortune befall him, though the carrier may have been in fault, it will be attributed to his own carelessness and inattention, and the responsibilities will not be thrown on the carrier.

¹ *Laing v. Colder*, 8 Penn. St. 479; 49 Am. Dec. 533. But this doctrine is repudiated in *Pittsburgh, &c. R. Co. v. McClurg*, 56 Penn. St. 294.

² *Summers v. Crescent City R. Co.*, 34 La. An. 139; 44 Am. Rep. 419. In a later case, *Moore v. Edison Electric Co.*, 43 La. An. 792; 9 So. Rep. 433, a passenger on a street-car, fearing he had taken the wrong car, put his head out of the window to ascertain its color, and while in this position was injured by com-

ing in contact with an electric-light pole. He brought his action against the electric-light company, but it was held that he was guilty of contributory negligence and could not recover. See *Federal Street, &c. R. Co. v. Gibson*, 96 Penn. St. 83, which was an action by a passenger to recover damages which he sustained while in a car of a street-railway company, in being struck by a passing load of hay. The passenger sat near an open window with his arm so exposed that it was struck and injured by the hay on a passing wagon. Thus, the proximate cause of injury, at least in part, was the act of a third party over which the railroad company had no control whatever. If the injury was caused by the contributory negligence of the passenger, or by the sole negligence of the driver of the wagon, there should be no recovery. The jury found that the passenger was without fault on his part, but recovery was denied on the ground that the burden of proving the company's negligence was on the passenger, and this proof he had failed to establish. *McCullough v. Clark*, 40 Penn. St. 399; *Allen v. Williard*, 57 Penn. St. 374; *Waters v. Wing*, 59 Penn. St. 211; *Railroad Co. v. Hinds*, 53 Penn. St. 512.

that one source of danger is the company's own cars passing upon other rails laid in the street. Again, in the case of double tracks in public streets, the company is not always permitted to exercise its discretion as to the distance apart at which they shall be laid, but these matters usually are, and probably in the case in question were, regulated by a municipal ordinance. To say that a passenger may be stupidly negligent, and expose his person to danger upon this class of vehicles, and the company made liable for the consequences of his negligence, is the assertion of a rule which has no foundation in reason and but little in authority; and it seems to us that the rule generally adopted, that such acts upon the part of a passenger either upon a street or steam car are *prima facie* negligent, is the correct one.¹

In a Pennsylvania case² in which this question was discussed, the court lays down a very sensible and sound rule: "A passenger on entering a railroad-car is presumed to know the use of a seat and the use of a window; that the former is to sit in, and the latter to admit light and air. Each has its separate use. The seat, he may occupy in any manner most comfortable to himself; the window, he has a right to enjoy, but not to occupy. . . . When a traveller puts his elbow or arm out of a car-window voluntarily, without any qualifying circumstances impelling him to it, it must be regarded as negligence *in se*; and when that is the state of the evidence, it is the duty of the court to declare the act negligence in law."³ While it is true that a passenger is presumed and bound to know that it is dangerous to expose any part of his person beyond the outer surface of the car, yet the railway company are also bound to know that passengers will sometimes incur this risk, and that exposures of that class will sometimes accidentally occur; and for this reason we agree with Mr. Wharton⁴ that as prudent men, in view of the consequences involved, they are bound to guard against such consequences as far as possible, and if by making erections so near their track

¹ See cases already reviewed. The language of the text is quoted with approval in *Georgia Pac. R. Co. v. Underwood*, 90 Ala. 49; 44 Am. & Eng. R. Cas. 367; 8 So. Rep. 117.

² *Laing v. Colder*, 8 Penn. St. 479; 49 Am. Dec. 533.

³ *Louisville, &c. R. Co. v. Sickings*, 5 Bush (Ky.), 5; *Lafayette, &c. R. Co. v. Huffman*, 27 Ind. 288; *Holbrook v.*

Utica, &c. R. Co., 12 N. Y. 236; *Pittsburgh, &c. R. Co. v. McClurg*, 56 Penn. St. 294. In a later Pennsylvania case (*New Jersey R. Co. v. Kennard*, 21 Penn. St. 203), it was held to be the duty of railway companies to put wire screens at the windows to prevent such accidents, but this doctrine was overruled by the case cited from the 56 Penn. St. 294.

⁴ Wharton on Negligence, 362.

that a person's arm, head, or body, *accidentally* exposed beyond the surface of the car, is injured, it is liable for the consequences. But in order to warrant a recovery in such cases, the plaintiff must show that the injury did not occur through his own negligence. If there is a conflict in the evidence upon that point, it seems that the question must be submitted to the jury.¹

But a passenger is not negligent in merely resting his arm on the sill of the window, provided he does not allow it to extend beyond the line of the car; and proof that while the passenger was in such a position his arm was struck by some substance from a passing freight train raises a presumption of negligence on the part of the company.²

SEC. 304. *Riding in Baggage-Car, Engine, Freight-Car, etc.* — A passenger who voluntarily rides in a baggage-car, or other known place of danger, in violation of the known rules of the company, and is injured in consequence of such violation, cannot recover damages therefor,³ even though he is there by the permission of the conductor;⁴ and in the absence of any proof upon that point, it will

¹ Pittsburgh, &c. R. Co. v. Andrews, 39 Md. 329; 17 Am. Rep. 568; Chicago, &c. R. Co. v. Pondrom, 51 Ill. 333; 2 Am. Rep. 306; Spencer v. Railroad Co., 17 Wis. 487.

² Breen v. New York Cent. R. Co., 109 N. Y. 297; 33 Am. & Eng. R. Cas. 523; Farlow v. Kelly, 108 U. S. 288; 11 Am. & Eng. R. Cas. 104; Winters v. Hannibal, &c. R. Co., 39 Mo. 468; Germantown Pass. R. Co. v. Brophy, 105 Penn. St. 38; 16 Am. & Eng. R. Cas. 361 (question for the jury); Dahlberg v. Minneapolis St. R. Co., 32 Minn. 404; 18 Am. & Eng. R. Cas. 202; 31 Alb. L. Jour. 355 (passenger placing his hand over base of an open window in taking his seat — question left to jury); Carrico v. West Va. R. Co., 35 W. Va. 389; 14 S. E. Rep. 12. In Hallanan v. New York, &c. R. Co., 102 N. Y. 194, the plaintiff, a passenger in one of defendant's cars, was sitting by an open window with his elbow on the window-sill, when it was struck by a crane used to deliver the mails to passing trains. In an action to recover damages for the injury, a witness after describing the position of the plaintiff's elbow upon the window-sill, added "I should judge that it could not project

out of the window by the position he held it in the car;" also, that "it could not be outside of the car." It was held that the testimony was competent; that it was not merely an opinion, but a statement of facts, without a positive allegation as to its accuracy; but even if regarded as an opinion, as it was being based upon personal knowledge of facts, it was competent.

³ Hickey v. Boston, &c. R. Co., 14 Allen (Mass.), 429; Penn. R. Co. v. Langdon, 92 Penn. St. 21; 37 Am. Rep. 651; 1 Am. & Eng. R. Cas. 87; Kentucky, &c. R. Co. v. Thomas, 79 Ky. 160; 42 Am. Rep. 208; 1 Am. & Eng. R. Cas. 79; Houston, &c. R. Co. v. Clemmons, 55 Tex. 88; 40 Am. Rep. 798; Blake v. Burlington, &c. R. Co., 78 Iowa, 57; 39 Am. & Eng. R. Cas. 405, (riding in "show car"); New York, &c. R. Co. v. Ball, 53 N. J. L. 283. But *contra*, see Watson v. Northern Ry. Co., 24 U. C. Q. B. 98; Jacobus v. St. Paul, &c. R. Co., 20 Minn. 125; 18 Am. Rep. 360; Carroll v. New York, &c. R. Co., 1 Duer (N. Y.), 571.

⁴ Hickey v. Boston, &c. R. Co., 14 Allen (Mass.), 429; Penn. R. Co. v. Langdon, 92 Penn. St. 21; 37 Am. Rep.

be presumed that the passenger knew of the danger, and the regulations forbidding passengers from riding in the baggage-car.¹ In some jurisdictions, it is held that the permission of the conductor will justify a passenger in riding in the baggage-car;² but it seems to us that the better rule is that where a person *voluntarily* and *unnecessarily* puts himself in a position of danger, he cannot excuse the act because he was permitted to do so by the company's agents, in direct violation of their rules. To say that a passenger may be negligent because he is *permitted* to be so by the conductor, is a dangerous relaxation of a salutary rule which requires proper care from a passenger.³ The idea which is promulgated in some of the cases that a passenger may, at the risk of the company, by the *permission* of the conductor, voluntarily put himself in a position of danger in violation of a known rule of the company seems to us to be contrary to reason and unjust.⁴ In the case cited from New York,⁵ which

651; *Houston, &c. R. Co. v. Clemmons*, 55 Tex. 88; 40 Am. Rep. 799; 8 Am. & Eng. R. Cas. 396.

¹ *Houston, &c. R. Co. v. Clemmons*, 55 Tex. 88; 40 Am. Rep. 799; 8 Am. & Eng. R. Cas. 396. But see *Dunn v. Grand Trunk R. Co.*, 58 Me. 187; also remarks of PAXSON, J., in *Penn. R. Co. v. Langdon*, 92 Penn. St. 21.

² *Carroll v. N. Y., &c. R. Co.*, 1 Duer (N. Y.), 571; *Watson v. Northern Ry. Co.*, 24 U. C. Q. B. 98; *O'Donnell v. Allegheny, &c. R. Co.*, 59 Penn. St. 239. In a Minnesota case it was held that even though a passenger *knew* of the regulations, yet if he was *permitted* to ride in the baggage-car he does not do so at his peril. *Jacobus v. St. Paul, &c. R. Co.*, 20 Minn. 125; 18 Am. Rep. 360.

³ In *Hickey v. Boston, &c. R. Co.*, 14 Allen (Mass.), 429, WELLS, J., very pertinently said, "It is not enough for the plaintiff to show that Hickey was *rightfully* upon the platform. Because he might rightfully occupy whatever place the conductor should permit, it does not follow that he would do so at the risk, exclusively, of the corporation." So in *Reary v. Louisville, &c. R. Co.*, 40 La. An. 32; 34 Am. & Eng. R. Cas. 277; it was held that permission from the baggage-master to ride in the baggage-car was without authority, and persons injured while so riding could not recover.

⁴ Thus, where a stock-shipper riding on top of a car, at the direction of the conductor, in order to aid in the signalling, is injured thereby, he has no right of action. *Atchison, &c. R. Co. v. Lindley*, 42 Kan. 714; 41 Am. & Eng. R. Cas. 82. Here the authorities are examined at length. See also *Little Rock, &c. R. Co. v. Miles*, 40 Ark. 298; 13 Am. & Eng. R. Cas. 10; *McCorkle v. Chicago, &c. R. Co.*, 61 Iowa, 555; 18 Am. & Eng. R. Cas. 156 (injury to stock-drover accompanying cattle); *Baltimore, &c. R. Co. v. Jones*, 95 U. S. 439 (employé riding on pilot in defiance of orders); *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518; 85 Ala. 203; 38 Am. & Eng. R. Cas. 11. In *Hutchinson on Carriers* (2d ed.), § 654, a contrary opinion is expressed however. It is said: "Even when the riding in such car is against the rules of the company, of which the passenger is informed, if he is in it with the knowledge of the conductor, and without any attempt on his part to enforce the rule by removing the passenger, his presence there would not be such negligence as would exonerate the company from the consequence of its negligence or want of care." Citing *Jacobus v. St. Paul, &c. R. Co.*, 20 Minn. 125; 18 Am. Rep. 360.

⁵ *Carroll v. N. Y., &c. R. Co.* 1 Duer (N. Y.), 571. For a very similar case see *Baltimore, &c. R. Co. v. State*, 72 Md. 36; 41 Am. & Eng. R. Cas. 126. In this

appears to oppose the view of the rule above stated, the facts were that a postal clerk while not on duty was riding home in the mail-car; he was allowed to ride in the regular coaches or in the mail-car at his option; in riding in the mail-car, therefore, he was violating no regulation of the company. Such a case is clearly distinguishable from those in which an ordinary passenger violates the rules of the company by leaving the accommodations provided for him and going into a place of danger. In the Minnesota case,¹ the evidence was conflicting as to whether the passenger knew of the rule of the company. But, it is proper to say that in this case, the court held that, inasmuch as the passenger was in the baggage-car by the permission of the conductor, it made no difference whether he knew of the existence of the rules or not.² It is doubtless true that a person may do acts under the advice or direction of the conductor of the train which involve more or less of personal risk, without being amenable to the charge of being guilty of negligence *in se*; but, as we have

case, a postal clerk, while off duty and on his way home, being entitled to ride on the train, voluntarily left his seat in the smoking-car, where he had been riding and went into the postal-car. While so riding he was killed through the negligence of the company, though no one in the smoking-car was injured, and if he had remained there he would have been unhurt. It was the custom to allow such clerks under similar circumstances to ride either in the regular passenger-coaches or in the mail-car. The court held that the company was liable for the injury; that deceased's riding in the mail-car was not necessarily contributory negligence and was properly a question for the jury. The court said: "To justify a court in saying that conduct is *per se* contributory negligence, the case must present some such feature of recklessness as would leave no opportunity for difference of opinion as to its imprudence in the minds of ordinarily prudent men. *Baltimore, &c. R. Co. v. Kane*, 69 Md. 21; *Cumberland Valley R. Co. v. Mangans*, 61 Md. 61; *Baltimore, &c. R. Co. v. State*, 54 Md. 655. Here the deceased was doing what he was actually required to do for the larger part of his time on the cars, and was permitted to do for the rest of his time while on the cars. It was provided

for his occupancy when on duty as postal clerk, and his not being on duty did not make the car more dangerous for him. His act therefore in no way contributed to the result which happened. A case precisely like this is found in *Carroll v. New York, &c. R. Co.*, 1 Duer (N. Y.), 571."

¹ *Jacobus v. St. Paul, &c. R. Co.*, 20 Minn. 125; 18 Am. Rep. 360. See also *Jones v. Chicago, &c. R. Co.*, 43 Minn. 279; 44 Am. & Eng. R. Cas. 357. And in *O'Donnell v. Allegheny R. Co.*, 59 Penn. St. 239; 98 Am. Dec. 336, where a mechanic in performing services for the company made frequent trips on the road going to and returning from his work, and regularly selected the baggage-car as the most appropriate place for him, with the knowledge of the conductor and without objection from him, it was held that he was not guilty of any negligence in so riding.

² The Pennsylvania court in referring to the case of *Jacobus v. Chicago, &c. R. Co.*, *supra*, observes: "We do not regard it as entitled to weight as authority. The reasoning of the court is not satisfactory, and the authorities cited do not sustain the position assumed by the learned judge who delivered the opinion." *Pennsylvania R. Co. v. Langdon*, 92 Penn. St. 21; 37 Am. Rep. 659.

previously stated, it is always a question of fact for the jury whether or not the danger was so obvious that the passenger was bound to see it, and to act upon his own judgment rather than upon the permissive or active assent of the conductor to the act. The contract of the company with the passenger is impliedly subject to the condition that the company will transport him safely, so far as reasonable care upon its part can secure that result, provided the passenger complies with the reasonable rules and regulations which it has established to secure his safety, and is not guilty of negligence which brings injury upon himself. If the passenger voluntarily violates these rules, or conducts himself negligently, and in consequence thereof is injured, can it consistently be said that the company should be chargeable with the damages? In a Pennsylvania case previously cited,¹ the court carefully reviews the cases and lays down what we believe to be the true rule. In that case, the decedent was travelling upon the defendant's road, upon a commutation ticket. At the time of the accident, he was riding in the baggage-car, in violation of the rules of the company, which were conspicuously posted in the baggage-car and elsewhere.² While the plaintiff's intestate was thus riding in the baggage-car, the train collided with an approaching mail-train, injuring him so severely that his death occurred within a few hours thereafter. *Had he been in the smoking-car, or in any of the passenger-cars, he would not have been injured.* After the accident he stated to some of the witnesses, that if he had not gone into the baggage-car he would not have been hurt. Said PAXSON, J., "The right of a railroad company to make reasonable rules for its own protection, and for the safety and convenience of passengers, has been repeatedly recognized.³ Such companies are held, and very properly, to a strict measure of responsibility in cases

¹ Pennsylvania R. Co. v. Langdon, 92 Penn. St. 21; 37 Am. Rep. 651; 1 Am. & Eng. R. Cas. 87. Compare Creed v. Pennsylvania R. Co., 86 Penn. St. 139; 27 Am. Rep. 693.

² The particular rule in question was as follows: "They [the train-men] must see that passengers are properly seated, and will not allow them to stand on the platforms of the cars, nor ride in the baggage or mail cars. Conductors and brakemen are instructed to strictly enforce this rule, and it is expected that passengers will cheerfully comply, as the rule is one in-

tended for their own safety, it being particularly dangerous for passengers to be on platforms as trains approach stations."

³ Sullivan v. Phila. R. Co., 30 Penn. St. 234; 72 Am. Dec. 698; Powell v. Penn. R. Co., 32 Penn. St. 414; 75 Am. Dec. 564; West Chester, &c. R. Co. v. Miles, 55 Penn. St. 209; 93 Am. Dec. 744; Pittsburgh, &c. R. Co. v. McClurg, 56 Penn. St. 294; Cent. R. Co. v. Green, 86 Penn. St. 421; 27 Am. Rep. 718; O'Donnell v. Allegheny Valley R. Co., 59 Penn. St. 239; 98 Am. Dec. 336.

of injuries to passengers. It is not unreasonable that they should have the right to require passengers to observe such proper regulations as are essential to their own safety. With all the care such corporations can exercise in the perfection of their road-bed and machinery, and in the selection of their servants, accidents involving injuries and loss of life will frequently occur. This must continue to be the case so long as iron and wood are destructible, and dependence is placed upon the fidelity, the vigilance, and the judgment of servants. A misplaced switch or an inaccurately worded telegram may send a train to destruction. In such and other like cases, the company is liable to the party injured. The practical impossibility of avoiding all accidents by rail furnishes no good reason why such corporations shall not respond in damages for the injuries caused by the negligence of their servants, when and so often as the same occurs. Such being the measure of their responsibility, may they protect themselves so far as to require passengers to conform to reasonable rules intended to lessen the chances of their being injured? We know of no well-considered case which holds that they may not do so, nor has any sufficient reason been shown why they should not. In doing so, they at least seek to guard the lives of their passengers.

"The baggage-car is a known place of danger. In this respect it differs from the cow-catcher and the platform only in degree. It is placed ahead of the passenger-cars and next to or near the locomotive. In cases of collision, it is the first car to give way to the shock, and frequently is the only one seriously injured. It is treated as dangerous by the rules of all well-regulated companies, and the rule of the defendant company emphatically declared it to be so. An infant or an idiot might be excused for riding in such a position, by reason of his lack of mental capacity, but an intelligent man, accustomed to railroad travel, must be presumed to know its danger. It is patent and the same under all circumstances. Can a passenger who voluntarily leaves his proper place in the passenger-car, in violation of the rules of the company, to ride in the baggage-car, or other known place of danger, and who is injured in consequence of such violation, recover damages for such injury? We are not speaking of a possible accident, the result of a brief visit to the baggage-car to give some needed direction about a passenger's luggage, to have it re-checked, or for any other legitimate purpose, but of a person who rides in a baggage-car in violation of a known rule of

the company, and who is injured in consequence of such violation.¹ In considering this question, regard must be had to the character

¹ In *Houston, &c. R. Co. v. Clemmons*, 55 Am. Rep. 88, 40 Am. Rep. 799, the passenger went into the baggage-car to get some water, there being none in the passenger-cars. He remained there about five minutes and the accident occurred, and if he had been in the smoking or passenger cars he would not have been injured. It was held that he could not recover. In *Kentucky Central R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208, the decedent was injured while riding in the express-car. There was a rule of the company that conductors and baggage-masters must not allow any person to ride in baggage, mail, or express cars, whose duty did not require their presence there. The court held that there could be no recovery, — *CORER, C. J.*, saying: "The decedent went into the express-car and was riding there when the accident occurred. None of the passenger-cars were thrown from the track, and no one in any of them was injured. There was plenty of room in the passenger-cars. It did not appear that the conductor knew the decedent was riding in the express-car. The most important questions in the case grow out of the action of the court in giving and refusing instructions. In the first instruction given for the plaintiff the court told the jury, in effect, that no fault on the part of the intestate which did not contribute to the wrecking of the train would authorize a verdict for the defendant, on the ground of contributory negligence, and refused to instruct, as asked by the defendant, that it was the duty of the intestate to occupy a seat in one of the passenger-coaches, and that if he went voluntarily into the express-car, and it was more dangerous to ride in that car than in a passenger-car, and if his life was lost in consequence of his being in the express-car, they should find for the defendant. That the intestate was a passenger, and entitled to the privileges and subject to the duties incident to that relation, is not disputed. When the defence is contributory negligence, the proper question for the jury is, whether the damage was occasioned entirely by the negligence or improper conduct of the de-

fendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary or common care and caution, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have occurred. In the first case the plaintiff would be entitled to recover; in the latter he would not. *Paducah, &c. R. Co. v. Hoehl*, 12 Bush (Ky.), 41. And this rule applies as well when the negligence of the plaintiff exposes him to the injury as when it co-operates in causing the misfortune from which the injury results. *Doggett v. Illinois Cent. R. Co.*, 34 Iowa, 284; *Colegrove v. New York, &c. R. Co.*, 20 N. Y. 492; *Kentucky Cent. R. Co. v. Dills*, 4 Bush (Ky.), 593; *Louisville, &c. R. Co. v. Sickings*, 5 Bush (Ky.), 1; *McAunich v. Mississippi, &c. R. Co.*, 20 Iowa, 345. When a passenger enters a railway train he should take a seat in a passenger-coach if there is room, and if he voluntarily goes to a position of greater danger, and is injured, the question whether he is guilty of contributory negligence which will defeat his action, will depend upon the nature of the misfortune which resulted in his injury. *Lawrenceburg, &c. R. Co. v. Montgomery*, 7 Ind. 474. Contributory negligence is a defence which confesses and avoids the plaintiff's case, and must be made out by showing affirmatively, not only that the plaintiff was guilty of negligence, but that such negligence co-operated with the negligence of the defendant to produce the injury. If a whole train be precipitated down an embankment, or through a bridge into deep water, and a passenger seated in the express-car is drowned, his representative will have the same right to recover as the representative of a passenger who was seated in a passenger-coach. There could be no pretence for saying that because the passenger in the express-car was more exposed to danger in case of a collision with a train running in the opposite direction than he would have been if he had been in a passenger-coach, he ought not to recover, when it is clear that as respects the misfortune which actually oc-

of the rule violated. The rules adopted by railroad companies are a part of their police arrangements. Some of them are for the convenience of the company in the management of its business. Others

occurred, his danger was not at all increased by the fact that he was in the express-car. So also of a large class of railroad disasters which result from the giving way of the track, or the breaking of some portion of a car. These are as liable to occur at one portion of a train as at another, and consequently a passenger is in no more danger of injury from such accidents in the express-car than in a passenger-car. *O'Donnell v. Allegheny R. Co.*, 59 Penn. St. 250; 98 Am. Dec. 336. And the fact that he was in that car when the accident occurred would not defeat his right to recover, unless perhaps the injury should result from some agency in that car which would not have existed in a passenger-car. But there is another class of disasters in which the danger may be greater in the express-car than in the passenger-car. Express-cars are usually in advance of passenger-cars, and in case of collision with stock or other objects on the track, or with trains running in an opposite direction, the danger may be greater in the express-car. The question of contributory negligence may be further affected by other facts. The conductor is, as to the train under his charge, the general agent of the company; and if a passenger be invited by him to occupy a position more dangerous than a seat in a passenger-car, and the passenger is injured while in that position, the company could not defeat an action for the injury by a plea of contributory negligence. In such a case the act of the conductor would be the act of the company. *Burns v. Bellefontaine R. Co.*, 50 Mo. 139, *Clark v. Eighth Avenue R. Co.*, 36 N. Y. 135; 93 Am. Dec. 495. *If a conductor requires a passenger to occupy a dangerous position, the company would be liable in the same manner as if it had itself given the order.* Ordinarily, it is the duty of a conductor to warn a passenger known to be occupying a dangerous position on the train, and to request him to take a seat in the passenger-car, and his failure to do so may sometimes be equivalent to the consent of the company that the pas-

senger may occupy that position. *Burns v. Bellefontaine R. Co.*, 50 Mo. 139; *Clark v. Eighth Avenue R. Co.*, 36 N. Y. 135; 93 Am. Dec. 495. But he is not bound at the peril of the company, to know that a passenger is in an exposed position, and unless he does know it, the passenger has no right to complain that he was not warned. *It is the duty of passengers to occupy the cars provided for them, and the conductor has a right to presume that they are doing so until he knows the contrary; and if a passenger goes into the baggage, mail, or express car without the knowledge or consent of the conductor, he will not be permitted to urge as an excuse for remaining there that the conductor should have discovered him and ordered him back to his seat, but failed to do so.* No one can be permitted to justify or excuse his own improper conduct by alleging that it was the duty of another to prevent such conduct on his part. It seems to us therefore that when contributory negligence is interposed as a defence to an action against a railroad company for negligently injuring a passenger, and the supposed negligence consists in the fact that the passenger voluntarily occupied a position in the train which was more dangerous than the position he should have occupied, the nature of the accident causing the injury is to be considered; and if upon such consideration it appears that the danger of injury from that particular accident was materially increased by the fact that the passenger was in that particular place instead of the place he should have occupied, he ought not to recover, unless he was there with the consent of the conductor. But if the nature of the accident be such that the danger of injury was not enhanced in consequence of the position occupied by the passenger, or if the accident was of such a nature as was as likely to occur in one portion of the train as another, or if he occupied the place with the knowledge or consent of the conductor, his right of recovery will not be affected by the fact that he was at an improper place."

are for the comfort of passengers, and yet others have regard exclusively to the safety of passengers. The distinction between them, and the difference in the consequences of their violation, is manifest. As an illustration: it would be unreasonable to hold that the violation of the rule against smoking could be set up as a defence to an action for personal injuries resulting from the negligence of the company. On the other hand, should a passenger insist upon riding upon the cow-catcher, in the face of a rule prohibiting it, and as a consequence should be injured, I apprehend it would be a good defence to an action against the company, even though the negligence of the latter's servants was the cause of the collision or other accident by which the injury was occasioned. And if the passenger thus recklessly exposing his life to possible accidents were a sane man, more especially if he were a railroad man, it is difficult to see how the knowledge or even the assent of the conductor to his occupying such a position could affect the case. There can be no license to commit suicide. It is true the conductor has the control of the train and may assign passengers their seats. But he may not assign a passenger to a seat on the cow-catcher, a position on the platform, or in the baggage-car. This is known to every intelligent man and appears upon the face of the rule itself. He is expressly required to enforce it, and to prohibit any of the acts referred to, unless it be riding upon the cow-catcher, which is so manifestly dangerous and improper, that it has not been deemed necessary to prohibit it. We are unable to see how a conductor, in violation of a known rule of the company, can license a man to occupy a place of danger so as to make the company responsible.¹ It is otherwise as to rules which are intended merely for the convenience of the company or its passengers. It was said by WOODWARD, J.,² that 'on

¹ Further on, in the opinion Judge PAXSON referring to the effect of permission from the conductor to ride in the baggage-car, said: "In a few cases it has been held that the assent of the conductor is sufficient to charge the company with the consequences of such act, that it amounts to a waiver of the rule forbidding passengers to ride in the baggage-car. *But how can a conductor waive a rule which by its very terms he is commanded to enforce?* He may neglect to enforce it, and when the rule is a mere police arrangement of the company, such neglect may perhaps

amount to a waiver as between the passenger and the company. But when the rule is for the protection of human life the case is very different. We are not disposed to encourage conductors or other railroad officials in violating reasonable rules which are essential to the protection of the travelling public. If it is once understood that a man who rides in a baggage-car in violation of the rules does so at his own risk, we shall have fewer accidents of this description."

² In *Sullivan v. Philadelphia R. Co.*, 30 Penn. St. 234; 72 Am. Dec. 698.

the part of the passenger, his assent is implied to all the company's reasonable rules and regulations for entering, occupying, and leaving their cars; and if injury befall him by reason of his disregard of regulations which are necessary to the conduct of the business of the company, the company are not liable in damages, even though the negligence of their servants concurred with his own negligence in causing the mischief.' This principle is even broader than the one we are now contending for. We only assert here, that *if a passenger wilfully violates a known rule intended for his safety, and is injured in consequence of such violation, he is not entitled to recover damages for such injury.* We are not aware that the foregoing views conflict with any of our own cases. They may not harmonize with some of the dicta which lie scattered through them, but a careful examination of the points decided shows no serious embarrassment."¹

If the rules of the company in this respect are habitually violated by a passenger without objection, or if a passenger is required by the conductor to ride in the baggage-car, a different question is presented. Thus, in a Pennsylvania case,² one who was in the employ of the company as a bridge-builder, while riding home from his work voluntarily went into the baggage-car without the direction or invitation of the conductor. It appeared that he had long been accustomed to do so, and no objection had ever been made, though the conductor had always been aware of his so doing. The court held that he could not be said to have been guilty of any contributory negligence in riding where he did; that the conductor of the train being clothed with a general authority over matters relating to his train, it was within his discretion to enforce or relax the company's rules to a reasonable extent, and that his allowing the plaintiff to ride in the baggage-car amounted to a consent on the part of the company.³

There is a class of cases in which it is held that, even though the rules of the company forbid the act, and the rules are established for the safety of passengers, yet the consent of the employes to their violation is binding upon the company. In Canada,⁴ it is held

¹ These views so clearly stated have been upheld in many cases. See *Creed v. Pennsylvania, &c. R. Co.*, 86 Penn. St. 139; 27 Am. Rep. 693; *Dunn v. Grand Trunk R. Co.*, 58 Me. 187; 4 Am. Rep. 267; *Keith v. Pinkham*, 43 Me. 501; 69 Am. Dec. 807.

² *O'Donnell v. Allegheny R. Co.*, 59 Penn. St. 239; 98 Am. Dec. 336.

³ *O'Donnell v. Allegheny R. Co.*, 59 Penn. St. 239; 98 Am. Dec. 336. But that this case does not conflict with the views already announced is seen from the review of this and other cases by *Paxson, J.*, in *Pennsylvania R. Co. v. Langdon*, 92 Penn. St. 21; 37 Am. Rep. 651.

⁴ *Watson v. Northern Ry. Co.*, 24 U. C. Q. B. 98; and in *Minnesota, Jacobus*

that a passenger who is riding in a baggage-car against the rules of the company is not precluded from recovering for injuries received by him by a collision of trains, through the gross negligence of the company. In Tennessee,¹ a person who had charge of the trains, trainmen, etc., invited some persons who had arrived at the station too late to take an outgoing train, to get on an engine which was at the station, with a view to overtaking the train. The engine overtook the train, but as a collision with the rear car was imminent, the plaintiff jumped from the engine, and it was held that the company was liable for the injury. In a case before the Circuit Court of the United States,² a drover, while riding on an engine with the consent of the engineer, to look after his cattle as was customary, was injured. It was contrary to the rules of the company for anybody to ride on the engine. The question was left to the jury to say whether the company had by its conduct held out its employes to the plaintiff as authorized under the circumstances to consent to his being carried on the train with his cattle.³ An engine is well understood by every one who travels by rail not to be intended for passengers, and no one has any right to suppose that the engineer has any authority to permit passengers to ride upon it instead of in the cars.⁴ Mr. Thompson, in his work upon "Carriers of Passengers,"⁵ states the rule accurately thus: "There are certain portions of every carrier's vehicles which are so obviously dangerous for a passenger to occupy, that the presence of a passenger there will constitute negligence as a matter of law, and preclude him from claiming damages while in that position. For instance, the engine would seem to be a place designed exclusively for the employes of a railroad company, *even in the absence of regulations forbidding the presence of passengers thereon.*"⁶ In another case,⁷ a laborer of the company on a construction train being told by the person in charge of the train that they were behind time and must hurry, and to jump on

v. St. Paul, &c. R. Co., 20 Minn. 125. Compare *ante*, n. 1, p. 1284.

¹ *Nashville, &c. R. Co. v. Erwin* (Tenn. 1883), 3 Am. & Eng. R. Cas. 405.

² *Waterbury v. N. Y. Central R. Co.*, 17 Fed. Rep. 671.

³ See also *Wabash, &c. R. Co. v. Shacklet*, 105 Ill. 364; 12 Am. & Eng. R. Cas. 166, to the same effect.

⁴ *Robertson v. New York, &c. R. Co.*, 22 Barb. (N. Y.) 91. Therefore one who rides on it in violation of the rules of the

company cannot recover for an injury received while riding there if his position at all contributed to cause the injury. *Robertson v. New York, &c. R. Co.*, 22 Barb. (N. Y.) 91.

⁵ Thompson's *Carriers of Passengers*, 265.

⁶ *Dogett v. Illinois Cent. R. Co.*, 34 Iowa, 284; *Baltimore, &c. R. Co. v. Jones*, 95 U. S. 439.

⁷ *Baltimore, &c. R. Co. v. Jones*, 95 U. S. 439.

anywhere, climbed upon the pilot of the engine, and riding there was injured by a collision of the engine with a car. It was held that he could not recover. Said SWAYNE, J.: "As well might he have obeyed a suggestion to ride on a cow-catcher, or put himself on the track before the advancing wheels of a locomotive." Where, however, a railway company should undertake to carry a person as a passenger upon a locomotive, it would be liable to him as a common carrier of passengers.

But there is a large class of cases in which it is held, or intimated, that a person who places himself in a dangerous position by the *direction* of the conductor of a train, where the danger is not so obvious as to call upon him to oppose his own judgment to that of the conductor, may recover if injured while in such position. Thus, where a drover was directed by the conductor to get out of the caboose in which he was riding and get on top of the train, as the caboose was to be left, and was told that another would be attached further up the road, and the drover, the car being at rest, did as directed, and while upon top of the train, by the backing and jerking movements of the train was thrown off and injured, it was held that he might recover.¹ In all such cases, however, it seems to be the rule that, *if the danger is obvious, and such as a reasonable man would not have incurred*, the passenger must not assume the risk.²

A person who rides upon a freight train, or a gravel train even, and pays his fare to the person in charge of the train, although the orders of the company to the persons in charge of the train are to take no passengers, is nevertheless entitled to recover for an injury received through negligence of the company to which he has not contributed.³

¹ Indianapolis, &c. R. Co. v. Horst, 93 U. S. 291. The court said: "We have said that riding on the top of a freight-car at night involved peril. When commanded to go there the plaintiff had no choice but to obey, or leave his cattle to go forward without any one to accompany or take care of them. The command was wrong; to give him no warning was an aggravation of the wrong. He, however, rode safely to the switch, standing in one place. He had a right to assume that the posture and place would continue to be safe. He had no foreknowledge of the coming shock. The company knew it, but gave him no word of caution

or notice. He was unaware of danger until the catastrophe was upon him. The behavior of the conductor was inexcusable. If there was fault on the part of the plaintiff, in what did it consist? We find nothing in the record which furnishes any warrant for such an imputation."

² Hazard v. Chicago, &c. R. Co., 1 Biss. (U. S.) 503; Pittsburgh, &c. R. Co. v. Krause, 30 Ohio St. 220; Chicago, &c. R. Co. v. Randolph, 53 Ill. 510; Jeffersonville, &c. R. Co. v. Swift, 26 Ind. 459.

³ Keith v. Pinkham, 43 Me. 501; 69 Am. Dec. 80; Dunn v. Grand Trunk R. Co., 58 Me. 187; 4 Am. Rep. 267.

Where a company is accustomed to carry passengers on freight trains it is bound to exercise the greatest possible care and diligence of which the management of such trains is admissible. It seems that in regard to the coach in which the passengers are to ride the duty is the same whether it is a part of a passenger or of a freight train, the same is of course true as regards the condition of its road-bed and bridges.¹ But as to other appliances the duty of the company is modified by the necessary difference between passenger and freight trains, and it is bound to use only such care in this regard as the nature of the train will permit.² Thus, while a company might properly be held negligent in failing to provide a means of communication between the conductor and engineer on a passenger train, it cannot be said that the same would be true in the case of a freight train which had a single passenger-coach attached.³

A passenger in riding on a mixed train must assume all the risks which are necessarily incident to such travel, and cannot insist upon the same care and attention which he might demand on a regular passenger train.⁴ If a railway company, said APPLETON, J.,⁵ "admits passengers into a caboose-car, attached to a freight train, to be transported as passengers, and takes the customary fare for the same, it incurs the same liability for the safety of the passengers as though

¹ *Missouri Pac. R. Co. v. Holcomb*, 44 Kan. 332; 44 Am. & Eng. R. Cas. 303. In this case the regular caboose used for passenger traffic on freight trains was in the repair-shop, and the company was using temporarily a common box car with crude accommodations. The use of such a box-car being more dangerous the company was held to a higher degree of care. The plaintiff, while sitting in such car, having been thrown off the seat by a violent jerk of the car whereby she sustained severe injuries was allowed to recover. Compare *Crine v. East Tenn., &c. R. Co.*, 84 Ga. 651; 44 Am. & Eng. R. Cas. 312, note, where a passenger injured by being thrown off his seat by a sudden jerk was not allowed to recover, it appearing that the jerk was necessary in the coupling of cars.

² *Crine v. East Tenn., &c. R. Co.*, 84 Ga. 651; 44 Am. & Eng. R. Cas. 312; *Missouri Pac. R. Co. v. Holcomb*, 44 Kan. 332; 44 Am. & Eng. R. Cas. 303; *Whitehead v. St. Louis, &c. R. Co.*, 99 Mo. 363; 39 Am. & Eng. R. Cas. 410; *Wallace v. Western N. Car. R. Co.*, 101 N. C. 454; 87

Am. & Eng. R. Cas. 159; *Thomas v. Chicago, &c. R. Co.*, 72 Mich. 355; 37 Am. & Eng. R. Cas. 108; *New York, &c. R. Co. v. Doane*, 115 Ind. 435; 37 Am. & Eng. R. Cas. 87; *Southern Kansas R. Co. v. Hinsdale*, 38 Kan. 507; 34 Am. & Eng. R. Cas. 256, *n.*; *Way v. Chicago, &c. R. Co.*, 73 Iowa, 463; 34 Am. & Eng. R. Cas. 286.

³ *Oviatt v. Dakota Cent. R. Co.*, 43 Minn. 300; 44 Am. & Eng. R. Cas. 311, *n.*

⁴ *Crine v. East Tenn., &c. R. Co.*, 84 Ga. 651; 44 Am. & Eng. R. Cas. 312, *n.* (passenger injured by sudden jolting of the car caused by coupling parts of the train). *Browne v. Raleigh, &c. R. Co.*, 108 N. C. 34; *Fisher v. Southern Pac. R. Co.*, 89 Cal. 399. See as to the obligation of the company to run passenger trains when possible, *Arkansas, &c. R. Co. v. Canman*, 52 Ark. 517; 44 Am. & Eng. R. Cas. 311, *n.*

⁵ *In Dunn v. Grand Trunk R. Co.*, 58 Me. 187; 4 Am. Rep. 267. See also *Pennsylvania R. Co. v. Newmeyer*, 129 Ind. 401.

they were in the regular passenger-coaches at the time of the occurrence of the injury.¹ The plaintiff was not entitled by law to be carried on the freight train contrary to the regulations of the defendant company. *They might have refused to carry him, and have used force to remove him from the train. Not doing this, nor even requesting him to leave, but suffering him to remain, and receiving from him the ordinary fare, they must be held justly responsible for negligence or want of care in his transportation.* The question before the court was whether the defendants were liable at all as common carriers. The defence was based entirely upon a regulation of the company. There was no question raised as to the general obligations of carriers. Indeed, none is raised at the argument. The counsel for defendants rest their defence on the rules of the company. The plaintiff had paid the usual fare of a first-class passenger. The defendants had received it, and had undertaken the transportation of the plaintiff in their freight train, during the course of which he was injured by their neglect or want of care. Under such circumstances, the judge said that they could not plead their regulation in release of their ordinary liabilities, but they were just as liable as if it had been a passenger train, and as if there had been no notice, provided plaintiff was not guilty of any fault or want of ordinary care himself.

"Undoubtedly a passenger taking a freight train takes it with the increased risks and diminution of comfort incident thereto; and if it is managed with the care requisite for such trains, it is all those who embark in it have a right to demand."² 'We have said in a former case,'³ observes BREESE, J., 'that a passenger takes all the risks incident to the mode of travel, and the character of the means of conveyance which he selects, the party furnishing the conveyance being only required to adopt the proper care, vigilance, and skill to that particular means; for this, and this only, was the defendant responsible. The passengers can only expect such security as the mode of conveyance affords.' If there was any peculiar risk incident to transportation on a freight train, the counsel should have called the attention of the court to such special difference, whatever it may be. But 'the responsibility of a railroad company for the safety of its

¹ Edgerton v. New York, &c. R. Co., 39 N. Y. 227.

² Chicago, &c. R. Co. v. Hazzard, 26 Ill. 373. It is therefore held that where one rides on a freight train contrary to the orders of the company, he has no right of

action for an injury received in consequence of his riding there. Powers v. Boston, &c. R. Co., 153 Mass. 188.

³ Chicago, &c. R. Co. v. Fay, 16 Ill. 568.

passengers does not depend on the kind of cars in which they are carried, or on the fact of payment of fare by the passenger.'¹ 'The evidence,' says WALKER, J., in that case, 'shows that the road had been carrying passengers on their construction trains, and they must be held to the same degree of diligence with that character of train as with their regular passenger-coaches, for the safety of the persons and lives of their passengers.' If the defendants claimed that they might exercise a diminished degree of caution arising from the character of the train, they should have requested a corresponding instruction."

In order to exonerate the carrier on the ground that the passenger was riding in the baggage-car or other place of danger in violation of the company's regulations, it is not enough merely to prove the fact that he was so riding at the time of the injury; it must be shown that such riding was a proximate cause of the injury,—in other words, that if the passenger had been where he should have been according to the company's regulations he would not have sustained the injury.²

Where one rides on a stock-car in pursuance of a special contract with the carrier, his riding in such a place does not constitute contributory negligence, because he is lawfully and properly there, though it may be obviously a more dangerous place than another to which he has access.³ So where a person desiring to accomplish a special errand rides on a hand-car by permission of the train-master and in ignorance of the latter's lack of authority to grant such permission, he is a passenger to whom the company owes the exercise of care to protect him from injury.⁴

SEC. 305. Duty as to stopping of Trains, for Passengers to alight.

— The trains must be stopped at the station so that passengers can

¹ Ohio, &c. R. Co. v. Muhling, 30 Ill. 9; 81 Am. Dec. 336.

² Webster v. Rome, &c. R. Co., 115 N. Y. 112; Jones v. Chicago, &c. R. Co., 43 Minn. 279; 44 Am. & Eng. R. Cas. 357; Davies v. Mann, 10 Mees. & W. 545; s. c. 2 Thomp. on Neg., 1105; Hutchinson on Carriers (2d ed.), § 654. "The contributory negligence which prevents recovery for an injury, however, must be such as co-operates in causing the injury, and without which the injury would not have happened." Lehigh Valley R. Co. v. Greiner, 113 Penn. St. 600; 28 Am. & Eng. R. Cas. 397. In Cody v.

New York, &c. R. Co., 151 Mass. 462, a passenger in the smoking-car, seeing a collision inevitable, went into a baggage-car in order to be prepared to jump, and did jump before the trains collided. The court held that the question as to whether he was negligent or not in so doing should be submitted to the jury. See also *ante*, p. 1282 n.

³ Lawson v. Chicago, &c. R. Co., 64 Wis. 447; 21 Am. & Eng. R. Cas. 249; Florida R. Co. v. Webster, 25 Fla. 394.

⁴ International, &c. R. Co. v. Prince, 77 Tex. 560; 44 Am. & Eng. R. Cas. 594.

alight upon the platform, and if they are stopped at any other place, and the station is called, so that passengers are required, or have a right to understand that they are required to stop there, the company is liable for injuries received in leaving such place, to the same extent and upon the same ground that it would be liable for injuries received from the defectiveness of its own premises.¹ The stoppage

¹ *Columbus, &c. R. Co. v. Farrell*, 31 Ind. 408; *Bucher v. N. Y. Central R. Co.*, 98 N. Y. 128; *Memphis, &c. R. Co. v. Whitfield*, 44 Miss. 466; 7 Am. Rep. 699; *Edgar v. Northern R. Co.*, 11 Ont. App. 452; 22 Am. & Eng. R. Cas. 432; *Nance v. Carolina Cent. R. Co.*, 94 N. C. 619; 26 Am. & Eng. R. Cas. 223. See also *post*, § 312. In *Delamatyr v. Milwaukee, &c. R. Co.*, 24 Wis. 578, the plaintiff received an injury while descending from the defendant's train at Hanover Junction, as was alleged by reason of the defendant not having furnished a safe and proper means of descent. The train consisted of only two cars, of which the one in the rear was the ladies' car, and the other a gentlemen's car, immediately in front of which was a baggage-car. When the train stopped at the junction the plaintiff was seated in the ladies' car. By direction of the brakeman she passed through the gentlemen's car to the car-platform at its front end for the purpose of descending there. Their steps attached to this platform had not been drawn up opposite to the station-walk or platform. The platform was only a few inches above the rail, and nearly two and a half feet below the lower car-step, and was over three feet from the rail horizontally. The plaintiff could not reach the station platform by stepping down in the usual manner, but was obliged to jump some distance obliquely. The ground immediately opposite the steps was muddy and slanted away rapidly from the ends of the ties so as to make a kind of pit, unsuitable for a landing-place. The sister of the plaintiff had got off at this point, safely, immediately before the plaintiff attempted to do so. The plaintiff descended to the lower step holding a sunshade and basket in one hand, and her skirts with the other, hesitated, and made some remarks about the impracticability of alighting there, but

being encouraged by her sister, took the hand of the latter and sprang for the platform. As she sprang her skirts caught upon a part of the brake, and she fell in such a way that her head and shoulders and a considerable portion of her body rested upon the station platform, and in the fall broke her arm. No officer or employé of the company was present to aid her in alighting. Under this state of facts it was held that the plaintiff was entitled to recover. In commenting upon the question whether the plaintiff under the circumstances was guilty of such contributory negligence as would prevent a recovery by her, COLE, J., very pertinently said: "As a matter of law, to characterize this conduct of hers as careless and negligent, would seem to be manifestly unwarranted," and it was left for the jury to say whether in fact the conduct of the plaintiff was so negligent as to estop her from a recovery. A similar doctrine was held in *Robson v. Northeastern Ry. Co.*, L. R. 10 Q. B. 271; 12 Moak's Eng. Rep. 302, where a passenger of a railway is invited to alight at a spot where there is no platform, so that usual means of descent are absent; the duty of the railway company not to expose the passenger to undue danger requires them to provide some reasonably fit and safe substitute; and, in the case of a female passenger, a jury may reasonably find that the company fails in this duty where the only means of alighting provided are the usual iron step and footboard, with no attendants to assist the passenger in alighting. Plaintiff, a female, was a passenger by defendant's railway to B., a very small station; on the arrival of the train at the station the engine and part of the carriage in which plaintiff was riding were driven past the end of the platform, which is short, and came to a standstill, the door of the plaintiff's compartment being be-

must be sufficiently long to allow passengers a reasonable time to alight in safety, and the company is responsible for an injury resulting from the sudden starting of a train while a passenger is in the act of alighting therefrom.¹

It is the duty of the company to stop its train at a station long enough to give all passengers desiring to stop there time to get out of the cars, and failing to do so, if a passenger while the cars are in motion, but before they have acquired *rapid* motion, jumps from the cars and is injured, there are cases which hold the company liable therefor unless under the circumstances the jury find that the attempt to alight was negligence.² But in the principal case maintaining this view,³ the train was moving very slowly at the time the passenger alighted, and the court merely held that in view of this and other circumstances the case should be submitted to the jury. It appears to us that in view of the danger which necessarily attends

yond the end of the platform. Upon the train stopping plaintiff rose and opened the door, and stepped on to the iron step, she looked out and saw the station-master, who is the only attendant kept there, taking luggage out of or putting luggage into a van. She did not see the guard or any other railway servant, and she stood on the step looking for somebody to help until she became afraid of the train moving away; and, no one then coming, she tried to alight by getting on to the footboard; she had her back to the carriage, and she had hold of the door with her right hand, and got one foot on to the footboard, and whilst endeavoring to get the other foot on to the footboard she lost her hold of the carriage-door, and slipped and fell and was injured. She had a small bag on her left arm, and an umbrella and two small articles in her left hand, but nothing in her right hand. The judge having nonsuited the plaintiff on the above evidence, with leave to enter a verdict for the plaintiff, it was held, first, that there was evidence from which a jury might have properly found that the plaintiff was invited or had reasonable ground for supposing she was invited to alight by the company's servants; and that the defendants had failed in their duty towards the plaintiff, and had not provided a reasonable substitute for a platform. Also, that the jury might not

improperly have found that the expectation of being carried beyond the B. station was reasonably entertained by the plaintiff, and that the inconvenience would have been such as not to render it imprudent on her part to expose herself to the danger incurred in alighting; and that the defendants were, therefore, liable for the injury resulting from the plaintiff's act, which had been caused by their negligent breach of duty; and that the nonsuit was therefore wrong, and the verdict ought to be entered for the plaintiff.

¹ *Bartholomew v. N. Y. Central R. Co.*, 102 N. Y. 716; *Black v. Brooklyn City R. Co.* 108 N. Y. 640.

² *Filer v. N. Y. Central R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327; *Bucher v. N. Y. Central R. Co.*, 98 N. Y. 128; *Lloyd v. Hannibal, &c. R. Co.*, 53 Mo. 509; *Illinois Central R. Co. v. Able*, 59 Ill. 131.

³ *Filer v. New York Cent. R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327. Here the brakeman told passenger, a woman, to get off, saying the train would not stop. See *Solomon v. Manhattan R. Co.*, 103 N. Y. 437. Where the evidence as to whether or not the train was in motion is conflicting, the question must be submitted to the jury; the company is entitled to a special finding as to the fact in such a case. *Sherwood v. Chicago, &c. R. Co.*, 82 Mich. 374; 44 Am. & Eng. R. Cas. 337.

such an act it should be held as a matter of law that it is negligence to attempt to board or to alight from a train while it is in motion, and the question should not be left to the jury unless there are exceptional circumstances tending to excuse or justify the act. And the great weight of authority favors this view.¹ The failure of the company to stop its train at a station as it ought to do, or to stop it for a sufficiently long time, does not justify a passenger in leaving a moving train;² his proper course is to be carried on until the train

¹ *Knight v. Pontchartrain R. Co.*, 23 La. An. 462; *Hubener v. New Orleans, &c. R. Co.*, 23 La. An. 492; *New York, &c. R. Co. v. Enches*, 127 Penn. St. 316; 39 Am. & Eng. R. Cas. 444; *Whelan v. Georgia, &c. R. Co.*, 84 Ga. 506; 44 Am. & Eng. R. Cas. 335; *Pennsylvania R. Co. v. Lyons*, 129 Penn. St. 113; 41 Am. & Eng. R. Cas. 154; *Ricketts v. Birmingham, &c. R. Co.*, 85 Ala. 600; 37 Am. & Eng. R. Cas. 12; *Central R. Co. v. Letcher*, 69 Ala. 106; *Savannah, &c. R. Co. v. Watts*, 82 Ga. 229. "It is, we think, the general rule of law established by the decisions in this and other States, that the boarding or alighting from a moving train is presumably and generally a negligent act, *per se*, and that in order to rebut this presumption and justify a recovery for the injury sustained in getting on or off a moving train, it must appear that the passenger was, by the act of the defendant, put to an election between alternate dangers, or that something was done or said, or that some direction was given to the passenger by those in charge of the train, or some situation created, which interfered to some extent with his free agency, and was calculated to divert his attention from the danger and create a confidence that the attempt could be made in safety." *ANDREWS, J.*, in *Solomon v. Manhattan R. Co.*, 103 N. Y. 437; 27 Am. & Eng. R. Cas. 158. Under the statute in Iowa regulating this subject, to entitle a passenger to recover for an injury sustained in alighting from a moving train it must be shown that he was an employé in the performance of his duty, or that the conductor had consented to his so alighting. *Raben v. Chicago, &c. R. Co.*, 74 Iowa, 732; 31 Am. & Eng. R. Cas. 45; *Lindsey v. Chicago, &c. R. Co.*, 64 Iowa, 407. See

also *Vimont v. Chicago, &c. R. Co.*, 64 Iowa, 513

In the case of *Illinois Central R. Co. v. Slatton*, 54 Ill. 133; 5 Am. Rep. 109, it appeared that the train upon which the passenger was travelling, having stopped at a station, remained a reasonable time for passengers to alight, but he, not availing himself of the opportunity, waited until the train began to move, when, in attempting to leave the cars, he was fatally injured. It was held that the company was not liable, there being no proof of mismanagement of the train or careless conduct of the employés.

² *Little Rock, &c. R. Co. v. Tankersly*, 54 Ark. 25; *Walker v. Vicksburgh, &c. R. Co.*, 41 La. An. 795; 41 Am. & Eng. R. Cas. 172; *Watson v. Georgia Pac. R. Co.*, 81 Ga. 476; *Jarrett v. Atlanta, &c. R. Co.*, 83 Ga. 347; *Nichols v. Dubuque, &c. R. Co.*, 68 Iowa, 732; 27 Am. & Eng. R. Cas. 183; *Porter v. Chicago, &c. R. Co.*, 80 Mich. 156; *Nelson v. Atlantic, &c. R. Co.*, 68 Mo. 593; *Kansas City, &c. R. Co. v. Fite*, 67 Miss. 373; *New York, &c. R. Co. v. Enches*, 127 Penn. St. 316; 39 Am. & Eng. R. Cas. 335; *East Tenn., &c. R. Co. v. Massengale*, 15 Lea (Tenn.), 328; *Jewell v. Chicago, &c. R. Co.*, 54 Wis. 610; 41 Am. Rep. 63; *Houston, &c. R. Co. v. Leslie*, 57 Tex. 83; *Richmond, &c. R. Co. v. Morris*, 31 Gratt. (Va.) 200. The mere desire to prevent anxiety on the part of friends or relatives who are expecting him will not authorize a passenger to leave the train while it is in motion. *Lake Shore, &c. R. Co. v. Bangs*, 47 Mich. 470. The fact that the name of the station has been called, and that other passengers are getting out, do not excuse the act of leaving the moving train. *England v. Boston, &c. R. Co.*,

stops, and if he sustains pecuniary or other loss from being carried beyond his station his remedy lies in an action for damages.¹ There are a large number of cases which hold that it is for the jury to say whether the act of a passenger in leaving a *street-car* constitutes negligence,² and very properly so. But manifestly these cases rest on an entirely different state of facts from those under consideration in this section. It is a matter of common observation that male passengers regularly board street-cars and leave them while in motion; such an act is the rule rather than the exception. The cars are low and easily boarded, and move comparatively slowly. The circumstances plainly are widely different from those which attend the boarding or leaving a moving railroad train.

A passenger has no right to do what is obviously dangerous, although he is advised to do it by the company's agents. Thus, information by the conductor of a freight train to a passenger of mature age, and accustomed to railroad travelling, that persons sometimes debarked at a particular place, does not justify the passenger in taking the risk of leaving the car at such place, and if he does so he must bear the consequences.³

153 Mass. 490. Nor will the fact that other persons had jumped from the train at the same place and under similar circumstances, without injury, excuse the passenger's act. *Lake Shore, &c. R. Co. v. Bangs*, 47 Mich. 470; 3 Am. & Eng. R. Cas. 426. In *Adams v. Louisville, &c. R. Co.*, 82 Ky. 603; 21 Am. & Eng. R. Cas. 380, it appeared that the plaintiff, on a dark night, was a passenger in the rear car of a railroad train. As the train was approaching a refreshment station, the plaintiff arose and left the train while it was slowing up, but before it had actually stopped. In doing so, he stepped from the car-step through a trestle, and falling upon stones in the bed of the creek below, was injured. In an action by him, it was alleged that the company was negligent in placing the sleeper in front of his car, so as to make it the last car in the train. The court held that there was no ground for an action.

¹ "If a passenger, by the negligence of the agents of the railroad company, is carried beyond the station where he has a right to be let off, he can recover for the inconvenience, loss of time, and the labor

and expense of travelling back; but if he leaps from the train while in rapid motion in order to avoid being carried beyond his stopping-place, he does so at his own risk." *Houch, J.*, in *Nelson v. Atlantic, &c. R. Co.*, 68 Mo. 595.

² *Briggs v. Union St. R. Co.*, 148 Mass. 72; 37 Am. & Eng. R. Cas. 204; *Booth's Street Ry. Law*, § 337.

³ *Chicago, &c. R. Co. v. Hazzard*, 26 Ill. 373. See also *Herman v. Chicago, &c. R. Co.*, 79 Iowa, 161; *Kansas City, &c. R. Co. v. Fite*, 67 Miss. 373. While the rule of the text is generally true, it is not so in all cases. The Supreme Court of Minnesota upholds what appears to us to be a very just exception. The passenger having been injured by leaving a moving train, the questions of negligence and contributory negligence were, on the trial, submitted to the jury. The court, in sustaining the verdict, said: "Ordinarily a passenger would be held not to be justified in getting off a train while it is in motion, except at his own risk. Unless the train is moving very slowly, and the circumstances are especially favorable, it would be deemed *prima facie* negligence. It is

There may be cases, however, in which a passenger may be justified in leaving a moving train, or in which the circumstances are such which render the question a proper one for the jury. Thus, where a passenger is placed in a position of great peril in consequence of the negligence of the company or by the direction of its agent, and to escape he alights from the train, it is for the jury to say whether his act was one of negligence or not.¹ So where a lady passenger, alone on

not necessarily so, however, and the circumstances presented by the record were such in this case as to make the question one for the jury. He [the passenger] claims to have been mistaken as to the speed of the train. He was directed [by the conductor] to make haste to get off. He might assume that the conductor knew all about the place and the movements of the train, and that it would be necessary to obey orders to avoid being carried beyond his destination. He was suddenly waked out of his sleep, and did not understand that the train was moving rapidly. These circumstances were proper to be considered, and were sufficient, we think, to justify the trial court in submitting the case to the jury." *Jones v. Chicago, &c. R. Co.*, 42 Minn. 183. *Citing Filer v. New York Central R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327; *Shannon v. Boston, &c. R. Co.*, 78 Me. 60; 23 Am. & Eng. R. Cas. 511; *Pool v. Chicago, &c. R. Co.*, 56 Wis. 236; 8 Am. & Eng. R. Cas. 360. See also *Ashton v. Detroit City R. Co.*, 78 Mich. 587; 41 Am. & Eng. R. Cas. 235, where plaintiff, a lady, was held to have been justified in leaving a moving car, when she did it to avoid insult.

¹ *Pennsylvania R. Co. v. Lyons*, 129 Penn. St. 113; 41 Am. & Eng. R. Cas. 154. See also opinion in *Nelson v. Atlantic, &c. R. Co.*, 68 Mo. 595, where this doctrine is stated, though the case did not call for its application. Thus, in a *Pennsylvania case*, A., a passenger, was awakened in the night by a jar, caused by the train being thrown from the track. Perceiving that the car was being dragged over the sleepers, he left his seat and, following an employé of the company, jumped from the platform and was injured. The car was dragged but a short distance beyond the point where A. jumped, and all the other passengers, who remained in the cars,

escaped unhurt. The derailment of the train was caused by the decayed condition of the ties. In an action by A. against the company to recover damages for his injury, the court left the question to the jury whether he had jumped from apprehension of danger which did not exist, or under circumstances making it a reasonable act of prudence on his part, instructing them that in the former event he could not recover, but that in the latter event he might. It was held that this was not error. *Pittsburgh, &c. R. Co. v. Rohrman*, 12 Am. & Eng. R. Cas. 176. If a passenger, alarmed by the peril apparently occasioned by the derailment, but acting as a person of ordinary prudence would in like circumstances in endeavoring to escape, goes to the platform of the car, and jumps or is pushed off by the motion of the car, or the other passengers, he may recover. *Smith v. St. Paul, &c. R. Co.*, 30 Minn. 169.

It is not necessarily negligent in a passenger to jump off a railway train in fast motion to avoid a collision, even if he would have escaped injury by remaining in his seat. Thus, in *Wilson v. Northern Pacific R. Co.*, 26 Minn. 278, the court said: "It is well settled, with reference to the liability of common carriers of passengers, that if, through the negligence of the carrier, a passenger is placed in a situation of great peril, the attempt of the passenger to escape the danger, even by doing an act also dangerous, and from which injury results, is not necessarily an act of contributory negligence, such as will prevent him recovering for the injury sustained. If it were, passengers would be required to suppress the instinct of self-preservation, and sit passive, to receive whatever might befall them, instead of acting as nature impels every man to act. The test of contributory negligence, where

a car, in order to avoid insult from the company's servant, leaves the car while it is in motion, her conduct in doing so is not necessarily negligent but must be left to the jury.¹ So also, as said in a leading case,² "for a person to jump from a car propelled by steam,

the passenger is injured in endeavoring to escape the peril in which the negligence of the carrier has placed him, is, was the attempt an unreasonable, precipitate, or rash act, or was it an act which a person of ordinary prudence might do? This is not determined by the result of the attempt to escape, nor by the result that would have followed had the attempt not been made. To permit that to determine it would be, in effect, to require of the passenger to judge with absolute certainty the extent to which the danger would go if he made no move, and with like certainty the consequences of the attempt to escape. In the case at bar, no degree of prudence, and it is doubtful if any degree of skill and experience in operating railroads, would enable one to determine with certainty that he would not be injured if he remained in the car, nor that he would be injured if he left it. The passenger in such a case must of necessity judge of the danger in remaining where he is, as also of the danger in attempting to escape, by the circumstances as they then appear to him, and not by the result. He acts upon the probabilities as they then appear to him, and if he acts as a man of ordinary prudence would in such case act, he will choose the hazard that from these circumstances appears to him to be the least. If plaintiff did so act (supposing him to have jumped from the car, as claimed by defendant), then the attempt to escape was not contributory negligence. *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181; *Buel v. New York Central R. Co.*, 31 N. Y. 314; 38 Am. Dec. 271; *Twomley v. Central Park, &c. R. Co.* 69 N. Y. 158; 25 Am. Rep. 162. That he was injured in his attempt to escape, and that those who remained in the car were unhurt, might of course be considered by the jury in determining this question." In the case of *Savannah, &c. R. Co. v. Watson*, 89 Ga. 110; 14 S. E. Rep. 890, it appeared that the plaintiff, who was a waiter in a hotel near the station, took dinner to the con-

ductor on defendant's train, as was his custom and duty, and in getting off the train while in motion was injured. There was evidence that the conductor told him to jump from the train, and on his objecting said that if he did not jump, he (the conductor) would "kick him off." It was held that the evidence warranted a verdict for the plaintiff.

In the case of *Shannon v. Boston, &c. R. Co.*, 78 Me. 52; 23 Am. & Eng. R. Cas. 511, it appeared that a lady, waiting at a railroad station for passage upon a train soon to depart, was invited by the ticket-agent to sit with other ladies in an empty car standing on the side track, while the station-room was being cleaned. The train to which the car was attached began to be moved without conductor or brakeman on board, and without signal or notice. The ladies were startled and alarmed lest they should be carried away, and they hastened to the rear of the car and jumped out while the car was still abreast of the platform, and apparently moving slowly. The plaintiff was thrown down and injured. It was held that she was a passenger, and that her conduct was not conclusively negligent.

¹ *Ashton v. Detroit City R. Co.*, 78 Mich. 587; 41 Am. & Eng. R. Cas. 235.

² *Doss v. Missouri, &c. R. Co.*, 59 Mo. 37; 21 Am. Rep. 371. For other cases in which the court has held that it is not necessarily negligent to leave a moving train, see *Louisville, &c. R. Co. v. Crunk*, 119 Ind. 542; 41 Am. & Eng. R. Cas. 158 (person assisting feeble passenger, not given time to leave train); *Little Rock, &c. R. Co. v. Atkins*, 46 Ark. 423; *St. Louis, &c. R. Co. v. Rosenbury*, 45 Ark. 256; *Central R. Co. v. Miles*, 88 Ala. 256. A passenger on a freight train attempted to alight at a point where the train was stopped short of the station, but was told by the brakeman to remain aboard as the train would soon be moved farther down. Upon its failure to stop again on being moved, the brakeman directed him to get off, and

when it is in rapid motion, may be regarded as mere recklessness; but to step from a car not yet beyond the platform, *and whose motion is so slight as to be almost or quite imperceptible*, may not be negligence, and whether it is or not, is for the jury to decide from the physical condition of the person and all the attendant circumstances." Again, where the risk or danger of leaving the moving train is not apparent to a passenger, and he is urged to take the hazard by the company's employes whose duty it is to know the danger, and he does so, he is not chargeable with negligence, when the danger is obviously slight. He has the right to rely upon the judgment of the conductor whose duty and experience he may presume gives him a special knowledge in such matters. So if a passenger leaps from a moving train under the belief justified by the conduct of the conductor that he would be ejected if he did not go voluntary or without force, he is blameless. The company being the author of the original peril would be liable for the consequences. But if he has no cause for such belief he is guilty of negligence.¹

The company is bound to stop its trains a reasonable time for all the passengers who desire to stop at the station to get off, and outgoing passengers to get on,² and the question as to whether the train was stopped a sufficient time is one of fact for the jury, and depends,

assisted him to do so, and in the attempt the passenger sustained injury. It was held that the company could not defend on the ground that it was the custom for passengers on the freight train to leave at the place where the train first stops, nor that the contract of carriage was complete as soon as plaintiff had an opportunity to leave the train. *Eddy v. Wallace*, 49 Fed. Rep. 801; 4 U. S. App. 247; 52 Am. & Eng. R. Cas. 265.

¹ *St. Louis, &c. R. Co. v. Rosenbury*, 45 Ark. 256. It is not negligence for the conductor to refuse to stop his train at a station forbidden by the regulations of the road to land a passenger who has embarked on the train without attempting to learn whether it would stop there though the conductor has taken up his ticket. In an action for damages resulting to a passenger from a refusal of the conductor to stop his train at the passenger's station, evidence for the company not only that the train was a through freight train, but also that it was not running on schedule time, but on

telegraphic orders, and that the station was not a telegraph station is admissible. *St. Louis, &c. R. Co. v. Rosenbury*, 45 Ark. 256.

² *Swigert v. Hannibal, &c. R. Co.*, 75 Mo. 475; *Wabash, &c. R. Co. v. Rector*, 104 Ill. 296. Where a person goes aboard a train with the knowledge of the conductor, not to take passage but to assist a feeble relative, he is a passenger for the time being, and it is the duty of the company to allow the train to remain stationary a sufficiently long time for him to leave it, and if it does not he is not necessarily guilty of contributory negligence in leaving it while it is in motion. *Louisville, &c. R. Co. v. Crunk*, 119 Ind. 542; 41 Am. & Eng. R. Cas. 159. The rule is different if the conductor was not aware of his presence on the train. *Coleman v. Georgia, &c. R. Co.*, 84 Ga. 1; 40 Am. & Eng. R. Cas. 690; *Griswold v. Chicago, &c. R. Co.*, 64 Wis. 652; 23 Am. & Eng. R. Cas. 463.

not upon the time designated in the company's time-table, but upon the circumstances of each case. The number of passengers who are to get on or off, the facilities for leaving and boarding the train are circumstances which must be considered in determining what length of time is reasonable.¹ If the train is moving slowly, and there is no obvious danger in getting off, it cannot be said to be negligence *per se* to make the attempt, especially if the passenger is directed to do so by the conductor or brakeman; and it would be error to instruct the jury that such an attempt *per se* constituted contributory negligence.² In this, as in reference to all other matters where the safety of passengers is concerned, the company owes a duty to the passenger to act with proper care and caution; and if the motion of the train is not entirely stopped, and the passenger is expressly or impliedly invited to leave the train while moving at a slow rate of speed, he has a right to presume that it is safe for him to do so; and the company, having virtually told him that it was safe, is estopped from saying that the passenger was guilty of negligence in doing what it had advised him to do. The passenger may not in all cases rely upon the assurances of the company in this respect, but must exercise his own judgment where there is reason seriously to doubt the soundness of the advice, but as between a mere doubt and the experience and superior knowledge of the company's officers and agents, he has a right to give way to the latter, unless the rate of speed at which the train is moving is such as would prevent a man of ordinary prudence from acting upon it. But if he attempts to leave the train when it is moving faster than a very slow rate of speed, or against the advice of the conductor, and when he is told that the train will be stopped, he cannot recover.³

¹ If the train was not stopped the usual time, this fact may be shown. Thus, on the trial of an action for an injury alleged to have resulted from the cars not stopping at a station a reasonable time for the passengers to alight, — which was controverted by the defendant, — the plaintiff offering evidence to show the usual and customary period of the cars' stopping at that place, it was held that such evidence was admissible. *Fuller v. Neugatuck R. Co.*, 21 Conn. 557.

² See *Filer v. New York Cent. R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327; *Cumberland Valley R. Co. v. Mangans*, 61 Md. 53; *Doss v. Missouri, &c. R. Co.*, 59

Mo. 27; 21 Am. Rep. 371; *St. Louis, &c. R. Co. v. Rosenbury*, 45 Ark. 256; *Straus v. Kansas City R. Co.*, 75 Mo. 185; 6 Am. & Eng. R. Cas. 884. See also *Ploppir v. N. Y. Central R. Co.*, 13 Hun (N. Y.), 625, all of which hold that it is not necessarily negligence for a passenger to leave a train moving very slowly.

³ See *Solomon v. Manhattan R. Co.*, 103 N. Y. 437; 27 Am. & Eng. R. Cas. 158; *Nelson v. Atlantic, &c. R. Co.*, 68 Mo. 593; *Davis v. Chicago, &c. R. Co.*, 18 Wis. 175; *Chicago, &c. R. Co. v. Randolph*, 58 Ill. 510.

In *Penn. R. Co. v. Aspell*, 23 Penn. St. 147, the plaintiff took passage from

As a rule it may be said that where a passenger, by the wrongful act of the company, is compelled to choose between leaving the cars

Philadelphia for Morgan's Corner in March, 1851, on the night line. Just before reaching the latter place, the agent endeavored to give the usual signal to the engineer to stop, by pulling the bell-rope. The rope did not operate, though the speed of the train was checked by the engineer in order the more safely to pass certain switches. The speed of the train increasing, other signals were made to the engineer to stop; but whilst the train was in motion the plaintiff leaped from the car, though warned by the conductor and brakeman not to do so, and informed that the train would be stopped and backed to the station. The plaintiff's foot was injured. The court below charged that the pulling the bell-rope, and the announcement of Morgan's Corner, warned the plaintiff that he had arrived there, and was expected to prepare for leaving; that though he was warned not to jump, he could nevertheless recover for the injury received; that the agents of the company, in announcing to the passengers the place of arrival while the cars were in motion at the rate of from seven to ten miles an hour, did not exercise the degree of diligence and care which the law required; that the train should have been stopped before such announcement as to the place was made. It was further charged that in this case a contract existed, and the train should have been stopped; that the announcement of Morgan's Corner caused the plaintiff, in going to the platform, to be in a position of danger, and although it was imprudent in the plaintiff to jump from the car, though warned of the danger, yet the agents of the company being in fault, the plaintiff could recover. It was further charged that the imprudence of the plaintiff might be considered by the jury in fixing the damages. The plaintiff had a verdict, but the Supreme Court reversed the case, *BLACK, C. J.*, saying in the course of his opinion: "It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that

it would not have happened except for the culpable negligence of the party injured concurring with that of the other party, no action can be maintained. A railroad company is not liable to a passenger for an accident which the passenger might have prevented by ordinary attention to his own safety, even though the agents in charge of the train are also remiss in their duty. From these principles it follows very clearly that if a passenger is negligently carried beyond the station where he intended to stop, and where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of travelling back, because these are the direct consequences of the wrong done to him. But if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, because this is gross imprudence, for which he can blame nobody but himself. If there be any man who does not know that such leaps are extremely dangerous, especially when taken in the dark, his friends should see that he does not travel by railroad. It is true that a person is not chargeable with neglect of his own safety when he exposes himself to one danger by trying to avoid another. In such a case, the author of the original peril is answerable for all that follows. On this principle we decided last year at Pittsburgh, that the owners of a steamboat which was endangered by a pile of iron wrongfully left on the wharf, and to get clear of it was backed out into the stream, where she was struck by a coal-boat and sunk, had a good cause of action against the city corporation, whose duty it was to have removed the iron. If, therefore, a person should leap from the car under the influence of a well-grounded fear that a fatal collision is about to take place, his claim against the company for the injury he may suffer will be as good as if the same mischief has been done by the apprehended collision itself. When the negligence of the agents puts a passenger in such a situation that the danger of remaining on the car is apparently as great as would be encountered in jumping off, the right to compensation is not lost by doing the

while they are moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, the company is

latter; and this rule holds good even where the event has shown that he might have remained inside with more safety. Such was the decision in *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181, so much relied on by the defendant in error. A passenger in a stage-coach, seeing the driver drunk, the horses mismanaged, and the coach about to upset, jumped out and was thereby much hurt. The court held the proprietors of the line responsible, because the misconduct of their servant had reduced the passenger to the alternative of a dangerous leap or remaining at great peril. But did the plaintiff in the present case suffer the injury he complains of by attempting to avoid another with which he was threatened? Certainly not; he was in no possible danger of anything worse than being carried on to a place where he did not choose to go. That might have been inconvenient, but to save himself from a mere inconvenience by an act which put his life in jeopardy, was inexcusable rashness. Thus far I have considered the case without reference to certain facts disclosed in the evidence which tend to diminish the culpability of the defendants' agents, while they aggravate (if anything can aggravate) the folly of the plaintiff. When he was about to jump, the conductor and the brakeman entreated him not to do it, warned him of the danger, and assured him that the train should be stopped and backed to the station. If he had heeded them, he would have been safely let down at the place he desired to stop at, in less than a minute and a half. Instead of this, he took a leap which promised him nothing but death; for it was made in the darkness of midnight, against a wood-pile close to the track, and from a car going probably at the full rate of ten miles an hour. Though these facts were uncontradicted, and though the court expressed the opinion that no injury would have happened to the plaintiff but for his own imprudence, the jury were nevertheless instructed that the defendants were bound to compensate him in damages. The learned judge held that the cases of mutual neglect did not apply, because this action

was on a contract. Now, a party who violates a contract is not liable, any more than one who commits a tort, for damages which do not necessarily or immediately result from his own act or omission. In neither case is he answerable for the evil consequences which may be superadded by the default, negligence, or indiscretion of the injured party. There is no form of action known to the law (and the wit of man cannot invent one) in which the plaintiff will be allowed to recover for an act not done or caused by the defendant, but by himself. When the train approached Morgan's Corner, some one (probably the conductor) announced it. Much stress was laid on this fact. The court said in substance, that to make such an announcement before the train actually stopped was a want of diligence, whereby the plaintiff was thrown into a position of danger; and though he was warned not to jump, yet, having done so, he could make the company pay him for the hurt he received. We think this totally wrong. It is not carelessness in a conductor to notify passengers of their approach to the station at which they mean to get off, so that they may prepare to leave with as little delay as possible when the train stops. And we cannot see why such a notice should put any man of common discretion in peril. It is scarcely possible that the plaintiff could have understood the mere announcement of Morgan's Corner as an order that he should leap, without waiting for a halt. If he did make that absurd mistake, it was amply corrected by the earnest warnings which he afterwards received. The remark of the court that life and limb should not be weighed against time, is most true; and the plaintiff should have thought of it when he set his own life on the hazard of such a leap, for the sake of getting to the ground a few seconds earlier. Locomotives are not the only things that may go off too fast; and railroad accidents are not always produced by the misconduct of agents. A large proportion of them is caused by the recklessness of passengers. This is a great evil, which we would not willingly encourage by allowing a premium on it to be ex-

liable for the consequences of the choice, *provided it is not exercised negligently or unreasonably*. Thus, where a passenger had bought a ticket and desired to stop at F., where the train was advertised to stop, and it did not stop entirely, but, while it was moving very slowly by, the plaintiff was directed by a brakeman to get off, and told that it would not stop or move more slowly, and another passenger got off safely, and in attempting to follow him the plaintiff was injured, it was held that leaving the cars under such circumstances was not, as a matter of law, negligence, but the question was a proper one for the jury.¹ But it must be understood *that the mere inconvenience or annoyance in being carried past his destination does not justify a passenger in leaving the moving train*. If he is carried beyond his station he has a remedy against the company in an action for damages; but if he leaps from the moving train, he must assume all the risk.² If the train stops, *but is started again while the passenger is in the act of leaving it, and without giving him a reasonable time for that purpose*, and an injury results, the company is liable.³

It is not in itself sufficient to charge the company in such cases that the conductor advised the passenger that he could safely jump from the train. The passenger must use his own judgment.⁴ The rule in reference to this matter may be said to be that if the plaintiff leaped from the car on the suggestion of the conductor, and the conductor only gave it as his opinion that the plaintiff could leap from the train in safety, *it was the plaintiff's duty to exercise his judgment whether or not it was safe; and if the danger was so apparent that a prudent man similarly situated would not have attempted the leap from the train, then the plaintiff was guilty of negligence, and should not be permitted to recover*.⁵ But in Georgia it has been held other-

torted from companies. However bad the behavior of those companies may sometimes be, it would not be corrected by making them pay for faults not their own. The court should have instructed the jury that the evidence, taken altogether (or even excluding that for the defence), left the plaintiff without the shade of a case."

¹ *Filer v. N. Y. Central R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327.

² *Little Rock, &c. R. Co. v. Tankersly*, 54 Ark. 25; *Walker v. Vicksburgh, &c. R. Co.*, 41 La. An. 795; 41 Am. & Eng. R. Cas. 172; *Damont v. New Orleans, &c.*

R. Co., 9 La. An. 441; 61 Am. Dec. 214; *Penn. R. Co. v. Aspell*, 23 Penn. St. 147; 62 Am. Dec. 323; *Illinois Central R. Co. v. Able*, 59 Ill. 131; *Gavett v. Manchester, &c. R. Co.*, 16 Gray (Mass.), 501; 77 Am. Dec. 422; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Jeffersonville, &c. R. Co. v. Swift*, 26 Ind. 459; *supra*, p. 1293.

³ *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228.

⁴ *Jeffersonville R. Co. v. Swift*, 26 Ind. 459.

⁵ *Chicago & Alton R. Co. v. Randolph*,

wise ; and where a railroad company accepts the fare of a passenger to a particular station on its road, it is bound to stop its train at that station, that he may get off the cars ; it is not sufficient that the speed of the cars is slackened ; and if, after passing the station, the speed of the cars is again slackened, that the passenger may get off, and, if he does get off under the direction of the conductor, and in so doing gets injured, the company is liable. It does not amount to a want of ordinary care for a passenger prudently to use the means which the company affords him to get off the train.¹ The rule as stated by an eminent authority appears to embody the true principle here : "The passenger may, however, safely rely on the judgment of the carrier, or those who represent him, where it is not plainly open to his observation that reliance will expose him to a danger that a prudent and reasonable man would not incur, and he cannot be charged with contributory negligence in obeying the directions of the carrier or his agents, unless such obedience leads to a known and obvious danger which a reasonable and prudent man would not incur."²

When a passenger enters a railway train and pays the regular fare to be transferred from one station to another, his contract does not obligate the corporation to furnish him with safe ingress and egress at an intermediate station ; and where such passenger, at an intermediate station, where the train is awaiting the passage of another train, without objection made or notice given, leaves the cars, he does no illegal act, but, for the time being, he surrenders his place as a passenger, and takes upon himself the direction and responsibility of his own motions during his absence. When a train is about to start, the proper employés should give reasonable notice

53 Ill. 510 ; 5 Am. Rep. 60. Where the danger is obvious and great the direction of the conductor cannot justify the act of leaving a train while it is in motion. *Lindsey v. Chicago, &c. R. Co.*, 64 Iowa, 407 ; 18 Am. & Eng. R. Cas. 179 ; *Vimont v. Chicago, &c. R. Co.*, 69 Iowa, 296 ; 71 Iowa, 58 ; 28 Am. & Eng. R. Cas. 210 ; *Bardwell v. Mobile & Ohio R. Co.*, 63 Miss. 574 ; *South, &c. R. Co. v. Schausler*, 75 Ala. 186. And the character of the danger is said to be a question for the jury. *Bucher v. N. Y. Central R. Co.*, 98 N. Y. 128 ; *International, &c. R. Co. v. Hassell*, 62 Tex. 256.

¹ *Georgia R. Co. v. McCurdy*, 45 Ga. 288 ; 12 Am. Rep. 577.

² *Hutchinson on Carriers* (2d ed.), § 661 c, citing *Jones v. Chicago, &c. R. Co.*, 42 Minn. 183 ; 41 Am. & Eng. R. Cas. 169 ; *Kansas, &c. R. Co. v. Dorrough*, 72 Tex. 108 ; *Baltimore, &c. R. Co. v. Kane*, 69 Md. 11 ; *St. Louis, &c. R. Co. v. Cantrell*, 37 Ark. 519 ; 40 Am. & Eng. R. Cas. 105 ; *Fowler v. Baltimore, &c. R. Co.*, 18 W. Va. 579 ; 8 Am. & Eng. R. Cas. 480 ; *Louisville, &c. R. Co. v. Kelly*, 92 Ind. 371 ; *Hanson v. Mansfield, &c. R. Co.*, 38 La. An. 111 ; 58 Am. Rep. 162 ; *Indianapolis, &c. R. Co. v. Horst*, 93 U. S. 291.

for such passenger to return to the car, and if there is an established signal by blowing the whistle, that should also be given. But if the passenger goes out of sight and out of reach of the voice which gives the usual loud and distinct notice for all passengers to repair on board, the corporation is not required to send after him.¹ The rule is that if a railroad company undertakes the carriage of passengers to an intermediate point on its road, *it is bound to stop there a sufficient length of time to enable all the passengers to alight whose destination is at that point; and if a passenger is injured in consequence of the starting of the train before a sufficient time has been given to alight, the company is liable in damages;*² and in an action to recover damages for injuries suffered by a passenger in leaving a train, alleged to have occurred by reason of the train not being stopped at a station long enough to enable the plaintiff to leave it in safety, it was held error for the court to refuse to instruct the jury that if the train had stopped "a sufficient time for the plaintiff to leave it, upon the platform where passengers leaving the defendant's cars usually land, and had again started on its course and had passed the platform, and the plaintiff then left the platform of the car, rather than be carried by, he was guilty of carelessness and could not recover in the action;" and that "if the train stopped a sufficient time to allow the plaintiff to get off, then the defendant was not guilty of negligence in its management."³

In an action for an injury to a passenger, caused by leaping from a box-car while the train was stopped at the station to which the plaintiff had taken passage, no means of descent being provided, it was held that an instruction to the effect that if the plaintiff leaped from the car without being in peril, or having reason to believe that she was in peril, and the injury thereby resulted, she could not recover, was held to be properly refused, because it did not contain the

¹ State v. Grand Trunk R. Co., 58 Me. 176; 4 Am. Rep. 258

² Pennsylvania R. Co. v. Kilgore, 32 Penn. St. 292; 72 Am. Dec. 787.

³ Davis v. Chicago, & C. R. Co., 18 Wis. 175. In an action for an injury to a passenger occurring while getting off the cars, instructions to the jury to the effect that if the want of proper care or skill on the part of the conductor caused the injury, the defendant would be liable, were held not to be erroneous, taken in connection

with another instruction to the effect that if the plaintiff was guilty of negligence in jumping from the car, she could not recover. And the evidence disclosing that the plaintiff leaped from the cars merely to prevent being carried on, and that she was at the time warned that it was dangerous, and so thought herself, it was held that she could not recover, she having contributed to the injury by her negligence. Evansville, & C. R. Co. v. Duncan, 28 Ind. 44.

further element that the circumstances might be such that the plaintiff might reasonably have apprehended injury from the leap.¹

But no recovery can be had if the cars are under such motion as to render it obviously dangerous for a person to attempt to leave them;² and under such circumstances it is not sufficient to charge the company that the conductor advised the passengers to make the attempt. It is the duty of the passenger to exercise his own judgment, and if the danger was so great that a man of ordinary prudence would not have attempted it, he is guilty of such contributory negligence as bars a recovery.³ When the danger is apparent, it must not be braved simply because the company is bound to stop the train, or because it is very important that the passenger should stop at that particular time. The company, in such case, is bound to respond in damages for its breach of duty in not stopping, *but is not liable for injuries received by the passenger in attempting to leave when it is dangerous for him to do so.*⁴ But in all cases the question of liability must necessarily be determined by the facts and circumstances of each case, — whether the train was in rapid motion, whether it was started while the passenger was attempting to leave, and whether the real danger was obvious.⁵

¹ Evansville, &c. R. Co. v. Duncan, 28 Ind. 441. See Illinois Central R. Co. v. Slatton, 54 Ill. 193; Penn. R. Co. v. Kilgore, 32 Penn. St. 292; Southwestern R. Co. v. Paulk, 24 Ga. 356; Lambeth v. North Carolina R. Co., 66 N. C. 494; Morrison v. Erie R. Co., 56 N. Y. 302; Dougherty v. Chicago, &c. R. Co., 86 Ill. 467; Wyatt v. Citizens' R. Co., 55 Mo. 485; Karle v. Kansas City, &c. R. Co., 55 Mo. 476; Meyer v. Pacific, &c. R. Co., 40 Mo. 151; Smith v. Union R. Co., 61 Mo. 588. In Burrows v. Erie R. Co., 3 Th. & C. (N. Y.) 44, the plaintiff, a lady, was about to alight at a station just as the train began to move slowly, another passenger attempted to assist her. She had several parcels in her hands. While attempting to help her off, the passenger assisting her was turned around and obliged to step off, and in doing so, pulled the plaintiff off with him, and she was injured. The General Term held that the plaintiff was not necessarily negligent in attempting to alight, but that the question whether she was so or not, was for the jury. But the Court of Appeals (63 N.

Y. 556) reversed this judgment, and held that the company was not responsible for injuries to the person assisting her, and that the plaintiff herself was guilty of negligence in attempting to leave the train while the cars were in motion.

² Damont v. New Orleans, &c. R. Co., 9 La. An. 441; Jeffersonville, &c. R. Co. v. Hendricks, 26 Ind. 228; Penn. R. Co. v. Aspell, 23 Penn. St. 147; Gavett v. Manchester, &c. R. Co., 16 Gray (Mass.), 501.

³ Chicago, &c. R. Co. v. Randolph, 53 Ill. 510; Jeffersonville, &c. R. Co. v. Swift, 26 Ind. 459; Chicago, &c. R. Co. v. Hazzard, 26 Ill. 373.

⁴ Georgia R. Co. v. McCurdy, 45 Ga. 288.

⁵ Jeffersonville, &c. R. Co. v. Hendricks, 26 Ind. 228; St. Louis, &c. R. Co. v. Cantrell, 37 Ark. 519. But see Burrows v. Erie R. Co., 3 Th. & C. (N. Y.) 44, in which it was held that no recovery could be had where the injury was brought about by the action of a person not in the employ of the company.

It is a part of the company's duty not only to stop the train, but also to have it remain stationary for a sufficient length of time for passengers to alight safely, and it is responsible for injuries sustained by the sudden starting of trains while a passenger is in the act of alighting.¹ Thus, in a case before the Michigan Supreme Court, a passenger, after the name of the station was called, went to the platform while the train was slackening up, and asked the conductor if it would stop there for water. The conductor said it would. The passenger then got upon the lower step of the platform, and when the train stopped at the usual landing-place tried to step off. But immediately, and without any notice or signal, the train started with a jerk, and drew up at the water-tank, a few feet farther on, throwing the passenger to the ground and severely injuring him. It was held that he had a right of action against the company.²

In a Maryland case,³ a young man in the full possession of all his physical and mental faculties, having a valise containing clothing in his right hand, and a basket of provisions on his left arm, attempted in broad daylight to leave a railway train while it was moving slowly, the distance from the lower step of the car to the platform being only eighteen inches, and in doing so was seriously injured. In an action of damages against the railroad company, it was held that he was not necessarily negligent. The court said: "Accidents occur, and injuries are inflicted under an almost infinite variety of circumstances; and it is quite impossible for the courts to fix the standard of duty and conduct by a general and inflexible rule applicable to all cases, so that a departure from it can be pronounced

¹ Wood v. Lake Shore, &c. R. Co., 49 Mich. 370.

² Wood v. Lake Shore, &c. R. Co., 49 Mich. 370; s. p. Santer v. N. Y. Central R. Co., 66 N. Y. 50; Mitchell v. Chicago, &c. R. Co., 51 Mich. 236; McNulta (receiver) v. Ensich, 134 Ill. 46; 24 N. E. Rep. 634. But in another case a different view is taken. The passenger, as the train approached the station and was still moving slowly, stood on the lower step of a car, in the act of stepping to the platform of the station, when, in consequence of the car being moved forward with a jerk, he was thrown upon the platform and injured. It was held that he was guilty of contributory negligence in attempting to alight from the train while it was in motion. Secor v. Toledo, &c. R. Co., 10 Fed. Rep.

15; Illinois Central R. Co. v. Green, 81 Ill. 19.

Where, after coming to a full stop, and while passengers were alighting, the train was suddenly moved without warning, it is immaterial whether the motion is backward or forward. That a passenger, injured under such circumstances, was intoxicated, would not exonerate the company. Such intoxication would have consideration upon the question of contributory negligence. Milliman v. N. Y. Central R. Co., 4 Hun (N. Y.), 409; 66 N. Y. 642. But an injury to which the intoxication of the passenger has contributed will not render the carrier liable. Weeks v. New Orleans, &c. R. Co., 32 La. An. 615.

³ Cumberland Valley R. Co. v. Mangans, 61 Md. 53.

negligence in law. There is no general accord of judicial opinion and precedent in reference to attempts to leave a car while it is in motion, but the weight of authority is against the proposition that it is always, as matter of law, negligence and want of ordinary care for a person to attempt to get off from a car when it is in motion. This proposition was pressed upon the Court of Appeals of New York;¹ but FOLGER, J., in delivering the opinion of the court in that case, said: 'Were I disposed to accede to it upon principle, which I am not, I should feel myself precluded by prior decisions of this court, and influenced to a contrary conclusion by those of other courts. The rule established, and as I think the true one, is that all the circumstances of each case must be considered, in determining whether in that case there was contributory negligence or want of ordinary care; and that it is not sound to select one prominent and important fact which may occur in many cases, and to say, that being present, there must, as matter of law, have been contributory negligence. The circumstances vary infinitely, and always affect, and more or less control, each other. Each must be duly weighed and relatively considered, before the weight to be given to it is known.'"²

Railway companies are bound to bring their trains to a halt *at places convenient and safe for passengers to alight*.³ In an English case,⁴ it appeared that the car in which the plaintiff rode, being the last car, remained about four feet from the platform when the train had stopped, and the plaintiff, in attempting to alight, believing she was about to step on the platform, fell, in consequence of the insufficiency of light at that point, and was injured. It was held that the plaintiff could recover. In this case, CÖCKBURN, C. J., said: "An invitation to passengers to alight on the stopping of a train, without any warning of danger to a passenger who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence; . . . and it appears to us

¹ In the case of *Morrison v. Erie R. Co.*, 56 N. Y. 302.

² *Johnson v. West Chester, &c. R. Co.*, 70 Penn. St. 357; *Penn. R. Co. v. Kilgore*, 32 Penn. St. 202; *Doss v. Missouri, &c. R. Co.*, 59 Mo. 27; s. c. 21 Am. Rep. 371; *Filer v. N. Y. Central R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327; *Lambeth v. North Carolina, &c. R. Co.*, 66 N. C. 494; 8 Am. Rep. 508; *Chicago, &c. R. Co. v. Baddley*,

54 Ill. 20; *Curtis v. Detroit, &c. R. Co.*, 27 Wis. 158. See also *Swigert v. Han. & St. Jo. R. Co.*, 75 Mo. 475; *Central R. & Bank Co. v. Letcher*, 69 Ala. 106; 44 Am. Rep. 505.

³ *Delamatyr v. Milwaukee, &c. R. Co.*, 24 Wis. 518; *post*, § 312.

⁴ *Cockle v. Southeastern Ry. Co.*, L. R. 7 C. P. 321.

that the bringing up of a train to a final stand-still, for the purpose of the passengers' alighting, amounts to an invitation to alight, — at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended he should get out if he proposes to alight at the particular station.”¹

Reasonable time for leaving the cars should be allowed, and if the time-tables do not allow sufficient time for all passengers, whether young or old, to leave the cars in safety, and an injury is thereby occasioned, the company will be liable.² But sick per-

¹ *Præger v. Bristol & Exeter Ry. Co.*, 24 L. T. Rep. N. S. 105 was a case exactly similar, and the plaintiff recovered. In *Colorado, &c. R. Co. v. Farrell*, 31 Ind. 408, where the train passed beyond the platform and stopped, leaving one of the cars over a culvert, the conductor announcing the name of the station, and a passenger in attempting to alight was injured by reason of darkness and not being able to see where the car was, the company was held liable. *Whittaker v. Manchester, &c. Ry. Co.*, L. R. 5 C. P. 464, was a case precisely similar, and the plaintiff was allowed to recover. But in *Bridges v. North London Ry. Co.*, L. R. 6 Q. B. 377, it was held that where a passenger alighted from the last car of a train, while such car was standing in a tunnel in the vicinity of a station, a recovery could not be had for the death of the passenger in consequence, there being no evidence that the train had come to a final stand-still, or to a place where the company designed the passenger should alight. See also *Siner v. Great-Western Ry. Co.*, L. R. 4 Exch. 117; *Frost v. Grand Trunk R. Co.*, 10 Allen (Mass.), 387. In *Forsyth v. Boston, &c. R. Co.*, 103 Mass. 510, where a passenger, on alighting from a car at night, instead of walking along the platform to the end steps, voluntarily stepped off the side into a cattle-guard, although knowing where the highway crossed the railroad track, it was held that he was not in the exercise of due care, and could not recover for injuries thus occasioned.

² *Toledo, &c. R. Co. v. Baddley*, 54 Ill. 19; 5 Am. Rep. 71. In *Kelly v. Hannibal, &c. R. Co.*, 70 Mo. 604, the plaintiff, a passenger, was injured in trying to leave a train under slow motion,

having been negligently carried past his destination. The court below nonsuited the plaintiff, and this was reversed, the court holding that the question of negligence was one for the jury. The court said, “In the case of *Doss v. Missouri, &c. R. Co.*, 59 Mo. 27, 21 Am. Rep. 371, it was held that whether the attempt of plaintiff to step from the cars while the train was in motion was, under all the circumstances of the case, such negligence as would relieve defendant of all liability for accident, was a question of fact for the jury. For a person to jump from a car propelled by steam while in rapid motion, is mere recklessness, and the leap must be made at his peril; but to step from a car not beyond the platform when its motion is slight or almost imperceptible may or may not be negligence, and of this the jury are to decide from all the attending circumstances.” In this case the plaintiff was not a passenger, but had got upon the train to assist some friends, and the train started without sufficient notice. *Wyatt v. Citizens' R. Co.*, 55 Mo. 485; *Karle v. Kansas City, &c. R. Co.*, 55 Mo. 476; *Lloyd v. Hannibal, &c. R. Co.*, 53 Mo. 509, 56 Mo. 338. “These are risks which the most prudent men take, and plaintiff will not be barred of a recovery if he adopted that course which the most prudent men would take under the circumstances. *Smith v. Union R. Co.*, 61 Mo. 588; *Meyer v. Pacific R. Co.*, 40 Mo. 151. “If a passenger be negligently carried beyond his stopping-place, and where he had a right to be let off, he can recover for the inconvenience, loss of time, and expense of travelling back. But when he jumps, or leaves the train, under circumstances which prudence would forbid, he does it at his

sons, and persons unable to take care of themselves should provide themselves with proper assistants while travelling in railroad-cars;

own risk and assumes the consequences of his own act." *Damont v. New Orleans, &c. R. Co.*, 9 La. An. 441; *Pennsylvania R. Co. v. Aspell*, 23 Penn. St. 147; *Jeffersonville, &c. R. Co. v. Jefferson*, 26 Ind. 228; *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Burrows v. Erie R. Co.*, 63 N. Y. 556; *Dougherty v. Chicago, &c. R. Co.*, 86 Ill. 467; *Lucas v. New Bedford, &c. R. Co.*, 6 Gray (Mass.), 64. If the conductor has given sufficient time for passengers to alight, a passenger who jumps from the train after it has started is remediless. *Strauss v. Kansas City, &c. R. Co.*, 75 Mo. 185; *Swigert v. Hannibal, &c. R. Co.*, 75 Mo. 475. It was said by the court in *Damont v. New Orleans, &c. R. Co.*, 9 La. An. 441, "If a passenger is foolhardy enough to jump off without waiting for a train to stop, he does it at his own risk, and for this, his own gross imprudence, he can blame no one but himself." In *Bon v. Railway Passenger Co.*, 56 Iowa, 654, which was an action to recover weekly compensation under an accident policy, which insured the plaintiff against accidents while actually riding on a public conveyance "in compliance with all rules and regulations of the carriers, and not neglecting to use due diligence for self-protection,"—it was held that for an injury received by him while riding on the steps of a railway-car, in violation of the known rules of the company, he could not recover upon the policy. *Secor v. Railroad Co.*, 10 Fed. Rep. 15; *Chicago, &c. R. Co. v. Seates*, 90 Ill. 586; *Gavett v. Midland R. Co.*, 16 Gray (Mass.), 501. In *Hickey v. Boston, &c. R. Co.*, 14 Allen (Mass.), 429, the rule was stated to be that a person cannot recover for injuries received while voluntarily and unnecessarily standing upon the platform of a car while in motion. *Nichols v. Middlesex R. Co.*, 108 Mass. 463; *Harvey v. Eastern R. Co.*, 116 Mass. 269; *Indianapolis, &c. R. Co. v. Able*, 59 Ill. 131; *Burrows v. Erie R. Co.*, 63 N. Y. 556; *reversing 3 Th. & C. (N. Y.) 544*; *Ohio, &c. R. Co. v. Schiebe* 44 Ill. 560; *Jeffersonville R. Co. v. Swift*, 26 Ind. 459.

In *Lake Shore, &c. R. Co. v. Bangs*, 47 Mich. 470, it was held that it is negligent

in a passenger to leap from a train moving six miles an hour, for the purpose of getting off at a station where the train should, but does not stop, although he does so to save anxiety to his mother who is expecting him, and although others have frequently jumped off trains going at that rate of speed. The court said: "We have reluctantly felt ourselves compelled to hold that in our judgment such conduct is beyond any question negligence, and that the jury should have been so instructed. The fact that many persons take the risk of leaving cars in motion does not make them any the less risks which they have no right to lay at the door of the railroad companies. No company can use effectively coercive powers to keep passengers from doing such things. All persons of sound mind must be held responsible for knowledge of the usual risks of such travelling. Every one is supposed to know that a fall beside a moving train is very likely to bring some part of the body or limbs in danger of being crushed. Every one is supposed to know that in jumping from a vehicle running six miles an hour or much less, he stands a good many chances of falling or being unable to fully control his movements, and that falling near a train is always dangerous. No doubt every one who tries such an experiment persuades himself that he will escape, but it is impossible to suppose that any one of common-sense does not know that there is danger. It is true that there are circumstances where it is not negligence to take a choice of risks or where an act is done without freedom of choice. But the common-sense of mankind teaches us that no one has a right to risk life or limb merely to avoid inconvenience. Upon the facts in this case no one can doubt that the railway agents were wrong in not stopping at the station. If put to any inconvenience by being carried further, Bangs had a legal remedy for it. No doubt the vexation and anxiety would lead to some trouble of mind, but they cannot be held sufficient to justify running into bodily danger." See also *Chicago City R. Co. v. Mumford*, 97 Ill. 560.

and if a person is sick or infirm and unable to walk without assistance, thereby requiring longer delay at the station than usual, he should give timely notice to the conductor.¹ But when such notice is given, or the company's agents have knowledge otherwise of the passenger's infirmity, the train must be stopped a sufficient time for him to alight safely regardless of whether more or less of the schedule time is required.²

Passengers at intermediate stations, where trains stop for refreshments, have the same rights in reference to safe egress and ingress, and proper station accommodations and platforms, as at the termini of the passage.³ But the rights of the passenger while a train is stopping

¹ *New Orleans, &c. R. Co. v. Statham*, 42 Miss. 607; 97 Am. Dec. 478.

² In the case of *Pennsylvania R. Co. v. Kilgore*, 32 Penn. St. 292, the plaintiff, who was ill and feeble, had taken passage, with her three children, on defendant's road to G. On arriving at G., two of the children alighted from the car, and plaintiff, with the other child, was preparing to alight when the train started. She sprang on the platform notwithstanding, but in so doing fell between the cars and the platform and was seriously injured. The jury having found a verdict in her favor, the court sustained it on the ground that the company was guilty of negligence in starting the train while she was in the act of leaving it and before she had had sufficient time to do so. In *Baltimore, &c. R. Co. v. Leapley*, 65 Md. 571; 27 Am. & Eng. R. Cas. 167, which was a case involving very similar circumstances (woman accompanied by two children, one of which she carried in her arms), the same conclusion was reached, and a recovery allowed. Compare *Burrows v. Erie R. Co.*, 63 N. Y. 556, reversing 3 Th. & C. (N. Y.) 544. See *Hutchinson on Carriers* (2d ed.), § 644.

³ *McDonald v. Chicago, &c. R. Co.*, 26 Iowa, 124; 95 Am. Dec. 114. In the case of *Peniston v. Chicago, &c. R. Co.*, 34 La. An. 777, it was held that railway companies carrying passengers over long journeys are bound to provide easy modes and to allow a reasonable time to their passengers to obtain food and necessary refreshments; to furnish safe and proper means of ingress and egress to and from trains to the eating-stations, whether said

eating-houses be under the control of the railroad or a third person; to provide sufficient lights for the safety of their passengers going to or coming from meals had at night, and give them correct information as to the exact location of their respective trains, when trains have been moved during the absence of the passengers at their meals; and that passengers receiving injuries for want of sufficient light and correct information of the whereabouts of their train on returning from the eating-station are entitled to recover damages against the company. The court said: "It is well established in jurisprudence that railway companies are under the legal obligation to furnish safe and proper means of ingress and egress to and from trains, platforms, station-approaches, etc., and it is well settled that any person injured, without fault on his part, by any dereliction of its duty in the premises by a railway company, can recover damages against the corporation for injuries thus received. *Cooley on Torts*, 605, 606, 642; *Add. on Torts*, § 245; *Shearm. & Red. on Neg.*, 327, § 275. This principle has been applied in a case where a passenger, an old lady, was put out at her destination at a station where there was no light to guide her steps, and no employé of the company to show her the way out of the station-grounds, and was injured in trying to go from the station to a friend's house, by falling from the platform. *Patten v. Chicago, &c. R. Co.*, 32 Wis. 528. Under the same rule a railway company was held responsible for injuries received by a passenger in walking from one of its trains to a transfer-boat by fall-

at an intermediate station for the purposes of the railroad alone, and not for the refreshment of the passenger, are not so extended.¹

ing on a wharf on which there was not sufficient light. *Beard v. Passumpsic, &c. R. Co.*, 48 Vt. 101. In the enforcement of the same rule a railway company was mulcted in damages in a case where a lady passenger, alighting from her train at her destination, and finding no safe and convenient platform leading to the highway, attempted to walk across three of the railroad tracks, and falling in a 'cattle-guard' filled with snow, was run over and killed by another train of said company. The obligation of furnishing, by railway companies, safe and easy ingress and egress to and from their platforms has been extended so as to embrace cases of persons who were not passengers on their roads, but who came on business to their stations, and were injured by means of insufficient or defective platforms, — such as a hackman who had transported passengers to a railroad depot. *Tobin v. Portland, &c. R. Co.*, 59 Me. 183; 8 Am. Rep. 415; *Jamison v. Railroad Co.*, 56 Cal. 593; *Low v. Conn., &c. R. Co.*, 72 Me. 313; 39 Am. Rep. 331; *Conn. v. Boston, &c. R. Co.*, 129 Mass. 500; 37 Am. Rep. 382; *Stewart v. International, &c. R. Co.*, 53 Tex. 289; 37 Am. Rep. 753. In a recent Michigan case, *Cartwright v. Chicago, &c. R. Co.*, 52 Mich. 606; 16 Am. & Eng. R. Cas. 321, the plaintiff, a woman sixty years of age, was travelling on the defendant's road. The night was dark and cloudy. On arriving at her destination she and her husband who was with her got out at the rear end of the car. There was a crossing there, and she was familiar with the locality. Instead of being over the level road as she expected, the end of the car was over a depression at the side of the road, and when her foot left the step she went down so far that her hold of the iron was broken and she fell to the ground. During all this time, no one connected with the train or employed by the defendant was giving her assistance or looking after passengers at the rear end of the car. It was held that under such circumstances it cannot be said that it is negligence *per se* for a passenger to leave the car at the rear. If there was negligence in this case it must

arise from the fact of the darkness, the known fact that the rear of the car was not at the landing, and the uncertainty in respect to the ground where it stood. If the front end of the car had been at the platform, there would have been more reason for insisting that the plaintiff should have gone in that direction. But we think a woman is excusable for not desiring to pass through the smoking-car, and she has a right to assume it is not expected of her. We also think that passengers, where not notified to the contrary, may rightfully assume that it is safe to alight from the car wherever it is stopped for passengers to leave it. And if no light is given them to leave the car by, they are not to be charged with fault for leaving in the darkness. If a car in which there were passengers was not standing where it would be safe for them to alight without assistance, it was the duty of the company to provide assistance, or give warning, or to move the car to a more suitable place. This was decided in *Cockle v. London, &c. Ry. Co.*, L. R. 7 C. P. 321, a case on its facts very similar to this; and the same principle has often been laid down in other cases. *Nicholson v. Lancashire, &c. Ry. Co.*, 3 H. & C. 534; *Foy v. London, &c. Ry. Co.*, 18 C. B. n. s. 225; *Brassell v. N. Y. Central R. Co.*, 84 N. Y. 241; *Penn. R. Co. v. White*, 88 Penn. St. 327; and *Baltimore, &c. R. Co. v. State*, 60 Md. 449; 12 Am. & Eng. R. Cas. 149, are among those so holding. There was therefore evidence to go to the jury on the question of negligence in the defendant. And the peculiarity of the case is such that the same facts which tend to show negligence in the railroad company tend in the same degree to show that the plaintiff was without fault. If she had a right to assume that the landing-place was safe, she was not negligent in stepping down as she did. It must be conceded that she did not exhibit a very high degree of caution, but we cannot say that it was not as much as the average passenger would have shown under like circumstances."

¹ *Frost v. Grand Trunk R. Co.*, 10 Allen (Mass.), 387.

Therefore, if a train is stopped at night, merely for the purpose of allowing a train which is expected from the opposite direction to pass by, and no notice is given by the employes of the company to passengers that they may leave the cars, one who leaves them and walks into an open cattle-guard and receives a personal injury cannot recover against the company therefor; and it is immaterial that he was misinformed by some person not in the employment of the company that he must go and see to having his baggage passed at a custom-house, supposed to have been reached by the train, or that the train was near a passenger-station, which was not the place of his destination.¹ This must admit of some modification in peculiar cases. Thus, in a recent case before the Supreme Court of Illinois, it appeared that a passenger on a steamboat on its stopping at a point on the river for some hours, in attempting to go on shore on the staging leading from the boat to the landing, was struck by the handle of a loaded box of coal in the hands of the company's servants and severely injured. Before attempting to pass over the staging he stopped to see whether it was safe to do so; the boat-hands were going off and coming on the boat bringing coal on board in boxes, those having loaded boxes coming in on the forward staging, and those going off with empty boxes on the after staging which was placed close by the side of the other. Perceiving no danger, passenger started to go on shore by the after staging, following closely after the servants going out with empty boxes; other servants in coming on by the forward staging with a loaded box, just before passing him, crossed over to the after staging and running against him inflicted the injury. The court held that he could recover; that the company had no right to require that passengers to a distant point should not go on shore at intermediate stations where a lengthened stop is made, except on their assuming all risk of being run down by its servants.² There seems to be no reason why the principle set up by this case should be applied as well to cases where a passenger is injured by the carrier's servants while in the act of alighting from the train at an intermediate station. From the

¹ *Frost v. Grand Trunk, &c. R. Co.*, 10 Allen (Mass.), 387; 87 Am. Dec. 668.

² *Keokuk Packet Co. v. True*, 88 Ill. 608. See also *State v. Grand Trunk R. Co.*, 58 Me. 176; 4 Am. Rep. 258. In a case in Pennsylvania it was held that one who passed out of a railway-car, and got upon

the platform thereof, and attempted to step or jump from the car while it was in motion, cannot recover for injuries suffered in consequence thereof, even though he had reached his place of destination, and the train, which had previously stopped to permit passengers to alight, had not so

decisions it is apparent that passengers are allowed considerable latitude in travelling by railroad; that the responsibility of railroad companies is made commensurate with the general duties which they owe the passengers, such as safe, convenient, and comfortable modes of ingress and egress from trains, platforms, station-approaches and passenger-rooms; and that the application of the rules of law, both in this country and in England, has been thus far characterized with a due regard both for the rights of the railways and the public.

In an action against a railroad company, for injuries, resulting from attempting to leave the train when in motion, an important element in the case is, whether the train was in fact stopped a sufficient time reasonably to enable the passengers to get off. If so, it cannot be said to have been guilty of negligence in the management of its train, and no recovery can be had.¹ In the case last

stopped for a reasonable length of time. *Penn. R. R. Co. v. Aspell*, 23 Penn. St. 147. In *Gavett v. Manchester, &c. R. R. Co.*, 16 Gray (Mass.), 501, it was held that "a passenger in a railroad-car who, knowing that the train is in motion, goes out of the car and steps upon the platform of the station while the train is still in motion, is so wanting in ordinary care as not to be entitled to maintain an action against the railroad corporation for an injury therefrom." *Hickey v. Middlesex R. R. Co.*, 14 Allen (Mass.), 429. *Nichols v. Railroad Co.*, 106 Mass. 463; *Harvey v. Eastern R. R. Co.*, 116 id. 269; *Illinois Central R. R. Co. v. Able*, 59 Ill. 131; *Ohio & M. R. R. Co. v. Schiebe*, 44 id. 460; *Burrows v. Erie R. R. Co.*, 63 N. Y. 556; *Morrison v. Erie R. R. Co.*, 56 id. 302; *Canada R. R. Co. v. Randolph*, 53 Ill. 510; *Illinois C. R. R. Co. v. Slatton*, 54 id. 133; *Ohio & M. R. R. Co. v. Stratton*, 78 id. 88; *Chicago & N. W. R. R. Co. v. Seates*, 98 id. 586. In *Secor v. Toledo, &c. R. R. Co.*, 10 Fed. Rep. 15, a passenger, on a train that had approached a station and was still moving slowly, stood on the lower step of a car, in the act of stepping to the platform of the station, when, in consequence of the car being moved forward with a jerk he was thrown upon the platform and injured; and *DRUMMOND, C. J.* held that he was guilty

of contributory negligence in attempting to alight from the train while it was in motion. *Bon v. Railway Co.*, 10 N. W. Rep. (Iowa) 225; *Lake Shore & M. S. R. R. Co. v. Bangs*, 47 Mich. 470, 11 N. W. Rep. 276; *Jewell v. Chicago, &c. R. R. Co.*, 54 Wis. 610.

¹ *Davis v. Chicago, &c. R. R. Co.*, 18 Wis. 175. In *Com. v. Boston & Maine R. R. Co.*, 129 Mass. 500, an action was brought to recover a statute penalty for killing one H., who claimed to be a passenger upon defendant's railroad. It appeared that the deceased, who was travelling on the defendant's train, left it while it was in motion, slowly passing a station where he intended to alight, and was struck by a train passing on another track and killed. It was held that the deceased was not a passenger after he had left the moving train, and was not entitled to protection by the defendant as such. The court said: "It is true that one who has bought a ticket of a railroad corporation is ordinarily a passenger of the corporation from the time when he reasonably and properly starts from the ticket-office or waiting-room in the station to take his seat in a car of the train until he has reached the station to which he is entitled to be carried, and has had an opportunity by safe and convenient means to leave the train and roadway of the corporation at

cited the court held that the defendant was entitled to an instruction that "if the train had stopped a sufficient time to enable the plaintiff to leave it safely, and had then again started on its course, and passed the platform, and the plaintiff then left the platform of the car while the train was in motion, rather than be carried by, he was guilty of carelessness and could not recover for the injuries sustained by him;" also, that "if the defendant stopped its train a sufficient time to allow the plaintiff to leave it safely, it was not guilty of negligence." The train must be stopped a sufficient time reasonably to enable all persons desiring to stop at the station to do so, and the question as to whether it did so in a given case is one of fact for the jury.¹

that station. *Warren v. Fitchburg R. R. Co.*, 8 Allen (Mass.), 227. The duty of the corporation toward him is to furnish a well-constructed and safe road, suitable engine and cars, competent and careful engine-men, conductors, and other necessary laborers, in order that all injuries which human foresight can guard against may be prevented. But this duty rests on the corporation only so long as the passenger sees fit to be carried by it; and if he chooses to abandon his journey at any point before reaching the place to which he is entitled to be carried, the corporation ceases to be under any obligation to provide him with the means of traveling further. And while it is true that if he leaves the train while it is at rest at a station, he is entitled to an opportunity so to do in safety, it is equally true that the corporation is not under any obligation to make it safe for him to leave the train while it is in motion, and that if he does so he assumes all risk of injury. *Gavett v. Manchester & Lawrence R. R. Co.*, 16 Gray (Mass.), 501. In the case at bar, so long as the train was in motion, H. could not leave it and still retain his right to protection until he had left the roadway of the corporation. By leaving the train while in motion he ceased to be a passenger and to have the rights of a passenger as completely, though the train was moving slowly and was near by the station, as if he had left it while moving at full speed between stations. *Hickey v. Boston & Lowell R. R. Co.*, 14 Allen (Mass.), 429. The fact that the car in

which H. was had passed the platform of the station to which he was entitled to be carried, did not give him the right to leave the train at the risk of the company." In *Harvey v. Eastern R. R. Co.*, 116 Mass. 269, it was held that the attempt to get on a moving train was *prima facie* contributory negligence. In *Illinois Cent. R. R. Co. v. Statton*, 54 Ill. 133, *id.* 109, the train stopped and remained a reasonable time, but the decedent waited until it began to move, and was killed in attempting to get off. It was held that there was no ground of recovery. Where a train stopped at a water-station, and a passenger attempted to get off, but just as he started to do so it was started with a jerk, and he was thrown off and injured, it was held that as he was told by the conductor that the train would stop, he was justified in getting off, and that the company was liable for the injury. *Wood v. Lake Shore, &c., R. R. Co.*, 49 Mich. 370.

¹ *Paulk v. Southwestern R. R. Co.*, 24 Ga. 356; *Illinois, &c. R. R. Co. v. Statton*, 54 Ill. 123; *Lambeth v. North Carolina R. R. Co.*, 66 N. C. 494; *Evansville, &c. R. R. Co. v. Duncan*, 28 Ind. 441; *Lloyd v. Hannibal, &c. R. R. Co.*, 53 Mo. 509; *Pennsylvania R. R. Co. v. Kilgore*, 32 Penn. St. 292; *Fairmount, &c. R. R. Co. v. Statler*, 54 *id.* 375; *Toledo, &c. R. R. Co. v. Baddsley*, 54 Ill. 19; *Southern R. R. Co. v. Kendrick*, 40 Miss. 374; *Inhoff v. Chicago, &c. R. R. Co.*, 20 Wis. 344.

If, under the influence of fright produced by a sudden peril to the train, a passenger jumps from the train, although he might not have been injured if he had stayed upon the train, yet he will not be precluded from recovering for the injury, if, in view of the peril, it was an act of reasonable precaution for the purpose of self-preservation, to leap from the cars.¹ The same degree of caution is not expected or required from a person who is suddenly and unexpectedly placed in a perilous position as would be required where there was time for deliberate action; and the rule may be said to be that a person, who without negligence, is placed in a position of peril is not responsible for a mistake of judgment in getting out of it.²

¹ *Southwestern R. R. Co. v. Paulk*, 24 Ga. 356. In *Wilson v. Northern Pacific R. R. Co.*, 26 Minn. 278, a passenger leaped from a train in rapid motion to avoid a collision, and it was held to be a question for the jury whether the passenger was guilty of contributory negligence or not, — *Buel v. N. Y. Central R. R. Co.*, 31 N. Y. 314; *Twonley v. Central Park, &c. R. R. Co.*, 69 N. Y. 162; *Iron Mountain R. R. Co. v. Mowrey*, 36 Ohio St. 318; *Schultz v. Chicago, &c. R. R. Co.*, 44 Wis. 638; *Guinz v. Chicago, &c. R. R. Co.*, 52 id. 672, — and that where there are two or more lines of action, any one of which may be taken, and a party, with ordinary skill, in the presence of imminent danger, is compelled immediately to choose one of them, and does so in good faith, the mere fact that it is afterward ascertained by the result that his choice was not the best means of escape is not sufficient to charge him with negligence. So in *Schultz v. Chicago & Northwestern R. R. Co.*, 44 id. 638, the court said: "It is probably true that had the plaintiff gone upon the east side of the track, or into the open space in the side of the coal-house, he would have escaped injury. But it cannot be held that he was absolutely guilty of negligence because he failed to take one of these methods of escape. He was acting on short notice in the presence of imminent danger. He had no time to calculate chances or to deliberate upon the means of escape. He was compelled to act at once, and it would be most absurd and unjust to hold him negligent because

the instinct of self-preservation did not suggest the most effectual method of escape from the peril. The jury might well find (as they did) that he was not negligent merely because there was a better way of escape than that which he chose."

² *Pennsylvania R. R. Co. v. Werner*, 89 Penn. St. 59. In *Mark v. St. Paul, &c. R. Co.*, 30 Minn. 493; 12 Am. & Eng. R. Cas. 86, GILFILLAN, C. J., said: "The action is by plaintiff, as administrator, for causing, through negligence, the death of his intestate, one Hemberg. In April, 1882, Hemberg was employed at the planing-mill at the corner of Fifth street and Second avenue northeast in the city of Minneapolis. At the corner of said avenue and Fourth street was a furniture-factory. Along and near the planing-mill and factory, and between them and the avenue, the defendant, for its accommodation, and to receive from and deliver furniture and lumber at the factory, had laid a side track from the main track, the expense of laying which was borne jointly by the defendant and the owners of the factory and mill. The planers in the mill stood about twenty feet from this side track. The boards coming out of the planers came within six to ten feet from it. The planed lumber as it was taken from the planers, was usually piled on the opposite side of the side track, and between it and the avenue. There appear to have been three planers, and at each a man was employed in receiving the boards as they came from it, carrying them across the side track, and piling them on the side opposite the

A railway company has not discharged its duty or relieved itself from liability to its passengers until it has stopped at the end of

mill. One of these men was Hemberg. The pile to which he was carrying boards at the time he was killed was about four feet from the track, and was lengthwise of it. One witness testified that each of these men had to cross the track about every second minute during the day; others appear to have been employed near and on both sides of the track between Fourth and Fifth streets. And there also appears to have been more or less lumber piled on each side of and near the track. One witness testified that there was a great deal of noise about the mill; that the noise 'kills the sound of the cars.' The defendant usually put a car in on this side track by 'kicking;' that is, by giving it an impetus with an engine, and then uncoupling and letting the car run in with the impetus thus given it. Cars were sent in that way four or five times a day, but it does not appear that it was done at any stated times; whenever the factory or mill was to receive or deliver a load, a car was sent in. On the occasion of Hemberg's death a car was 'kicked' in, and he being on the track it struck and killed him. There was evidence from which the jury might find that this car was sent in at an unusual rate of speed, — as high as nine miles an hour. It had no means of giving a signal of its approach, except by the calling out of the brakeman upon it. He did call out as the car approached the place where Hemberg was at work, and other persons also appear to have called out, and it may fairly be concluded from the evidence that Hemberg heard the shouting, and saw the car when it was very near to him. As to his action after he saw it, there is some disagreement in the evidence. One witness testified that he had started to cross the track, carrying a board, and as he was about to step on the track he saw the car, dropped the board, and started across in front of the car and it struck him. According to another witness he had carried the board across, put one end of it on the pile and attempted to recross, going with his back in the direction of the cars, and was struck while recrossing. Upon the evidence it was a

case for the jury to determine, both as to the negligence of the defendant and as to negligence on the part of Hemberg. The charge of the court on the subject of negligence on the part of Hemberg, while in a proper case it might be correct, was in view of the circumstances incorrect, because it ignores any consideration of the effect which the defendant's negligence (if the jury should find it guilty of negligence) may have had on Hemberg's mind, and on his ability to determine at once just what was the safest thing for him to do, when through such negligence he found the car almost upon him. We quote only one passage from the charge, the remainder of it, on the matter of negligence by Hemberg, being of the same general tenor. After referring to the testimony of the witness whose testimony we have first mentioned above, it proceeds: 'Now if that were true, if you should find that version to be true, I should charge you as a proposition of law that was negligence on his part; that it was a careless act for him, no matter what may have been his mental condition, though he may have been frightened, the act itself would have been a careless act. To attempt to run across a railroad-track when there was a car approaching would be carelessness of itself, and it would be contributory negligence which would defeat the recovery.' Hemberg was at work receiving boards from the planer (very close to the track on one side), carrying them across the track and piling them very close to it on the other side, and for that purpose crossing the track as often as every second minute during the day. So far as appears he had a right to be so at work. His employers occupied rightfully, it is to be presumed, the land on both sides of the track, on one side for their planing-mill, and on the other side for piling their lumber. Others as well as he were at work along-side of and near the track, crossing and recrossing it at all times during the day. It was the duty of defendant to run its cars with reference to this state of things, and also with reference to the fact that it ran them in at irregular times. If the jury had

their journey a reasonable time for them to get off the train in safety.¹ But if the train is stopped a sufficient length of time to enable a passenger to conveniently alight, and, without any fault of the company's servants, he fails to do so, and the conductor, not knowing, and having no reason to suspect, that he was in the act of alighting, caused the train to start while he was so alighting, then the company would not be liable.² If a passenger is negligently carried beyond his stopping-place, he can recover for the inconvenience, loss of time and expense of travelling back; *but if he jumps or leaves the train under circumstances which render the act imprudent, he does it at his own risk, and assumes the consequences of his act.*³ And it is negligence for a passenger to leap from a moving train for the mere purpose of getting off at a station where the train should stop but does not do so, even though he takes that course to save others from distress on account of his absence.⁴ But where a railway company fails to bring its train to a full stop at a station it will be liable in damages for injuries sustained by a

found, as they might from the evidence, that through the defendant's negligence, the unexpected sudden and rapid approach of the car placed Hemberg, without his fault, in a position of apparent peril, requiring instant action to escape, and that the peril and shouting by the brakeman and others frightened and bewildered him, so that for the moment he was incapable of deliberating and choosing the safest course to pursue, the defendant cannot allege it as negligence in law on his part, so as to prevent his recovery, that he adopted an unsafe course, if it were a natural result of the fright and bewilderment so caused by the defendant's negligence, such as might occur to one acting with ordinary prudence. To allow the defendant to do so would be like permitting one to take advantage of his own wrong. *Galena & C. U. R. R. Co. v. Yarwood*, 17 Ill. 509; *Indianapolis, &c. R. R. Co. v. Carr*, 35 Ind. 510; *Buel v. New York C. R. R. Co.*, 31 N. Y. 314; *Coulter v. Amer. Merch. Exp. Co.*, 5 Lans. 67; *Johnson v. Westchester, &c. R. R. Co.*, 70 Penn. St. 357; *Iron Mountain R. R. Co. v. Mowrey*, 36 Ohio St. 418; *Wilson v. Northern Pacific R. R. Co.*, 26 Minn. 278; *Mobile, &c. R. R. Co. v. Ashcroft*, 48 Ala. 15. If the jury had been satisfied from the evidence,

as they might have been, that the car was run in negligently, that it was not negligence in Hemberg not to see the car till it was close upon him, and if he then ran upon the track, his doing so was through terror and loss of self-possession caused by defendant's negligence, his doing so was not his negligence."

¹ *Jeffersonville, &c. R. R. Co. v. Parmelee*, 51 Ind. 42; *Keller v. Sioux City & St. Paul R. R. Co.*, 27 Minn. 178.

² *Straus v. Kansas City, St. Jo., &c. R. R. Co.*, 75 Mo. 185.

³ *Kelly v. Hannibal, & St. Joseph R. R. Co.*, 70 Mo. 604; *Straus v. Kansas City, &c. R. R. Co.*, 75 Mo. 185; *Nelson v. Atlantic & Pacific R. R. Co.*, 68 Mo. 593; *Houston, &c. R. R. Co. v. Leslie*, 57 Tex. 83; *Southwestern R. R. Co. v. Singleton*, 67 Ga. 306; *Burrows v. Erie R. R. Co.*, 63 N. Y. 556; *Jewell v. Chicago, St. Paul, &c. R. R. Co.*, 54 Wis. 610; *Lake Shore & M. S. R. R. Co. v. Bangs*, 47 Mich. 470; *Illinois Central R. R. Co. v. Chambers*, 71 Ill. 519; *Illinois Central R. R. Co. v. Lutz*, 84 Ill. 598; *Dougherty v. Chicago, &c. R. R. Co.*, 86 Ill. 467.

⁴ *Lake Shore & Michigan Southern R. R. Co. v. Bangs*, 47 Mich. 470.

passenger in attempting to get off, if, under all the circumstances, it was not imprudent for him to make the attempt.¹

In a Georgia case, it was held that if a conductor, or agent, in charge of a train, improperly ordered one who entered it to leave it while in motion, and in complying with this order he was injured, although the party may have been negligent in obeying the order, it would not free the company from liability; but that if one leaps from a train of cars moving at the rate of fifteen miles an hour, on the advice and concurrence of the conductor, his right to recover involves the question whether he prudently used the only means provided by the company for him to get off the train, and also whether his recklessness and want of ordinary care contributed to the injury; for if by the use of ordinary care he could have avoided the injury, the company would not be liable.² It is the duty of a railway company when passengers are getting out of the cars, after an announcement by the conductor that ten minutes would be given for refreshments, to permit the cars to stand still.³

It may be stated, from the cases previously cited, that in all cases involving the question of liability to passengers for injuries received in leaving a train while it is in motion, the question to be regarded is, whether the person injured, as an ordinarily prudent man, was justified in making the attempt; and in determining this question regard is to be had to the circumstances, — the speed at which the train was moving, the reason which induced the attempt, whether

¹ *Price v. St. Louis, &c. R. R. Co.*, 72 Mo. 414. Thus, in an action for an injury of a passenger in alighting from a freight train, the company's employes were held negligent in backing the train without giving the passenger time to alight from the caboose; but the contributory negligence of the passenger in jumping off the train while in motion was held to defeat the action. *Richmond & Danville R. R. Co. v. Morris*, 31 Gratt. (Va.) 200. The Lake Shore and Michigan Southern Railroad Company ran a special train from Clinton to Adrian and return, and the plaintiff below, who resided at Tecumseh, an intermediate station, bought a ticket from the latter place to Adrian and return. On the return trip the train reached Tecumseh between eleven and twelve o'clock at night, and stopped at the crossing of the principal street, about a quarter

of a mile before reaching the station, where most of the Tecumseh passengers left the cars. The train then started on and passed the station without stopping and without notice to passengers. The plaintiff, supposing it would stop at the station, went out on the platform of the car, and seeing that the train was not going to stop, jumped off on the opposite side from the depot, and in so doing was thrown under the train and seriously injured. It was held that the plaintiff's conduct was beyond all question negligent, and that the jury should have been so instructed. *Lake Shore & Michigan Southern R. R. Co. v. Bangs*, 47 Mich. 470.

² *Southwestern R. R. Co. v. Singleton*, 67 Ga. 306.

³ *Sauter v. New York Central & Hudson River R. R. Co.*, 6 Hun (N. Y.), 446.

the passenger was invited or advised by the employes of the company to do so, and all the facts and circumstances immediately connected with the act and the injury; and, unless the facts are such as to show that the passenger was guilty of negligence *per se*, it is a question for the jury whether he was guilty of such contributory negligence as relieves the company from liability for the injury. But, when the act of the plaintiff is such as to amount to negligence *per se*, the court will nonsuit the plaintiff or direct a verdict for the defendant.¹

SEC. 306. **Invitation to alight.**—A distinction prevails in some of the cases where the passenger is acting under the instructions of the company's employes. Thus, in an Illinois case,² the plaintiff pur-

¹ Central R. R. Co. v. Letcher, 69 Ala. 108; Memphis, &c. R. R. Co. v. Houston, 95 U. S. 297; Memphis, &c. R. R. Co. v. Copeland, 61 Ala. 376. In Treat v. Boston & Lowell R. R. Co., 131 Mass. 371, a passenger on the train approaching the station to which he was going, which was a flag-station and at which the conductor had promised to stop, left his seat and tried to make his way to the car-door, in order to leave the train at that station. It was a day of great public excitement, and the train which was a very long one, was crowded with people who filled all the seats, passage-ways, platforms, and even the roofs of the cars. The train did not come to a full stop on reaching the station, and the passenger in making his way through the crowd, reached the platform and, in the surging of the crowd, fell, or was pushed out on the platform and down the steps of the car; and after holding on with one hand for a short distance, he finally fell to the ground and was injured. It was held that it was a question for the jury whether the plaintiff acted with due care, and whether the defendant negligently and improperly managed its train so that the plaintiff's injury was caused thereby.

² Chicago & Alton R. R. Co. v. Randolph, 53 Ill. 510; 5 Am. Rep. 60. In Poole v. Chicago, &c. R. R. Co., 56 Wis. 227, the plaintiff, who was employed by the defendant railroad company as a detective, was directed to go to a point on the defendant's railroad, and a hand-car was provided to carry him. He, under the direction of the person who had charge of

the car, sat down in a manner that exposed him to danger, but he did not know that it was dangerous. It was held that it was for the jury to say whether plaintiff was negligent. In Giles v. Railroad Co., 49 N. Y. 47, the plaintiff was injured by getting off a car when it was in motion. It was proved in the case that when the train arrived at the place where the plaintiff desired to get off, the train ran very slowly but did not come to a full stop, and that the brakeman told the plaintiff to get off, and in attempting to do so she was injured. The court said: "That there was more hazard in leaving the car while in motion, although moving ever so slowly, than when it is at rest, is self-evident; but whether it is imprudent and careless to make the attempt depends upon circumstances;" and held that under all the circumstances it was proper to submit the question of contributory negligence to the jury. The case came before the court again in 59 N. Y. 351, and it was then held by the court that if the brakeman directed her to get off while the cars were in motion, she had the right to assume that she could get off with safety, although the train was in motion. GROVER, J., who delivered the opinion in 59 N. Y., says: "The employes upon a train, including brakemen, are in the line of their duty in assisting passengers in getting on and off the train, and in directing them in procuring seats. Passengers rightly assume that these persons are familiar with all the movements of the train, and know whether they can under the particular circum-

chased a ticket for a passage on a freight train. The train not stopping at his station he jumped on while it was moving slowly, and was injured. There was conflicting evidence whether the conductor suggested to him to jump. It was held that it was a question for the jury whether the plaintiff acted prudently. In a North Carolina case,¹ a passenger was killed in attempting to leave a train moving from two to four miles an hour. The conductor went out on the platform to help him alight. It was held that if without direction from the conductor he voluntarily incurred danger by jumping off, there could be no recovery; but otherwise, if the motion was so slow that the danger was not apparent to a reasonably prudent person, and the decedent acted under the conductor's instructions.² While it is true that the passenger must measurably use his own judgment as to whether or not it is safe for him to alight from a moving train, yet the question as to whether he is justified in yielding his judgment to the supposed superior knowledge of the company's servants, who from a long practical experience are presumed to be better competent to judge of the safety in doing so, and alighting at their invitation or advice, is one which must largely depend upon the circumstances of each case; and the controlling element is the speed at which the train is moving at the time, and the

stances, get on or off, or move upon the train with safety. When the conductor or a brakeman directs a passenger to get off the train, although in motion, such passenger will naturally assume that he knows that it is entirely safe or he would not give the direction." In *McIntyre v. R. R. Co.*, 37 N. Y. 287, it was held that "it is not negligence in law for a passenger to follow the direction given by a servant of a railroad company, and to pass from one car to another while the same are in motion. Whether in such case it is negligence is a question for the jury." In *Clark v. Street R. R. Co.*, 36 N. Y. 135, the court held that if a passenger is riding upon a platform of a car in a place of danger, his negligence is *prima facie* established; but that he may rebut that presumption by showing that he was riding there at the invitation of those having the car in charge. GROVER, J., says: "The proof of the plaintiff in the present case tends to show that the inside of the car was full and that the platform was full, so that no more persons could stand thereon; that

in this situation the car was stopped for the plaintiff to get on; that upon his getting on there was no place for him except standing on the step; that while riding in this situation the conductor called upon him for and received from him his fare. These facts, if true, authorized the jury to find that the plaintiff had been invited by those having charge of the car to ride in that place, and that it implied an assurance had been by them given that that was a suitable, safe place for him to ride. Under such a state of facts I do not think negligence can fairly be imputed to the plaintiff for riding in that position." It was held that the question of the plaintiff's negligence was properly submitted to the jury.

¹ *Lambeth v. North Carolina R. R. Co.*, 66 N. C. 794; 8 Am. Rep. 508.

² *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327; *Georgia R. R. Co. v. McCurdy*, 45 Ga. 288; 2 Am. Rep. 577. *Lake Shore, &c. R. R. Co. v. Bangs*, 47 Mich., 11 N. W. Rep. 276.

physical condition of the passenger. A passenger would not under any circumstances be justified in yielding to such advice when the train is moving at a high rate of speed; nor would a person who is lame, or laboring under any serious physical disability resulting from age, disease, or other cause, be justified in getting off the train while it is moving at all. In these cases, the passenger must *think* before he acts, and he is bound to *think and act as a person of ordinary prudence would do under the same circumstances*; so that in all these cases the question is, whether under the circumstances of the case, the passenger was, as a prudent person, justified in acting upon the invitation or advice of the agents of the company, or should have exercised and acted upon his own judgment and remained in the car.¹ A passenger is not justified in doing that which is obviously dangerous, although invited to do so by the company's servants or agents. Thus it will be seen that it is impossible to formulate any general rule that will furnish an absolute test of liability in a given case, but that in all cases the question is whether the passenger was himself guilty of negligence in acting upon the advice of the company's agents.² If the car is in rapid motion, or other circumstances exist which indicate that it is dangerous to alight, neither the advice nor direction of the conductor will justify the act.³ In determining

¹ *Bucher v. New York Central R. Co.*, 98 N. Y. 128; 21 Am. & Eng. R. Cas. 361; *South & North Ala. R. Co. v. Schaeffer*, 75 Ala. 136; 21 Am. & Eng. R. Cas. 405; *Vimont v. Chicago, &c. R. Co.*, 64 Iowa, 513; 28 Am. & Eng. R. Cas. 210; *McGee v. Missouri Pacific R. Co.*, 92 Mo. 208; 31 Am. & Eng. R. Cas. 1; *Edgar v. Northern R. Co.*, 11 Ont. App. 452; 22 Am. & Eng. R. Cas. 433; *Dela-ware, &c. R. Co. v. Webster* (Penn.), 6 Atl. Rep. 841; 27 Am. & Eng. R. Cas. 860; *St. Louis, &c. R. Co. v. Person*, 49 Ark. 182; 30 Am. & Eng. R. Cas. 567; *McCaslin v. Lake Shore, &c. R. Co.*, 93 Mich. 55; 52 Am. & Eng. R. Cas. 290; *Fulks v. St. Louis, &c. R. Co.*, 111 Mo. 335; 52 Am. & Eng. R. Cas. 280.

² In *Southwestern R. Co. v. Singleton*, 66 Ga. 252, the plaintiff got upon a car attached to a pay-train upon which passengers were not permitted to ride, and he was so informed by the conductor, and upon his advice leaped from the train while it was running at the rate of fifteen miles an hour, and was injured. It was

held that the question of negligence was for the jury.

³ *Guion v. N. Y. & Harlem R. Co.*, 3 Robt. (N. Y.) 25; *Penn. R. Co. v. Aspell*, 23 Penn. St. 147. The fact that the passenger is being carried by the station, and that it is very important that he should stop there will afford no excuse for an imprudent act. *Mettlestadt v. Ninth Ave. R. Co.*, 4 Robt. (N. Y.) 377; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228. If the statute requires the company to stop at a station a certain time, as five minutes, its failure to comply with the statute is not *per se* such an act as will render the company liable, irrespective of the contributory negligence of the passenger. *Houston, &c. R. Co. v. Leslie*, 57 Tex. 83; *Galveston, &c. R. Co. v. La Gierse*, 51 Tex. 189. Because the company has failed to discharge its duty the passenger is not absolved from his duty to act with due care and prudence. *Memphis, &c. R. Co. v. Houston*, 95 U. S. 697. *BRICKELL, J.*, in *Central R. Co. v. Letcher*, 69 Ala. 106.

the question, the weight which a person acting rapidly would be justified in giving to the advice or opinion of an experienced person, is an important factor, but as before intimated is by no means decisive. In a Missouri case,¹ the train stopped at a station only a minute; during that time the plaintiff's little child alighted; the plaintiff followed without delay, but after the train was in motion, and received her injuries in consequence of jumping from the train. It was held that the plaintiff would not be barred of a recovery by the fact that she jumped from the train while in motion.² In a Texas case,³ the court charged the jury that starting the train on the instant of the signal was negligent, and that while attempting to board a train moving rapidly would be negligent, such an attempt, if the train were moving slowly, would not be negligent. But the appellate court reversed this ruling upon the ground that the question was one of fact, in view of all the circumstances, and that the court could not, as a matter of law, say whether the act was negligent or not.⁴

¹ Lloyd v. St. Joseph, &c. R. Co., 53 Mo. 509.

² Pennsylvania R. Co. v. Kilgore, 32 Penn. St. 292.

³ Texas & Pacific R. Co. v. Murphy, 46 Tex. 356; 26 Am. Rep. 272.

⁴ Johnson v. Westchester R. Co., 70 Penn. St. 357. In a recent case in Alabama, as the train was approaching a station the name of the station was called and the train soon afterwards stopped, because about to cross the track of another railroad. When it stopped, the plaintiff, whose destination was the station called, went out of the rear door of the car, and though the train was by this time again in motion, jumped from the car and was injured in the fall. It was at night, and there were no lights, no depot building, or other landmark to indicate that a station had been reached; moreover, plaintiff was familiar with the locality and knew of the crossing. It was held that he had no right to recover. East Tennessee, &c. R. Co. v. Holmes (Ala.), 12 So. Rep. 286. See also Louisville, &c. R. Co. v. Lee (Ala.), 12 So. Rep. 48; Gadsden, &c. R. Co. v. Causler (Ala.), 12 So. Rep. 439. In Richmond, &c. R. Co. v. Morris, 31 Gratt. (Va.) 200, M. took passage in the caboose of a freight train on a railroad from W. to B., a way station. It was night when

the train arrived at B. M. had fallen asleep, and when approaching B., the conductor awakened him, telling him they were at B. The train went a short distance beyond the station-house without stopping, and when it stopped, the conductor, seeing M. still in the caboose asleep, again aroused him. The train stopped about a minute, and M. could then have gotten off whilst the train was not in motion. The conductor then went to the other end of the car, and looking back saw that M. did not get up. He returned, shook M. and told him to get up, or get off, he was at B. Immediately after the waking of M. the last time, the conductor went out at the end of the caboose with his lantern in his hand on to a stationary platform about two and a half feet from the platform of the car and stood there; the train commenced backing, and M. got up and walked out to the end of the car and jumped off, not knowing which way the car was going; and the caboose car and several others passed over him, injuring him severely. The point where M. jumped off was opposite the stationary platform, which extended quite a distance along-side the train, and was in good condition. There was no chain across the end of the platform in rear of the caboose, and it was not customary to have them on such cars.

SEC. 307. Injuries received in getting upon a Train. — The same duty and the same rule of liability exist on the part of a railroad company, in reference to stopping its trains sufficiently long to enable passengers to get on to it as exist in relation to stopping it for passengers to get off. Generally, it may be said, a person attempting to get aboard a train while it is in motion is guilty of such contributory negligence as will bar a recovery for an injury received while attempting to do so.¹ And the fact that pressing business

It was a dark, drizzly night, and the only lights at the station were two lanterns, one in the hands of the conductor and the other in the hands of a servant of the company at the station. The train reached the station behind time. It was held that the company was guilty of culpable negligence, and this negligence was the proximate cause of M.'s injury. The court said: "The conductor should not have put the train in motion until M. could leave the car; or if put in motion, he should have cautioned him not to attempt to get off until the train was stopped. Instead of this he told him to get off, and the train immediately commenced backing. The company was also in fault in not having stationary lights at the place, and this made it all the more incumbent on the conductor to exercise more than usual care and caution in letting off passengers. But whilst the injury sustained by M. was directly traceable to the culpable negligence of the company, the negligence or absence of ordinary prudence and caution on the part of M. contributed to his injury; and he is not entitled to recover of the company damages for the injury he sustained. One who by his negligence has brought an injury upon himself, cannot recover damages for it. Such is the rule of the civil and common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also in the same connection, the result depends on the facts. The question in such cases is: 1. Whether damage was occasioned entirely by the negligence or improper conduct of the defendant; or, 2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of ordinary care and cau-

tion on his part the misfortune would not have happened. In the former case the plaintiff is entitled to recover. In the latter he is not." *Railroad Co. v. Jones*, 95 U. S. 439; *Butterfield v. Forrester*, 11 East, 60; *Bridge v. Grand Junc. R. Co.*, 3 M. & W. 244; *Pennsylvania R. Co. v. Aspell*, 23 Penn. St. 147; *Baltimore, &c. R. Co. v. Sherman*, 30 Gratt. (Va.) 602; *Baltimore, &c. R. Co. v. Whittington*, 30 Gratt. (Va.) 805.

¹ *Hubener v. New Orleans, &c. R. Co.*, 23 La. An. 492; *Carroll v. Interstate Rapid Transit Co.*, 107 Mo. 653; 52 Am. & Eng. R. Cas. 273; *Keating v. N. Y. Central R. Co.*, 3 Lans. (N. Y.) 469; *Knight v. Pontchartrain R. Co.*, 23 La. An. 462. *Chicago, &c. R. Co. v. Scates*, 90 Ill. 586; *Phillips v. Rensselaer, &c. R. Co.*, 49 N. Y. 177; *Wabash, &c. R. Co. v. Rector*, 104 Ill. 296; 9 Am. & Eng. R. Cas. 264; *Solomon v. Manhattan R. Co.*, 103 N. Y. 437; 27 Am. & Eng. R. Cas. 155. In this last case it is said that if there is any difference the act of attempting to board a moving train is less excusable than that of leaving one. In *Chicago, &c. R. Co. v. Randolph*, 53 Ill. 513, 5 Am. Rep. 60, the plaintiff purchased a ticket for passage on a freight train. The train not stopping at the station, he jumped on while it was moving slowly and was injured. It was held a question for the jury whether he acted prudently. In *Texas, &c. R. Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272, the court charged that starting the train on the instant of the signal was negligent, and that while attempting to board a train moving rapidly would be negligent, such an attempt, if the train were moving slowly, would not be negligent. It was held error, and that this was a question of fact. See also *Johnson v. Westchester R. Co.*,

requires that he should take the train, *or any other motive*, will not excuse his negligence, or entail the consequences thereof upon the company. *If he was in fact guilty of contributory negligence, although the company was also negligent* no recovery can be had.¹ But while,

70 Penn. St. 357. In *Eppendorf v. Brooklyn City, &c. R. Co.*, 69 N. Y. 195, 25 Am. Rep. 171, the plaintiff signalled a street-car to stop; the car was open, with a side step or rail; the driver applied the brake, and while the car was moving slowly, the plaintiff undertook to board it, when the driver started suddenly, and he was injured. It was held a proper case for the jury. The court said: "Ordinarily it is perfectly safe to get upon a street-car moving slowly, and thousands of people do it every day with perfect safety." And so it is not negligence *per se* to leap from a a street-car in motion, when it has not stopped on request. *Wyatt v. Citizens' R. Co.*, 55 Mo. 485; *Crissey v. Hestonville, &c. R. Co.*, 75 Penn. St. 83. But compare *Nichols v. Sixth Ave. R. Co.*, 38 N. Y. 131; *Johnson v. Westchester, &c. R. Co.*, 70 Penn. St. 357; *Kelley v. Chicago, &c. R. Co.*, 50 Wis. 381; *McCorkle v. Chicago, &c. R. Co.*, 61 Iowa, 555. In *Harvey v. Eastern R. Co.*, 116 Mass. 269, it is held *prima facie* contributive negligence for a passenger to board a moving train. *Spooner v. Brooklyn City R. Co.*, 31 Barb. (N. Y.) 419; *Deyo v. N. Y. Central R. Co.*, 34 N. Y. 9. The rule is sometimes stated to be that if the injury was the result of the negligence of both parties, then, as the passenger's fault contributed to it, he cannot recover, unless the managing agents saw his perilous condition and might, by ordinary diligence, have prevented the injury. *Kentucky Central R. Co. v. Dill*, 4 Bush (Ky.), 593; *Higgins v. Hannibal, &c. R. Co.*, 36 Mo. 419; *Southern R. Co. v. Kendricks*, 40 Miss. 374; *Harper v. Erie R. Co.*, 32 N. J. L. 188. It is a question of fact whether it was negligent for a passenger to get on a moving train, and, unless under a great motion, it cannot be said to be *per se* negligent. The rate of speed is the most important factor. *Swigert v. Hannibal, &c. R. Co.*, 75 Mo. 475; 9 Am. & Eng. R. Cas. 322. If a passenger by a freight

train has ample time to get on the caboose, he is not justified in getting into a freight-car. *Player v. Burlington, &c. R. Co.*, 62 Iowa, 723; 12 Am. & Eng. R. Cas. 112. The train should come to a stop and remain at the station long enough for passengers reasonably to get aboard. The fact that they bring their cars up to the station some time before the departure, and move them back and forth in making up their trains, is not necessarily sufficient to establish negligence. *Flint, &c. R. Co. v. Stark*, 38 Mich. 714. In a New York case, the plaintiff attempted to get upon a train of cars while slowly passing a station where he had bought a ticket. The platform and steps were full, so that he could only get upon the lower step. A jerk of the cars threw him off, but he held on to the iron rod and ran along by the car striving to recover his position upon the step, although the speed of the train was increasing, when he was struck by a platform near the track and injured. It was held that there was such contributory negligence upon his part as justified a nonsuit. *Phillips v. Rensselaer, &c. R. Co.*, 49 N. Y. 177.

It is not generally considered that a passenger is necessarily negligent in attempting to board a moving street-car. *Stager v. Ridge Ave. R. Co.*, 119 Penn. St. 70; 33 Am. & Eng. R. Cas. 540. But even this may be negligence under some circumstances, as when a lady encumbered with bundles attempts to board a car before it has stopped. *Dietrich v. Baltimore, &c. R. Co.*, 53 Md. 347; 11 Am. & Eng. R. Cas. 115.

¹ It is not enough to rebut the strong presumption of negligence on the part of the passenger in attempting to board a moving train, to show that the trainmen acquiesced in his action, or that the company violated its duty in not stopping the train at the station. *Solomon v. Manhattan R. Co.*, 103 N. Y. 437.

as previously stated, generally an attempt to get aboard a train in motion will be treated as evidence of negligence *per se* on the part of the passenger, yet instances may exist where it is not so, and the passenger is justified in making the attempt; but in such cases liability arises, if at all, because of the fact that the danger was not obvious;¹ or because the agents of the company directed the passenger to make the attempt.² Thus, where a passenger attempted to board a night train with a sleeping-car attached, there is no error in refusing to instruct the jury that the plaintiff's attempt to get aboard before the sleeping-car was abreast of the platform, was negligence *per se*; it not appearing that the plaintiff knew the length of the train as compared with the platform, or ought to have assumed that it was intended to bring the sleeping-car to that position, — the rule being that, where a train stops at a station in such a manner as to induce the belief on the part of the passengers waiting on the platform that it had stopped for their reception, it is negligence to start the train without a signal when they had commenced to go aboard. Under these circumstances, if it was not intended the passengers should go aboard, it was the duty of the company to have some one there to warn and prevent them.³ So where there was evidence tending to show that the train had come to a full stop, and that the persons waiting to get upon it were told to go on board by the persons in charge of it, and that the plaintiff, in attempting to get on board, was injured in consequence of the sudden starting of the train, it is not error to leave to the jury the question of the negligence of the parties. And the fact that plaintiff was told by the company's servants to get on the hind car, and that he was injured in trying to get on another car, is not such conclusive proof of negligence on his part as to take the case from the jury. But it was held to be erroneous to instruct the jury that it was negligence in the company in not having an agent present, wearing a badge, whose duty should

¹ *Curtis v. Detroit, &c. R. Co.*, 27 Wis. 158; *Johnson v. Westchester, &c. R. Co.*, 70 Penn. St. 357; *Swigert v. Hannibal, &c. R. Co.*, 75 Mo. 475; 9 Am. & Eng. R. Cas. 322.

² *Detroit, &c. R. Co. v. Curtis*, 23 Wis. 152; 99 Am. Dec. 141.

³ *Curtis v. Detroit, &c. R. Co.*, 27 Wis. 158. In *Johnson v. Railroad Co.*, 70 Penn. St. 357, the passenger had a ticket entitling him to passage over two lines of

road. Upon his arrival at the terminus of the first line where he was to take a train on the other line, the train he was to take was moving off. It was held that he was not guilty of contributory negligence in attempting to board it while it was moving slowly, and that having fallen in the attempt and sustained injury he was entitled to recover as the company had violated its duty in moving the train before he had sufficient time to get aboard.

consist in informing the passengers what cars to enter.¹ *But even where the agents of the company direct the passenger to do so, the company is not liable, if it was negligence on the part of the passenger to make the attempt, in view of all the circumstances; and whether it was so or not depends upon the fact whether, under the circumstances, the act was obviously dangerous, and is a question for the jury.*²

The sale of a railroad ticket before the arrival of a train, or when it is at the station, does not give the purchaser a specific right to take that particular train, so that it must be held long enough for him to go upon it. The ticket gives no right to delay the train, but simply a right to take any train bound to the passenger's destination which stops at that station provided he presents himself in time, and upon the passenger is imposed the duty of presenting himself in time, or waiting for a succeeding train.³ Thus, in the case last cited, the plaintiff came to a station on defendant's road late for a train she desired to take. The train was at the station when she purchased her ticket, and she came out upon the platform after the signal to start had been given, and after drop-platforms, which were let down to connect the car and station platforms, had been raised, and just as the engineer was about to apply the steam, and at a moment when she could not see the conductor, who, with the brakeman, had stepped on the train and was not aware of her presence. All passengers had left the train, and all those in sight desiring to take it had gone aboard when the signal was given. As plaintiff took hold of the rail of a car and attempted to get on to the train it

¹ Detroit, &c. R. Co. v. Curtis, 23 Wis. 152; 99 Am. Dec. 141.

² Phillips v. Rensselaer, &c. R. Co., 49 N. Y. 177; Curtis v. Detroit, &c. R. Co., 27 Wis. 158. In the case of Hunter v. Cooperstown, 112 N. Y. 371; 37 Am. & Eng. R. Cas. 74, a passenger acting upon the direction of the conductor attempted to board a moving train at a station where the train was advertised to stop, but in making the attempt he was thrown to the ground and killed. The train was moving at the rate of at least six miles an hour. The court held that notwithstanding the deceased had acted under the suggestion or direction of the conductor, his conduct amounted to contributory negligence which would bar an action for his death. The court said: "We do not

regard it as of the slightest importance, under the circumstances of this case, that the conductor notified deceased to jump on. That notification certainly cannot be interpreted to mean more than that the train would not stop or go slower than it was then going, and that if deceased wanted to take it he must jump on at that moment. That does not alter the highly dangerous character of the act itself. The deceased was in absolute safety at the time the direction was given. It created no emergency which called for the exercise of immediate judgment in the choice between the two dangers. . . . We think the plaintiff should have been non-suited."

³ Paulitsch v. N. Y. Central R. Co., 102 N. Y. 280.

started and she was thrown down and injured. In an action to recover for the injury, defendant requested the court to charge that, "When the people who desired to stop . . . had left the train, and the persons who were there at the station-platform had entered on the train, the defendant had the right to raise the drop-platform and start the train." This the court refused to charge, unless with this qualification, "provided they had given each person having a right to enter upon that train as a passenger the opportunity to get on board." The Court of Appeals held that this refusal was error, and reversed the case.¹

It is the duty of a railroad company, through its agents, to give reasonable signals of the departure of its trains from its stations and depots; such signals as would ordinarily attract the attention of passengers and those interested in the movements of the cars of the railroad company. Should a passenger needlessly linger about a depot or station, and neglect to board a train, then the company, as to such passenger, is only bound to ordinary diligence; and it would be the duty of the passenger to use caution in observing signals which might be given by the agents of the company.² Thus, a passenger who was standing on the platform was going to Savannah to get married, and saw the train moving from the platform, and in his haste in trying to get upon the train, which had moved off, as he claimed, without signal, he was run into by another engine and severely injured. It was held that his own negligence was a question for the jury.³ In giving signals to tardy passengers who have needlessly neglected to board the train, the purpose is to prevent them from

¹ *Paulitsch v. N. Y. Central R. Co.*, 102 N. Y. 283, reversing 18 J. & S. (N. Y.) 241.

² See *Illinois Central R. Co. v. Slatton*, 54 Ill. 133; 5 Am. Rep. 109.

³ *Perry v. Central R. Co.*, 66 Ga. 746. A railway company may be liable for damages resulting from misleading announcements whereby passengers are led to attempt to get upon the wrong train. *Flint, &c. R. Co. v. Stark*, 38 Mich. 714. A plaintiff who arrives at the depot before the cars, with plenty of time to go upon the platform, but who waits upon the ground on the opposite side of the track, and when the cars come along attempts to get on from that side, and especially after dark, and is thrown off by the cars starting before she is securely on, cannot be said to be free from negligence

contributory to the result. *Michigan Central R. Co. v. Coleman*, 28 Mich. 440; *Harvey v. Eastern R. Co.*, 116 Mass. 269. The fact that the railway company is violating the law in not stopping its train for five minutes at a station will not excuse a passenger in attempting to get upon the train while it is in motion. *Galveston, &c. R. Co. v. Le Gierse*, 51 Tex. 189. If the company has constructed and maintained a platform at a convenient and suitable place, by which passengers can safely and securely enter the cars when the train is placed in position for the reception of passengers when the cars are not in motion, it has fulfilled its duty to the passenger so far as the platform is concerned. *Chicago, &c. R. Co. v. Scates*, 90 Ill. 586.

being left, in consequence of their own want of promptitude. Ordinary diligence as to such signals, according to what is usual on like occasions, in like circumstances, is required on both sides, — on the side of the company in giving them, and on the side of the passengers in looking, listening, or observing. What kind of signals will come up to such ordinary diligence, by what means to be made, and with what degree of loudness or distinctness, are questions for the jury, and not for the court.¹ The fact that the conductor of a train about to leave a station is induced by the conduct and conversation of a person on the station-platform to believe that he does not intend to take passage on the train, will not relieve the company from liability for injuries received by such person in consequence of the train being started without giving him time to get on, if the conductor actually sees him attempting to get on when he gives the order to start.²

SEC. 308. **Accommodations: Contributory Negligence.** — A railroad company is bound to furnish its passengers reasonable and proper accommodations for travelling, and if it has an insufficient number of cars, so that passengers are *compelled to ride upon the platform*, it is liable for injuries received by them while riding there;³ but for injuries received while *unnecessarily* riding there the

¹ Central R. & Banking Co. v. Perry, 58 Ga. 461.

² Swigert v. Hannibal, &c. R. Co., 75 Mo. 475; 9 Am. & Eng. R. Cas. 322. A lady passenger in getting on the cars in the night stepped off the platform and was injured. She sued the company, claiming that the accident was caused by insufficiency of light on the cars. It was held that the accident was not one ordinarily attributable to the neglect of the carrier. Proof of want of care must be shown. Chicago, &c. R. Co. v. Trotter, 60 Miss. 442.

³ Willis v. Long Island R. Co., 34 N. Y. 670; Malcolm v. Richmond, &c. R. Co., 106 N. C. 63; 44 Am. & Eng. R. Cas. 379; Louisville, &c. R. Co. v. Bisch, 120 Ind. 549; 41 Am. & Eng. R. Cas. 89; Central R., &c. Co. v. Miles, 88 Ala. 256; 41 Am. & Eng. R. Cas. 49; Werle v. Long Island R. Co., 98 N. Y. 650; 21 Am. & Eng. R. Cas. 429; Jackson v. Railway, 2 C. P. Div. 135; Graville v. Manhattan R. Co., 105 N. Y. 525; 34

Am. & Eng. R. Cas. 375. The fact that there are no seats in the cars does not justify a person in riding on the platform. So long as there is *standing-room* in the cars, he must ride there. Chicago, &c. R. Co. v. Carroll, 5 Brad. (Ill.) 201. But it has been lately held in New York that the fact that a passenger, failing to find a seat, and having none pointed out to him by the company's employés, takes a position on the platform of the car where other passengers are riding, without objection from any of the company's agents, and is thrown from the car by a sudden lurch given it by the increased speed in going round a curve, does not, as a matter of law, constitute contributory negligence. Long Island R. Co. v. Werle, 98 N. Y. 650; 21 Am. & Eng. R. Cas. 429. But it appears to us that the doctrine of the Illinois case is the more correct. A passenger who is not shown a seat may refuse to surrender his ticket or to pay fare until one is given him, but he has no right to put himself in a place of danger so long

company is not responsible,¹ nor while passing from one car to

as there is room in the car. In the New York case above cited, the question is barely considered; the court merely held that in view of the conflict in the evidence, it was proper to submit the whole question to the jury. If a car is crowded so that a passenger is forced out of his place, the company is liable for an injury sustained by him while in that position. *Jackson v. Ry. Co.*, 2 C. P. Div. 125.

¹ *Hickey v. Boston, &c. R. Co.*, 14 Allen (Mass.), 429; *Wills v. Lynn, &c. R. Co.*, 129 Mass. 351; *Alabama, &c. R. Co. v. Hawke*, 72 Ala. 112; 18 Am. & Eng. R. Cas. 195. In *Quinn v. Ill. Cent. R. Co.*, 51 Ill. 495, the decedent stood upon the steps of the car, holding on by the railing, when the conductor came along collecting fare. In making change for a bill which the passenger gave for his fare the wind blew it away, and the passenger in attempting to get it lost his foothold, and falling from the car was killed. The cars were quite full, but there was standing-room in all of them. The court held that there could be no recovery.

The rule is that no recovery can be had for an injury received while riding upon the platform, unless it was through a wanton or wilful act. *Taylor v. Danville, &c. R. Co.*, 10 Brad. (Ill. App.) 311. In *Camden, &c. R. Co. v. Hoosey*, 99 Penn. St. 434, 6 Am. & Eng. R. Cas. 654, the plaintiff was a passenger upon a train of about twenty overcrowded cars. He went through the train in search of a seat but found all the cars filled, and after standing in the forward car for a few moments, he went out upon the platform of the car, and by an ordinary jolt of the car, lost his equilibrium, and fell off the car and was injured. He was the only person upon the train who was injured during the trip, although many passengers were standing up in the cars. "If he had submitted," says the court, "as many others did, to the inconvenience of standing inside the cars, or if he had been guilty of no greater imprudence than in passing from car to car while the train was in rapid motion, it is not at all probable he would have been injured. His-much-to-be-regretted injury was the result of his

own carelessness;" and it was held that he could not recover, three out of seven judges dissenting. The case of *West Phila. Pass. R. Co. v. Gallagher*, 108 Penn. St. 524; 27 Am. & Eng. R. Cas. 201, seems to state an exactly contrary doctrine. In *Cotchett v. Savannah, &c. R. Co.*, 84 Ga. 687, it appeared that the passenger left his car to go to another for a drink of water; he stopped a moment on the platform to talk, and while standing there the coupling pin broke so that the cars parted and he sustained severe injuries. It was held error to direct a non-suit in an action by him, as the case was one for the jury. See also *Snowden v. Boston, &c. R. Co.*, 151 Mass. 220; *Lent v. New York, &c. R. Co.*, 120 N. Y. 467; 44 Am. & Eng. R. Cas. 375. In each of these cases the passenger was standing on the rear platform waiting for another car to be joined to the train, and immediately on the two being joined attempted to step to the new car. The question was held to be for the jury. But it is held not to be negligence *per se* for a passenger upon a street-railway car to stand upon the platform, — *Thirteenth St. R. Co. v. Boudrou*, 92 Penn. St. 475; *Nolan v. Brooklyn City, &c. R. Co.*, 87 N. Y. 63, — even though there is room in the car. *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Briggs v. Union St. R. Co.*, 148 Mass. 72; 37 Am. & Eng. R. Cas. 204; *Burns v. Bellefontaine*, 50 Mo. 139. But see *Ginna v. Second Ave. R. Co.*, 67 N. Y. 596; *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135; 93 Am. Dec. 496; *Downie v. Hendrie*, 46 Mich. 598. See also *Augusta, &c. R. Co., v. Renz*, 55 Ga. 126; *Meesel v. Lynn, &c. R. Co.*, 8 Allen (Mass.), 234; *Huel-senkamp v. Citizen's R. R. Co.*, 37 Mo. 537; s. c. 34 Mo. 45. And standing on the front platform, even when there is room inside, does not constitute negligence *per se*, when the injury is incurred by the fault of the company's servant. *Burns v. Bellefontaine R. Co.*, 50 Mo. 139; *Maguire v. Middlesex R. Co.*, 115 Mass. 239. So where one was compelled to ride on the platform of a car by a conductor, being ordered to give up his seat inside, the company was held liable for

another unnecessarily.¹ The fact that the conductor *permits* a passenger to ride upon the platform, when there is no necessity for

an injury incurred by careless driving. *Sheridan v. Brooklyn, &c. R. Co.*, 36 N. Y. 39. So where he was induced to ride there by the invitation of the conductor without pay. *Wilton v. Middlesex R. Co.*, 107 Mass. 108, 9 Am. Rep. 11; *contra*, *Baltimore, &c. R. Co. v. Wilkinson*, 30 Md. 224. But standing in an unsafe position upon the platform of a car after an opportunity is afforded the passenger of exchanging it for a safer one is contributory negligence. — *Ward v. Central Park, &c. R. Co.*, 42 How. Pr. (N. Y.) 289, — though it is not negligence *per se* to omit to take hold of the railing to prevent being thrown off. *Ginna v. Second Avenue*, 67 N. Y. 596. It is usually a question of fact for the jury whether those in charge of a car are negligent in allowing a passenger to stand upon or get on or off the front platform, and in not sooner stopping the car. *Crissey v. Hestonville, &c. R. Co.*, 75 Penn. St. 83; *Maher v. Central Packet R. Co.*, 67 N. Y. 52. And where plaintiff, a child of five years, with another of

eleven years, got on the front platform of a street-car and the driver allowed them to continue in that position, and in attempting against the remonstrance of the driver to get off while the car was in motion the plaintiff was hurt, it was held negligence as matter of law in the driver to allow children so young to ride on the platform, and that the company was liable. *Caldwell v. Pittsburgh, &c. R. Co.*, 74 Penn. St. 421; *Brennan v. Fairhaven, &c. R. Co.*, 45 Conn. 284; *Philadelphia, &c. R. Co. v. Hassard*, 75 Penn. St. 367; *East Saginaw R. Co. v. Boker*, 27 Mich. 503; *Wilton v. Middlesex R. Co.*, 107 Mass. 108, 9 Am. Rep. 11; *Day v. Brooklyn, &c. R. Co.*, 12 Hun (N. Y.), 435; *Com. v. Boston, &c. R. Co.*, 129 Mass. 374; 37 Am. Rep. 378. In *Andrews v. Capital, &c. R. Co.*, 2 Mackey (D. C.), 137; 15 Rep. 330, it was held that a passenger who remains on the rear platform of a street-car when there is standing-room within, and means of support, cannot recover for injuries suffered

¹ *Macon, &c. R. Co. v. Johnson*, 38 Ga. 409; *McDaniel v. Highland Avenue, &c. R. Co.*, 90 Ala. 64; 44 Am. & Eng. R. Cas. 378, *n.* It may be said that, except when acting under the suggestion of the conductor, it is *per se* negligence for a passenger to pass from one car to another, when it is in motion. But when acting under a suggestion from the conductor to do so, if a passenger in attempting to pass from one car to another while they are in motion, is injured, he will not be debarred from a recovery therefor, if the jury find that he made the attempt in consequence of either the order or advice of the conductor, and acted differently from what he otherwise would, in consequence thereof. *Cleveland, &c. R. Co. v. Manson*, 30 Ohio St. 451. But see *Ohio, &c. R. Co. v. Schiebe*, 44 Ill. 460, where such an act was held to preclude a recovery when done *against* the advice of the conductor. It is not necessarily contributory negligence for a man accustomed to railroad travel to attempt to pass from a passenger-coach to the baggage-car while the train is

moving three or four miles an hour, if, after the signal for his station is given, the conductor tells him that the train will not have time to stop, and directs him to hasten to the baggage-car, in order to get certain goods preparatory to getting off. *Davis v. Louisville, &c. R. Co.*, 69 Miss. 136. Whether there was any apparent danger in a particular act that is contemplated is, except in very plain cases, a question for the jury. *Davis v. Louisville, &c. R. Co.*, 69 Miss. 136. In another case, the plaintiff, after entering a passenger-car and standing for some time without finding a seat, was directed by the conductor, while the train was in motion, to pass forward into another car, where he would find a seat; in so passing he was jostled by the brakeman on the platform and fell off or was thrown off the cars. It was held that he was not guilty of any contributory negligence and was entitled to recover. *Louisville, &c. R. Co. v. Kelly*, 92 Ind. 371; 47 Am. Rep. 149.

his doing so, does not render the company liable for injuries received by him ; no person can charge another with the consequences of his

by him from being thrown from the platform by a sudden lurch of the car in going around a curve at the customary speed used on the straight portions of the track. It appeared also that the seats were all comfortably filled so that the plaintiff could not have gotten a seat unless room had been made for him by the passengers sitting closer together. With the exception of one white lady and gentleman, the passengers were all colored persons. They were orderly and well behaved. There were the ordinary straps for standing passengers to hold on by. CARTER, C. J., said: "The law does not contemplate that these corporations shall take the keeping of a man's discretion into their hands. If the plaintiff saw fit, under the facts found in the verdict, to stand on the platform, he took with him the perils of the platform, and cannot recover." JAMES, J., however, said: "I concur with the view that the plaintiff was responsible, or rather that he lost his right of action by contributing to the result; but I have not the least doubt that the defendant company was in fault. The special verdict found as a fact that the car was going around the curve at the same speed at which they ordinarily travel in a straight line. That is too fast to go around a curve ; but it is said to be necessary from the construction of the car, and from the fact that they have to go round pretty rapidly with one horse ; so that the rapid speed which they keep up in rounding a curve is largely attributable to the arrangement which they have chosen to make so as to use only one horse. I think therefore that the defendant was also in fault ; but the plaintiff ought not to recover when his own act contributed to the accident." *Thirteenth St. R. Co. v. Boudrou*, 92 Penn. St. 475, 37 Am. Rep. 707. In *Nolan v. Brooklyn, &c. R. Co.*, 87 N. Y. 63, 41 Am. Rep. 345, it was held that it was not negligent for a passenger to ride on the front platform of a street-car, although there were vacant seats, when he was smoking, and the rule of the company required passengers when smoking to ride on that platform, and the conductor took

his fare there without objection or notice. And in *Goodrich v. Penn., &c. R. Co.*, 28 Hun (N. Y.), it was held that a passenger was not, as matter of law, precluded from recovery for injury received while unnecessarily standing on the platform of a steam-railway car, it appearing that he had or saw no prohibition, and did not know that it was against the rules to stand there. In an action against a street passenger railway company the evidence showed that the plaintiff, while riding in a car of the defendant, got up and gave his seat to an elderly lady. The car being crowded he was obliged to pass out on to the front platform. While standing there the car ran off the track, and, at the request of the driver, the plaintiff, with others on the platform, got off and assisted in getting the car again on the track. When this was done the passengers got on the front platform again by stepping over an enclosure three feet high surrounding the same ; and while the plaintiff was in the act of getting on the platform in the same manner, the driver, without a signal or warning, started the horses. By the sudden jerk in starting, the plaintiff was thrown down on the side of the car and was dragged some distance and his foot crushed by the wheel. The accident occurred in the day time, and there was proof tending to show that the driver might have seen the plaintiff in the act of boarding the car. Proof was also offered to show there was a notice on the inside of the car requiring passengers to enter and leave the car by the rear platform. It was held that conceding there was negligence on the part of the plaintiff in attempting to enter the car by the front platform the question was whether the driver of the defendant's car, by the exercise of proper care and prudence, might have seen the position of the plaintiff, and thereby have avoided the injury ; that taking into consideration that the plaintiff had paid his fare, and that owing to the crowded condition of the car he was obliged to stand on the front platform, that he had gotten off at the request of the driver to help in getting the car again on the track, and the other facts in the

own negligence, simply because such other person permitted him to do the act.¹ In all cases, however, when questions of liability under

case, — there was an obligation on the part of the driver to see that the plaintiff and others had an opportunity to get on the car again before he started the horses; and if he saw, or by the exercise of proper care might have seen, the position of the plaintiff and thereby have avoided the injury, the defendant was liable, and that there was evidence *legally sufficient* to submit this question to the jury. *Lewis' Case*, 38 Md. 588; *Tuff v. Warman*, 94 Eng. C. L. 533; *Butterfield v. Forrester*, 11 East, 60; *Dowell v. Gen. St. Nav. Co.*, 85 Eng. C. L. 195; *People's Pass. R. Co. v. Green*, 56 Md. 84. In *Wills v. Lynn, &c. R. Co.*, 129 Mass. 351, it was held that a passenger injured while sitting on the *front* platform of a street-car, in spite of the rule of the company and the warning of the driver, has no remedy against the company. The court said, in substance: "Plaintiff's intestate, a passenger on defendant's street-railroad car, when the car was approaching a draw-bridge, sat down on the front platform. He was told by the driver of the car that he had better not sit in that place, as it was against the rules of the defendant and unsafe, to which he made a reply not understood by the driver. He continued to occupy his position while the car was detained at the bridge some fifteen minutes by an open draw; and remained there until he fell from the car after it had passed the bridge, receiving the injuries whereof he died. There were notices posted upon the car forbidding passengers to be upon the platforms, and that the defendant would not be responsible for the safety of passengers while there. In an action for such injuries, it was held that the defendant was not liable. It was for the plaintiff to prove that the intestate was free from negligence contributing to the injury which he received." In *Germantown Passenger R. Co. v. Walling*, 97 Penn. St. 55, it was held that riding on the *front* platform of a street-car which is crowded

is not contributory negligence *per se*, precluding a recovery for the death of a passenger occurring while so riding. The facts were these: Deceased took passage in one of defendant's street-cars; when the car stopped for him he tried to get on the rear platform, but could not do so on account of the crowd thereon. He then went to the front platform and found a place upon the step which he took and kept by holding with one hand on to the iron of the dasher and with the other hand to an iron bar under the front window of the car. While the car was going round a corner some little time after deceased had commenced to ride, several passengers were thrown against him, forcing him to let go his hold on the iron bar under the window, and causing him to fall over in front of the car, in consequence of which he was run over and killed. The court said: "Conductor, driver, and passengers acted as if there was room, so long as a man could find a rest for his feet and a place to hold on with his hands. Nor was that action exceptional. Notoriously it was very common in 1876, and perhaps it is not infrequent at this day. The companies do not consider such practice dangerous, for they knowingly suffer it and are parties to it. Their cars stop for passengers when none but experienced conductors could see a footing inside or out. The risk in travelling at the rate of six miles an hour is not that when the rate is sixty or even thirty. An act which would strike all minds as gross carelessness in a passenger on a train drawn by steam-power, might be prudent if done on a horse-car. Rules prescribed for observance of passengers on steam railroads, which run their trains at great speed, are very different from those on street railways. In the absence of express rules every passenger knows that what might be consistent with safety on one would be extremely hazardous on the other. Street-railway companies have all along consid-

¹ *Higgins v. N. Y. & Harlem R. Co.*, 2 Bosw. (N. Y.) 132; *South, &c. R. Co. v. Schaufier*, 75 Ala. 136; 21 Am. & Eng.

R. Cas. 405. Compare *Long Island R. Co. v. Werle*, 98 N. Y. 650; 21 Am. & Eng. R. Cas. 429.

such circumstances arise, and the facts are not so clearly established as to authorize the court to direct a verdict for the defendant, it is a question for the jury whether the plaintiff was guilty of such contributory negligence as will prevent a recovery, and this must be determined in view of all the facts; and if upon the whole it is found that the negligence of the company was the proximate cause of the injury, the fact that the plaintiff was in an improper place when injured will not prevent a recovery.¹

ered their platforms a place of safety, and so have the public. Shall the court say that riding on a platform is so dangerous that one who pays for his standing there can recover nothing for an injury arising from the company's default? *Meesel v. Lynn, &c. R. Co.*, 8 Allen, 234, was a case much like this in its facts. The court said: 'It is well known that the highest speed of a horse-railroad car is very moderate, and the driver easily controls it and stops the car by means of his voice, his reins, and his brake. In turning round an angle from one street to another, passengers are not required to expect that he will drive at a rapid rate, but on the contrary might reasonably expect a careful driver to slacken his speed. The seats inside are not the only places where the managers expect passengers to remain; but it is notorious that they stop habitually to receive passengers to stand inside till the car is full, and then to stand on the platforms till they are full, and continue to stop and receive them after there is no place to stand except on the steps of the platforms. Neither the officers of these corporations nor the managers of the cars nor the travelling public seem to regard this practice as hazardous; nor does experience thus far seem to require that it should be restrained on account of its danger. There is therefore no basis upon which the court can decide upon the evidence reported that the plaintiff did not use ordinary care. It was a proper case to be submitted to the jury upon the special circumstances which appeared in evidence.' These remarks are quite applicable to the case in hand. Standing on the front platform of a horse-car when there is room inside is not conclusive evidence that the person injured by the driver's default was

not exercising due care. *Maguire v. Middlesex R. Co.*, 115 Mass. 239. A street-railway company has the right to carry passengers on the platforms, and if a passenger be injured while standing there without objection by the company's agent, whether the injury was with his contributory negligence is for the jury to decide under all the facts and circumstances detailed in evidence. *Burns v. Bellefontaine, &c. R. Co.*, 50 Mo. 139. It has also been decided in other States that if a passenger be injured while standing on the platform of a street or horse car the question of his contributory negligence is one of fact for the jury. So little danger exists in riding on the platforms, accidents to passengers while thus riding are so rare, that this is the first time the question raised has been presented in Pennsylvania. We think the decisions in other States above referred to are sound. They accord with well-settled principles." See same views in *Nolan v. Brooklyn City R. Co.*, 87 N. Y. 63.

¹ *Zemp v. Wilmington, &c. R. Co.*, 9 Rich. (S. C.) 84; *Edgerton v. N. Y. & Harlem R. Co.*, 3 Barb. (N. Y.) 389; *Sheridan v. Brooklyn, &c. R. Co.*, 36 N. Y. 39; *Willis v. Long Island R. Co.*, 34 N. Y. 670; *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135; *Meesel v. Lynn, &c. R. Co.*, 8 Allen (Mass.), 234. So where a passenger leaps from the car to avoid injury, if the danger was such as to justify the step, the company is responsible for the consequences. *Southwestern R. Co. v. Paulk*, 24 Ga. 356; *Railroad Co. v. Aspell*, 26 Penn. St. 167; *Frink v. Potter*, 17 Ill. 406; *Eldridge v. Long Island R. Co.*, 1 Sandf. (N. Y.) 89. So for injuries received from sudden movements of the train, either in starting or stopping. *Stimson v. N. Y. Cent. R. Co.*, 32 N. Y.

It is the duty of a passenger standing on the platform of a railroad car to go into the car when requested so to do by a person having charge of the train, if there is standing room inside, although there are no vacant seats. The fact that the passenger has a well-founded ground of complaint against the railroad company for not providing adequate accommodations for passengers, does not release him from the duty of leaving the platform. It is questionable whether, where a passenger refuses to go inside the car when so requested, the brakeman or conductor has the right to force him to do so.¹

SEC. 309. Same Subject: Seats. — As a rule, it is the duty of a railroad company to furnish each passenger with a seat; and if it fails to do so, and the passenger is required to stand up, it is liable for any injury sustained by him in consequence thereof, so long as he is himself in the exercise of due care;² and the circumstance that the passenger knew that the car was full before he got into it makes no difference. So long as the company consents to take passengers, it is an assurance to them that it will take due care of them; and it takes the risks incident to the mode in which its agents know that the passenger must ride.³

While a passenger must not unnecessarily expose himself to risk and danger while on a train, yet it cannot be expected that he will constantly remain in his seat; and if he stands up in the car to look

333; *Gordon v. Railroad Co.*, 40 Barb. (N. Y.) 546; *Brown v. N. Y. Cent. R. Co.*, 32 N. Y. 597. It is not a passenger's business to interfere with the management of a train. He is not guilty of contributory negligence therefore in not pulling the bell-rope in order to warn the conductor of an impending collision. *Grand Rapids, &c. R. Co. v. Ellison*, 117 Ind. 234; 39 Am. & Eng. R. Cas. 480.

A railroad company is under no obligation to remove the effects of a continuous storm of snow, sleet, and rain, from the exposed platform of the car while making its passage between stations or between the termini of its route; and a passenger who has reason to know that there is snow and ice on the platform, and that the company has had no reasonable opportunity effectually to remove it, cannot recover for injuries sustained through a fall caused by his slipping thereon. *Palmer v. Pennsylvania R. Co.*, 111 N. Y. 488; 37 Am. & Eng. R. Cas. 150. See also *Weston v.*

New York El. R. Co., 73 N. Y. 595; *Taylor v. Yonkers*, 105 N. Y. 202.

¹ *Graville v. Manhattan R. Co.*, 105 N. Y. 525. In the case of *Thompson v. Duncan*, 76 Ala. 334, the court held that: "If there be any danger in standing near an open side-door of a car, when the train is starting or in motion, it is not an unreasonable presumption that persons of ordinary prudence are aware of it; and when a person so standing is thrown from the car by the shock attendant on its coupling with the train, and thereby injured he cannot complain that he was not notified of his danger, nor warned of the coming shock."

² *Blair v. Erie R. Co.*, 66 N. Y. 313. But the obligation of the company to furnish a seat for him, does not require the passenger to keep it during the whole trip. *Barden v. Boston, &c. R. Co.*, 121 Mass. 426.

³ *Evansville, &c. R. Co. v. Duncan*, 28 Ind. 441.

from a window, or to go to the sanitary, or for any reasonable purpose, and is injured while doing so through the negligence of the carrier, he is not precluded from a recovery. Thus, if a passenger, in order to look out of a window, presses against a door of which the window is a part, and the door being negligently fastened flies open, and he is injured, he is not guilty of such contributory negligence as precludes a recovery.¹ In a Pennsylvania case,² the plaintiff was a passenger by the defendant's ferry-boat from Camden to Philadelphia. As the boat approached the wharf she arose from her seat, along with the other passengers, and at the moment of the collision she was standing inside the cabin. The boat struck the bridge with such force as to throw the plaintiff down and produce the injury complained of. The court said: "Of course, it is true that if she had remained in her seat she would not have been injured, but it does not necessarily follow that her act of leaving her seat was contributory negligence. Had she occupied a manifest place of danger, as, for instance, a position very near to the end of the boat where there was no railing, and been precipitated into the water by the shock of the collision, the contention of the defendant would be much more appropriate, and would, perhaps, be conclusive against her. But the position she was in at the moment of the accident was not one of apparent danger at all. . . . It is the uniform habit of persons riding on steamboats to be upon their feet at will while the boat is in motion, and especially as it approaches the landing. It is one of the most comfortable and satisfactory features of steamboat travel that passengers are at liberty to move about from place to place on the vessel while it is in motion." Inasmuch as seats are usually provided for less than half the passengers, the argument of the ferry company seems particularly impudent.

SEC. 310. Duty of Railroad Company as to Stations. — A railway company is bound to keep its stations and premises in proper repair, and properly lighted, and to exercise proper care in other respects, to furnish a safe ingress and egress for, and to prevent injury to its passengers who come upon them.³ The duty owing by the company

¹ *Gee v. Metropolitan Ry. Co.*, L. R. 8 Q. B. 125; *Siner v. Great Western Ry. Co.*, L. R. 4 Exch. 117.

² *Camden, &c. Steam Ferry Co. v. Monaghan Penn.*, 10 W. N. Cas. 47.

³ *Burbank v. Ill. Central R. Co.*, 42 La. An. 1156; 45 Am. & Eng. R. Cas. 693;

Delaware, &c. R. Co. v. Trantwein, 52 N. J. L. 169; 41 Am. & Eng. R. Cas. 187; *Bennett v. New York, &c. R. Co.*, 57 Conn. 422; 41 Am. & Eng. R. Cas. 184; *Boyce v. Manhattan R. Co.*, 118 N. Y. 314; 41 Am. Eng. R. Cas. 111 (hole in platform); *Pennsylvania Co. v. Marion*,

in this respect extends to all who come upon the station premises in pursuance of the invitation which it holds out to the public; it embraces passengers who come to take passage on any of its trains, and those who leave its trains at that point, and in each case the duty continues for a reasonable time before and after the departure of the trains.¹ The duty also embraces those who are at the station to meet a friend or relative, or to see him safely off,² or as it has been aptly expressed, "all who are there to welcome the coming or speed the parting guest."³ Actions have been upheld for injuries sustained from defective platforms;⁴ from a failure to provide suitable lights

104 Ind. 239; 27 Am. & Eng. R. Cas. 132; *St. Louis, &c. R. Co. v. Fairbairn*, 48 Ark. 491; 30 Am. & Eng. R. Cas. 166.

¹ *Stewart v. International, &c. R. Co.*, 53 Tex. 289; *Pennsylvania Co. v. Marion*, 104 Ind. 239; 27 Am. & Eng. R. Cas. 132; *McKone v. Mich. Central R. Co.*, 57 Mich. 601; 47 Am. Rep. 596. But the company is not an insurer of the safety of its passengers, and as in other cases the contributory negligence of the injured person is a complete defence. *Renneker v. South Carolina R. Co.*, 20 S. C. 219; 18 Am. & Eng. R. Cas. 149. But where the company has provided safe platforms, etc., it is not liable for injuries resulting to a passenger by voluntarily alighting at some other point. *Pennsylvania R. Co. v. Zebe*, 33 Penn. St. 318; *Forsyth v. Boston, &c. R. Co.*, 103 Mass. 510.

² *McKone v. Michigan Central R. Co.*, 57 Mich. 601; 47 Am. Rep. 596; 13 Am. & Eng. R. Cas. 29; *Shannon v. Boston, &c. R. Co.*, 78 Me. 52; 23 Am. & Eng. R. Cas. 511. See also *Keefe v. Boston, &c. R. Co.*, 142 Mass. 251; *Tobin v. Portland R. Co.*, 59 Me. 183, *post*, n. 3, p. 1336. Thus, where the infirmities of the passenger make it necessary that he should have attendants, the company owes a duty to them while they are at the station in attendance upon him. *Hamilton v. Texas, &c. R. Co.*, 64 Tex. 251; 21 Am. & Eng. R. Cas. 336. The fact that one has not yet purchased his ticket, if he is at the station with a *bonâ fide* purpose of taking passage, does not discharge the company of its obligation to him. *Buffet v. Troy, &c. R. Co.*, 40 N.Y. 168. See also *Muel-*

hausen v. St. Louis R. Co., 91 Mo. 332; 28 Am. & Eng. R. Cas. 157.

But one who is merely in the station seeking shelter from a storm is not entitled to the rights of passenger, and the company owes him no duty. *Leary v. Cleveland, &c. R. Co.*, 78 Ind. 323. So when one comes to the station and finding that his train has left waits there for a horse-car, the company is under no obligation to keep the station lighted while he is so waiting. *Heinlein v. Boston, &c. R. Co.*, 147 Mass. 136; 33 Am. & Eng. R. Cas. 500. And when one who is a mere loiterer around the station is injured he cannot recover; the company owes him no duty. *Baltimore, &c. R. Co. v. Schwinding*, 101 Penn. St. 253; 8 Am. & Eng. R. Cas. 544; *Burbank v. Ill. Central R. Co.*, 42 La. An. 1156; 45 Am. & Eng. R. Cas. 693. But one who goes on a station-platform to read a notice of stock killed which has been posted there is entitled to recover for an injury sustained in consequence of a defective plank in the floor of the depot. *St. Louis, &c. R. Co. v. Fairbairn*, 48 Ark. 491.

The company is bound to afford a safe passage to and from its mail-cars in order to enable persons desiring to do so to mail letters, and for a failure to discharge this duty it is liable to any person injured thereby, although he came upon the station grounds for the sole purpose of mailing his letters and not to take passage on the company's trains. *Hale v. Grand Trunk R. Co.*, 60 Vt. 605; 15 Atl. Rep. 300.

³ *Hamilton v. Texas, &c. R. Co.*, 64 Tex. 251; 21 Am. & Eng. R. Cas. 336.

⁴ As where the flaps were improperly turned back. *BRAMWELL, B.*, in *Corn-*

to enable passengers safely to leave the premises;¹ from defective steps or platforms;² from pits or unfenced holes in the station-ground;³ from the slipperiness of stairs leading to the

man *v. Eastern Counties Ry. Co.*, 4 H. & N. 784; *Dobiecki v. Sharp*, 88 N. Y. 203; *St. Louis, &c. R. Co. v. Cantrell*, 37 Atk. 519; *Liscombe v. New Jersey R. Co.*, 6 Lans. (N. Y.) 75 (hole in station floor). Where a platform was so narrow that a passenger standing thereon was injured by a passing train, the company was held liable. *Chicago, &c. R. Co. v. Wilson*, 63 Ill. 167; *McDonald v. Chicago, &c. R. Co.*, 26 Iowa, 124.

¹ *Alabama, &c. R. Co. v. Arnold*, 80 Ala. 600; 84 Ala. 159; 35 Am. & Eng. R. Cas. 466; *St. Louis, &c. R. Co. v. White*, 48 Ark. 495; 30 Am. & Eng. R. Cas. 545; *Moses v. Louisville, &c. R. Co.*, 39 La. An. 649; 30 Am. & R. Cas. 556; *Bueneman v. St. Paul, &c. R. Co.*, 32 Minn. 390; 18 Am. & Eng. R. Cas. 153; *Stewart v. International, &c. R. Co.*, 53 Tex. 289; *Patten v. Chicago, &c. R. Co.*, 32 Wis. 524; *Nicholson v. Lane & Yorkshire Ry. Co.*, 34 L. J. (Exch.) 84; *Birkett v. Whitehaven Junc.*, 4 H. & N. 730; *Martin v. Gt. Northern Ry. Co.*, 16 C. B. 180; *Cornman v. Eastern Counties Ry. Co.*, 4 H. & N. 781; *Toomey v. London, &c. Ry. Co.*, 3 C. B. n. s. 146; *Foy v. London, &c. Ry. Co.*, 18 C. B. n. s. 225, *affirmed*, L. R. 4 Exch. 117.

² *McDonald v. Chicago, &c. R. Co.*, 26 Iowa, 124; 95 Am. Dec. 114; *Delaware, &c. R. Co. v. Trautwein*, 52 N. J. L. 169; 41 Am. & Eng. R. Cas. 187 (defective staircase); *Liscombe v. Jersey, &c. R. Co.*, 6 Lans. (N. Y.) 75 (defective floor of depot). In *East Tennessee, &c. R. Co. v. Watson*, 94 Ala. 634; 10 So. Rep. 228, the company was held liable for an injury caused by passenger's stepping into a hole in a bridge constructed on the company's right of way, but put there by the proprietor of an adjoining hotel and turned over by him to the company; and this although the company had never repaired it or exercised any control over it, and it had not been used by the company for any purpose for three years prior to the accident. So where a company erected and maintained an approach to its boat-landing, the fact

that it was a part of the public street cannot relieve the company from responsibility for injuries caused by defects in its construction. *Skottowe v. Oregon, &c. R. Co.*, 22 Ore. 430; 30 Pac. Rep. 222.

³ *Burgess v. Great Western Ry. Co.*, 6 C. B. n. s. 923; 95 Eng. Com. Law, 923; *McKone v. Mich. Central R. Co.*, 57 Mich. 601; 47 Am. Rep. 596; 13 Am. & Eng. R. Cas. 29; *Cross v. Lake Shore, &c. R. Co.*, 69 Mich. 363; 35 Am. & Eng. R. Cas. 476 (civil engineer properly allowed to testify that hole was in dangerous place and needed repairing); *Louisville, &c. R. Co. v. Wolfe*, 80 Ky. 82. *Boycé v. Manhattan R. Co.*, 118 N. Y. 314; 41 Am. & Eng. R. Cas. 111; *Seymour v. Chicago, &c. R. Co.*, 3 Biss. (U. S.) 43. In *Tobin v. Portland, &c. R. Co.*, 59 Me. 183, 8 Am. Rep. 415, the liability of railroad companies to persons coming to their stations upon business, and not as passengers, for injuries caused by defects in station-platforms was adjudicated, and it was held that a hackman could recover of a railroad company for an injury received while carrying a passenger to their depot for transportation, by stepping without fault into a cavity in the platform, negligently left in a defective condition. It is the well-settled rule that railroad companies are bound to keep their platforms and landing-places safe and convenient for all who make use of their cars as a means of conveyance. But it is not so clear what the liability of the company is in this respect to persons not passengers. But *APPLETON, C. J.*, in delivering the opinion of the court in this case, said: "The hackman conveying passengers to a railroad depot for transportation, and aiding them to alight upon the platform of the corporation, is as rightfully upon the same as the passengers alighting. It would be absurd to protect the one from the consequences of corporate negligence and not the other. The hackman is there in the course of business; but it is a business important to and for the convenience and profit of defendants. The general principle is well settled that a person in-

station;¹ from allowing articles to stand or lie upon the platform obstructing and endangering travel over it, as a switch handle;² and generally, the company is bound, as to its passengers or persons upon its premises "by invitation," to see to it that its premises are in such a condition, *in all respects*, that a person in the exercise of ordinary care can leave them without injury; and this extends to and embraces proper and suitable platforms, steps, and walks, as well as suitable lights.³ The question as to whether a station and its grounds are sufficiently lighted is one of fact, and the mere circumstance that they were lighted sufficiently for the company's servants and agents who

jured without neglect on his part, by a defect or obstruction in a way or passage over which he is induced to pass for a lawful purpose, by an invitation, express or implied, can recover damages for the injury sustained against the individual so inviting, and being in fault for the defect." *Barrett v. Black*, 56 Me. 498; 96 Am. Dec. 497; *Carleton v. Franconia Iron & Steel Company*, 99 Mass. 216. From the general duty which railroad companies owe to persons thus apparently invited, such as friends and companions of passengers, porters and hackmen, it would seem that they are responsible for injuries resulting from a neglect of that duty in respect to platforms, station-approaches, etc. A railway company was held liable for the death of a passenger who slipped into an unfenced cattle-guard and was killed by a passing train. *Hoffman v. N. Y. Central R. Co.*, 75 N. Y. 605; *Hartwig v. Chicago, &c. R. Co.*, 49 Wis. 358; *Hulbert v. N. Y. Central R. Co.*, 40 N. Y. 145.

¹ *Davis v. London, &c. Ry. Co.*, 2 F. & F. 588; *Osborne v. London, &c. Ry. Co.*, 21 Q. B. Div. 220; 35 Am. & Eng. R. Cas. 483. In the case of *Baltimore, &c. R. Co. v. Rose*, 65 Md. 485; 27 Am. & Eng. Cas. 125, which was an action for an injury sustained by reason of defective stairs leading from a pier, the company defended on the ground that plaintiff had no right to make use of those particular stairs. But, it appearing that the company had provided no special means of ingress or egress, the court held that the defence was not available; that until it had constructed and designated a special way for ingress and egress passengers had

a right to use any way not prohibited to them.

² *Martin v. Great Northern Ry. Co.*, 16 C. B. 179; *Wabash, &c. R. Co. v. Peyton*, 106 Ill. 534; 18 Am. & Eng. R. Cas. 1. Thus where passenger while standing on platform is struck by a part of the car which projected over the platform, it is proper to submit the case to the jury; a passenger has a right to presume that he can stand on the platform with safety. *Dobiecki v. Sharp*, 88 N. Y. 203; 8 Am. & Eng. R. Cas. 485.

³ *Cornman v. Eastern Counties Ry. Co.*, 4 H. & N. 781; *McKone v. Mich. Central R. Co.*, 57 Mich. 601; 47 Am. Rep. 596. In *Beard v. Connecticut, &c. R. Co.*, 48 Vt. 101, the plaintiff was at the defendant's depot for the purpose of taking the train. There was a platform extending from the east side of the depot to the track over which passengers passed in going to and from the cars. There were stairs leading through the centre of the depot to the street on the opposite side which was several feet lower than the track, and there were also stairs at either end of the depot leading from the platform to the street. The stairs at the north end of the depot were open at the top, and there was nothing to indicate that they were not for the use of passengers. In fact they were built by and were intended for the sole use of the express company, but they were on the defendant's premises. The plaintiff in attempting to pass down these stairs in the dark, from the upper platform to the street, *without fault on her part*, fell from the lower platform to the ground and was injured. It was held that the defendant was responsible for the injury.

know the premises is not sufficient. They must be sufficiently light to enable strangers safely to get upon or leave the premises.¹ So if the exit side of the station is blocked by a train, and a passenger in attempting to cross behind it falls over some object that is left there and is injured, the company is liable.² But in order to fix the liability of the company, it must appear that they managed or used the property in such a way as to make it likely to be a source of danger to passengers and others lawfully upon it.³ It is not enough to prove the mere fact that an injury was received by falling down the steps of the station, but it must also be shown that they were constructed in such a way as to be more than ordinarily dangerous;⁴ or, that the company had placed obstacles upon the platform, as a weighing machine, over which a passenger tumbled and was injured, but it must also be shown that the mischief could not reasonably have been foreseen, and that precautions to prevent it ought to have been used.⁵

"It is the duty of railway passenger carriers," say the court in an Iowa case,⁶ "to provide comfortable rooms for the accommodation of passengers, while waiting at stations, and to enforce such regulations in regard to smoking therein as to enable passengers to occupy them in reasonable comfort. If this is not done, it will afford reasonable excuse for passengers to enter the cars before they are drawn up in front of the platform in preparation for immediate departure. And, if in so doing a passenger sustains injury through a defect in the platform, against or opposite which the cars are standing, . . . the company will be held responsible. Railway passenger carriers have power to make reasonable rules and regu-

¹ *Missouri Pac. R. Co. v. Neiswanger*, 41 Kan. 621; 39 Am. & Eng. R. Cas. 471; *Martin v. Gt. Northern Ry. Co.*, 16 C. B. 180; *Birkett v. Whitehaven Junction Ry. Co.*, 4 H. & N. 730. But where there are lighted stairways leading from the station, a passenger assumes all risk in attempting to use an unlighted one. *Bennett v. New York, &c. R. Co.*, 52 N. J. L. 422; 41 Am. & Eng. R. Cas. 184.

² *Nicholson v. Lancashire, &c. Ry. Co.*, 34 L. J. Exchq. 84; *Holmes v. Northeastern Ry. Co.*, 38 id. 161. In the case of *Buchanan v. West Jersey, &c. R. Co.*, 52 N. J. L. 265; 41 Am. & Eng. R. Cas. 59, a female passenger who was injured by her throwing herself to the

platform in order to avoid being struck by a piece of timber which projected over the platform, was allowed to recover for the impairment of her health resulting from the accident.

³ *Burgess v. Gt. Western Ry. Co.*, 32 L. T. Rep. 76.

⁴ *Toomey v. London, &c. Ry. Co.*, 3 C. B. N. s. 146. See *Kelley v. Manhattan R. Co.*, 112 N. Y. 443; 37 Am. & Eng. R. Cas. 60; *Ryan v. Manhattan R. Co.*, 121 N. Y. 126; 44 Am. & Eng. R. Cas. 426.

⁵ *Cornman v. Eastern Co. Ry. Co.*, 4 H. & N. 785.

⁶ *McDonald v. Chicago, &c. R. Co.*, 26 Iowa, 124; 95 Am. Dec. 114.

lations, in regard to the conduct of passengers, extending to the time and mode of entering the cars ; but such rules and regulations must, in some way, be made known to passengers, or they will not be in fault for not conforming to them." It was, accordingly, held, in this case, that the female plaintiff, who found the passenger-room unfit for occupation, by reason of tobacco smoke and other impurities, and attempted to enter the cars which had not yet been drawn up to the platform, and was injured by the giving way of the steps at the end of the platform, was entitled to recover. DILLON, C. J., in this case,¹ laid down the following rule as applicable to all cases of injury

¹ McDonald v. Chicago, &c. R. Co., 26 Iowa, 124 ; 95 Am. Dec. 114. In this case, it appeared that plaintiff in company with her husband, having purchased a ticket, in attempting to get aboard the train some twenty minutes before it was time for it to leave, and at a point some distance from the usual place, she stepped upon the end of a plank in the platform which, being loose and out of place at one end, gave way, and let her down upon the track headforemost under the train, breaking her leg and otherwise injuring her. It was so dark that the plaintiff could not see the condition of the plank. The defendants showed that the point at which the injury happened was three hundred feet from the station, and that the usual place for passengers to get on or off the train was at a point immediately in front of the station. It was also shown that it was customary when the train arrived, as in this instance, from the west, to run back so as to bring the baggage and express cars to a point opposite the freight-depot for the purpose of discharging and receiving baggage and express matter. This movement, on the evening on which the accident in question happened, placed the passenger-coaches west of the west end of the platform, so that the nearest passenger-car was about one car length beyond the steps at the west end of the platform. It was while the cars were thus standing that the plaintiff, without waiting for them to be drawn up to the platform in front of the passenger-depot, started for them, walking the whole length of the platform, and in descending the steps the injury for which this action was brought happened. Defendant also produced evidence to the effect

"that there was plenty of room to get on and off the trains from the platform ; and that there was no necessity for any one to go down these steps to get on. Before leaving, trains always draw up in front of the passenger-depot and stop to take on passengers. The accident happened fifteen or twenty minutes before the leaving-time of the train. The steps are not intended or used for passengers to get on the trains."

The defendant asked the court to give the following instructions: "1. If the jury believe from the evidence that the defendant, at the time of the alleged injury at the station, was provided with a safe and suitable platform in front of and adjacent to the passenger-rooms of said station, so that passengers could safely and conveniently pass from said room to the trains, and that passenger trains stopped at said platform for the purpose of receiving passengers, and if said plaintiff, in attempting to get upon said train by a different and unusual way and at a different and unusual place, met with said accident, then the plaintiff is not entitled to recover in this action. 2. That if the plaintiff attempted to enter the train at a place not prepared or designed by the defendant for receiving passengers on trains, there being no paramount necessity for so doing, and in making such attempt she received the said injury, then her own fault contributed to the same, and the plaintiff cannot recover. 3. The liability of defendant as a common carrier did not commence as to the plaintiffs until the train which they were to take was drawn up to the usual place for receiving passengers, unless they were directed

about stations and in entering cars: "Railway companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station-grounds reasonably near to the platforms, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go." ¹

by some authorized agent of defendant to go upon the train at another and different place or before the train reached the usual place."

Each of these was *refused*, and the defendant excepted. The court then charged the jury as follows: "The principal question for you to determine is, by whose fault or negligence did the accident occur? If one of the steps was loose and not nailed down, by reason of which the accident happened, it is such a want of care as would render the defendant liable, unless you find that the accident happened, or was contributed to, by the want of ordinary care and prudence on the part of the plaintiff. It is for you to determine from the evidence whether the plaintiff used ordinary care and prudence in leaving the depot and going to the cars by the way and at the time she did; and by ordinary care is meant such care and prudence as an ordinarily prudent person would exercise under like circumstances. If you find that an ordinarily prudent person would not have gone down the steps of the platform where the accident occurred, but would have waited until the passenger-cars were opposite the passenger-depot, then the defendant is not liable. And if you find that the plaintiff went by a way which was not used or travelled over by passengers to enter the cars, and that a person of ordinary prudence would not have gone by that way, you may fairly infer that there was a want of ordinary care on her part. Passengers must exercise ordinary care in approaching and entering the cars. If, however, you find that the defendant backed its train up to the place where it stood when the accident happened; that persons could conveniently and safely approach the train where it then stood but for the defective step, and there was no rule or regulation of the

company prohibiting persons from approaching the cars by that way, and that an ordinarily prudent person would have approached the train by that way, the defendant is liable, if the accident occurred by reason of the defective step." The charge was fully sustained on appeal. *McDonald v. Chicago, &c. R. Co.*, 26 Iowa, 124; 95 Am. Dec. 114

¹ *Burgess v. Gt. Western Ry. Co.*, 6 C. B. N. s. 923; *Martin v. Great Northern Ry. Co.*, 16 C. B. 179. In *Sheperd v. Midland Ry. Co.*, 20 W. R. 705, the plaintiff, while waiting for the train, it being cold, walked back and forward on the platform in front of the station, and slipping on a strip of ice, fell, dislocating his shoulder. It was held that he could recover. In *Caswell v. Boston, &c. R. Co.*, 98 Mass. 194; 93 Am. Dec. 151, it was held that where a passenger had stepped upon the platform in front of the station to wait for a train, and by the negligent misplacement of a switch, an engine appeared to be approaching directly towards the platform, and the passenger had cause to apprehend danger, and, while running to avoid it, was injured, the company was liable. In *Longmore v. Great Western Ry. Co.*, 19 C. B. N. s. 183, it appeared that a railway company, for the more convenient access for passengers between two platforms of a station, erected across the line a wooden bridge which the jury found to be dangerous. It was held that the company were liable for the death of a passenger through the faulty construction of the bridge, although there was a safe one about one hundred yards further around, which the deceased might have used. In *Cockle v. Southeastern Ry. Co.*, 27 L. T. N. s. 320, a railway train in which the plaintiff was a passenger, on arriving at the station of the plaintiff's destination, was drawn up with the body

Wherever passengers are accustomed to be received upon a train, whether at the station-house, at the water-tank, or elsewhere, railroad companies are bound to keep in a safe condition for transit the ordinary space in which passengers go to and from the train, and passengers have the right to presume that this duty has been performed.¹ Where it appears that there was no passenger-platform to indicate the proper place for passengers to enter the cars, and it was the custom of the company to receive and discharge passengers on both sides, and the plaintiff himself, on former occasions, had been received and discharged on the east side of the track, as had other passengers all along, for a distance of over two hundred feet; it was held that the company, having permitted this method of receiving passengers at

of the train alongside the platform, but with the last carriage, in which the plaintiff rode, opposite a receding part of the platform, at which persons could not alight, — a space of about four feet intervening between it and the train. Arriving trains were not usually drawn up at this spot, but at a point farther on, where the platform was well lighted with gas-lamps. It was a dark night, and there were no lamps lighted near the place where the plaintiff's carriage stopped. No express invitation to the passengers to alight, and no warning of danger in alighting was given by the company's servants, but the train had come to a final standstill. The plaintiff opened the door of her carriage, stepped out and fell, and thereby sustained injuries in respect of which she brought her action against the company. It was held by the court (affirming the judgment of the Court of Common Pleas, and following *Præger v. The Bristol & Exeter Ry. Co.*, 24 L. T. R. N. s. 105), that the action was maintainable; for the leaving a carriage which has been brought up to a place at which it is unsafe for a passenger to alight, under circumstances which warrant a passenger in believing that it is intended she shall get out, and that she may, therefore, do so with safety, without any warning of her danger, amounts to negligence on the part of the company, for which, at least in the absence of contributory negligence on the part of the passenger, an action may be maintained.

¹ *Hulbert v. N. Y. Central R. Co.*,

40 N. Y. 145. In *Green v. Erie R. Co.*, 11 Hun (N. Y.), 333, the plaintiff's intestate was a passenger on a western-bound train of defendant, for Otisville, of which place he was resident; passengers arriving there from the east are compelled to alight upon a platform between the tracks and cross the eastern track, in order to reach the station. The plaintiff's intestate stepped from the smoking-car, at the end nearest the locomotive, upon the platform, and from thence upon the eastern track, when he was struck and killed by a train of coal-cars going east, the engine of which had been switched off. There was no brakeman on the forward end of the coal cars, nor was any signal given of its approach. The defendant claimed that the plaintiff's intestate was guilty of contributory negligence, *as there was no evidence to show that he looked to the west before stepping on the track*. It was held that the question of contributory negligence was, under the circumstances of the case, a question for the jury, and that it was for them to draw the inference as to whether the deceased looked both ways for the train, or not, and it was error to direct a non-suit. And that although, as a general rule, the plaintiff in an action to recover damages sustained by reason of the negligence of the defendant cannot recover if he has been guilty of contributory negligence, yet where the defendant could, by the exercise of ordinary care and diligence, have prevented the accident, the plaintiff's negligence will not excuse him.

the station, must be regarded as responsible for the safety of the appliances used, and must answer for the injury sustained by plaintiff because of their inefficiency.¹

A passenger on a railway is justified in assuming that the company has, in the exercise of due care, so regulated its trains that the road will be free from interruption or obstruction when passenger trains stop at a depot or station to receive and discharge passengers.² But where it has a platform and other facilities for entering and leaving the cars with safety on the depot side of their track, the failure to have the opposite side likewise prepared as a place for entering and leaving the cars cannot be regarded as negligence; it may select and adhere to such arrangement of its depots and platforms as it may see fit, if those made are safe and commodious.³ The company's

¹ *Phillips v. Rensselaer, &c. R. Co.*, 57 Barb. (N. Y.) 644. In the case of *Plopper v. N. Y. Central R. Co.*, 13 Hun (N. Y.), 625, a prominent question on the trial was whether the plaintiff was not guilty of contributory negligence which conduced to the injury, by attempting to get off the cars on the south side of the train in place of getting off on the north side, where the depot was located, and on which side passengers generally alighted from the defendant's trains, and on which north side several passengers alighted in safety on the occasion in question. The plaintiff had never attempted to alight from the train on the south side except on this occasion. She came out of the car, as it was slowing down, on to the rear platform, and casting a bundle which she was carrying down into the highway which crosses the railroad at right angles at that point, proceeded down the steps of the car. When she arrived at the bottom step, with her right foot upon the ground and the other upon the step, and with her left hand holding the rail, the conductor, being upon the north side of the train and not perceiving that any person was in the act of alighting on the south side of the train, had given a signal to the engineer indicating that the train was to proceed; and when the plaintiff was in this position, one foot upon the ground and the other upon the car-step, the train had acquired such speed that it was impossible for the plaintiff to recover herself, and she was

dragged along in that manner for a few feet until her hold upon the rail was broken and she was thrown into the ditch, and it is alleged received the injuries for which she claimed to recover. The judge at the Circuit instructed the jury that as matter of law the attempt on the part of the plaintiff to leave the cars on the south side was not evidence of such contributory negligence as would prevent the plaintiff's recovery; but this judgment was reversed at General Term, the court holding upon the authority of *Keating v. N. Y. Central R. Co.*, 49 N. Y. 379, that the question was for the jury. *Taber v. Delaware, &c. R. Co.*, 71 N. Y. 489. See however *contra*, *Secor v. Toledo, &c. R. Co.*, 10 Fed. Rep. 15; *Illinois, &c. R. Co. v. Green*, 81 Ill. 19; *Blodgett v. Bartlett*, 50 Ga. 353.

² *Baltimore & Ohio R. Co. v. State*, 60 Md. 449; 12 Am. & Eng. R. Cas. 149; *Dobiecki v. Sharp*, 88 N. Y. 203. It is contributory negligence for a passenger to crawl under a car which has a locomotive attached, in order to reach his train, and if he is injured in so doing he has no right of action. If he cannot reach his train without subjecting himself to peril, he must seek his remedy against the company for a violation of its duty. *Smith v. Chicago, &c. R. Co.*, 55 Iowa, 33. Compare *Ranch v. Lloyd*, 31 Penn. St. 358, where a different rule was applied, plaintiff being a child of six or seven years.

³ *Michigan Central R. Co. v. Coleman*, 28 Mich. 440.

failure to light its depot-building, or to have an agent there to aid passengers leaving the train at night, are acts from which negligence may be inferred, and it is a question to be submitted to the jury to determine, from all the facts and circumstances, whether the defendant was guilty of neglect in those respects, and whether, if so, its negligence was the direct and proximate cause of the accident to the plaintiff so as to render it liable.¹ It is also liable to a passenger who, while entering the station for the purpose of taking an approaching train, is struck and injured by mail-bags carelessly and negligently thrown from the mail-car by a postal-clerk employed by the United States government; for although the injury does not result from its act or the act of any person over whom it has control, still the company having knowledge that the mail-bag was thrown out in that way habitually, was guilty of a want of ordinary care in discharging the high duty owing to its passengers in not taking measures to protect them from such injuries.²

The company cannot be made responsible to a passenger when the injury might have been avoided if he had made proper inquiries of the conductor, instead of relying upon his own knowledge and judgment. But in such cases it is a question for the jury whether the passenger was negligent. Thus, in a Wisconsin case, at about half past nine o'clock on a dark, rainy, and snowy night, the plaintiff went to the defendant's depot at a village, for the purpose of taking the caboose at the rear of the defendant's freight train for his place of residence. The train stopped with the caboose

¹ *Patten v. Chicago, &c. R. Co.*, 36 Wis. 413. It is the duty of a railroad corporation to provide for a passenger a safe passage to the train he desires to take, and take reasonable care that he shall not, while on its premises, be exposed to any unnecessary danger, or to one of which it is aware. It is bound to exercise the utmost vigilance, not only in guarding its passengers against careless interference by others, but even against violence; and if in consequence of neglecting this duty, a passenger receives injury, which, in view of all the circumstances, might have been reasonably anticipated, it is liable. *Carpenter v. Boston, &c. R. Co.*, 97 N. Y. 494 (passenger injured by being struck by a mail-bag thrown out by a postal clerk).

² The lower court held that the company was not liable, but this was reversed

on appeal. *Carpenter v. Boston, &c. R. Co.*, 97 N. Y. 494; 21 Am. & Eng. R. Cas. 331, reversing 24 Hun, 104. In an exactly similar case in Massachusetts, the same conclusion was reached. *Snow v. Fitchburg R. Co.*, 136 Mass. 552; 18 Am. & Eng. R. Cas. 161. It is the duty of the company to provide for the safety of its passengers as far as human care and foresight will go: that is, to use the utmost care and forethought to discover and control all causes likely to produce injurious effects to its passengers in so far as it can do so by the use of the most efficient means or agencies of which the nature of the case will admit. *Hutchinson on Carriers*, §§ 449 *et seq.*; *Carpenter v. Boston, &c. R. Co.*, 97 N. Y. 494; 27 Am. & Eng. R. Cas. 331; *Muster v. Chicago, &c. R. Co.*, 61 Wis. 325; 18 Am. & Eng. R. Cas. 113.

several rods north of the depot-platform, and two car-lengths north of a cattle-guard, which was constructed across both tracks of the road and between them, and was partly uncovered. The plaintiff asked the night-watchman whether he would have to walk that far back to get on the caboose, and was answered affirmatively, and while on his way to the caboose met the conductor with a lantern, accompanying lady passengers from the caboose; nothing was said to him by the conductor, and before the plaintiff reached the caboose he fell into the open cattle-guard and was injured. He had been in the habit of taking this train with the caboose standing north of the platform, but had never taken it with the caboose standing north of the cattle-guard; and he had never noticed the situation and condition of the cattle-guard, nor did he know before the accident that the caboose stood north of it. It was held that these facts warranted the jury in finding that the defendant was guilty of negligence, and that the plaintiff was free from contributory negligence.¹

A passenger has the right to presume that he can stand without danger upon a depot-platform.² And the company is bound to provide safe platforms for the landing of passengers, of sufficient length to afford safe egress from an ordinary train;³ and it is gross negligence for it to construct its platform for passengers so narrow that a passenger while standing upon it may be injured by a passing train.⁴ It is its duty to remove snow and ice from a platform over which it is necessary for passengers to pass in order to reach its cars; or to take precautions by covering it with ashes or other substance to protect passengers passing over it from danger to which otherwise they would be exposed. And a passenger has the right to assume that the corporation has performed its duty, and that the platform is safe. His going upon it in order to reach the cars is not, therefore, of itself, contributory negligence.⁵ But where the passenger has an

¹ *Hartwig v. Chicago, &c. R. Co.*, 49 Wis. 358.

² *Dobiecki v. Sharp*, 88 N. Y. 203; 8 Am. & Eng. R. Cas. 485; *Jeffersonville, &c. R. Co. v. Riley*, 39 Ind. 568.

³ *St. Louis, &c. R. Co. v. Cantrell*, 37 Ark. 519; 40 Am. Rep. 105.

⁴ *Chicago, &c. R. Co. v. Wilson*, 63 Ill. 167.

⁵ *Weston v. New York Elevated R. Co.*, 73 N. Y. 595. Thus, in the case of *Toomey v. London, &c. Ry. Co.*, 3 C. B.

n. s. 146, it appeared that on the platform there were two doors in close proximity to each other, the one, for necessary purposes, had painted over it the words, "For gentlemen," the other had over it the words, "Lamp-room." The plaintiff, having occasion to go to the urinal, inquired of a stranger where he should find it, and having received a direction, by mistake opened the door of the "lamp-room" and fell down some steps and was injured. In an action against the railway company it was held

opportunity to do so, he must look for himself, and not rush recklessly upon danger.

A railroad company having a telegraph office in one of its stations for the use of the public is responsible to one of its passengers, who is injured solely because of the company's negligence in failing to keep in proper condition the structure or platform erected by them over which the passenger, in alighting from the cars, must pass to reach the telegraph office.¹ It is bound so to fence a station that the public may not be misled, by seeing a place unfenced, into injuring themselves by passing that way, it being the shortest to the station.²

The general duty of a railroad company as to its stations may be thus summed up: All the property of a railroad company, including its depots and adjacent yards and grounds, is its private property, on which no one is invited or can claim a right to enter except those persons who have business with the railroad; which class embraces, not only passengers, but protectors and friends attendant on their departure, or awaiting their arrival. To the class of persons thus having business the railroad company is under obligation to keep in safe condition all parts of its platforms, with the approaches thereto, to which the public do or would naturally resort, and all portions of the station grounds reasonably near to the platform where passengers would be likely to go, and to provide safe waiting-rooms, and to keep the depot and platform well lighted at night; but to the public at large the company owes "nothing beyond the observance of the duties of good neighborhood," which includes "the universal duty of doing no wilful or wanton injury, and of not erecting or continuing on or near its platform or approaches, to which the public may be expected to go, any nuisance, trap, or pitfall from which personal injury is likely to ensue."³ ⁴

that in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in non-suiting the plaintiff, on the ground that there was *no evidence* of negligence on the part of the company. In another English case, the defendant had at one of its stations a staircase, used to enable passengers to ascend from the platform to the street; the stairs were six feet wide, and were nosed with a strip of brass two and one-half inches in width, which had worn smooth and slippery, and were not provided with any hand-rail. The plaintiff, who for eighteen

months had been in the almost daily habit of travelling on the line and using the stairs, in ascending them in the daylight slipped upon the brass nosing and was injured. It was held that there was no evidence of negligence on the part of the defendant to go to the jury. *Crafter v. Metropolitan Ry. Co.*, L. R. 1 C. P. 300.

² *Clussman v. Long Island R. Co.*, 9 Hun, 618; *affirmed*, 73 N. Y. 606.

³ *Burgess v. Great Western Ry. Co.*, 32 Law Times, 76.

⁴ *Montgomery, &c. R. Co. v. Thompson*, 77 Ala. 448. The building in the city

SEC. 310 *a*. **Further as to Injuries at Stations.** — A railway company cannot be said to be wholly free from negligence when it calls upon passengers to disembark, for the purpose of going to its passenger-depot, without any warning or information that a train is about to cross the path, and immediately, and before a passenger has time to get beyond the path of the expected train, allows the locomotive silently, and without ringing the bell or giving any alarm, to rush upon and crush him.¹ Thus, a station on defendant's line was situated south

of Montgomery known as the "Union Depot," with the yard or grounds annexed, is the property of the two railroad companies known as the South and North Alabama, and the Louisville and Nashville; but the Montgomery and Eufaula railroad company having acquired by lease, at a stipulated rent, the right to use the property in common with them for the arrival and departure of its trains, with the use of its waiting-rooms, ticket-office, baggage-room, etc., is liable to passengers and the public generally, in relation to the property, as if it were the owner in fee. The plaintiff, in this case, came to Montgomery on the Montgomery and Eufaula railroad, and, on alighting from the train at the Union Depot, desiring to find a privy, made inquiry of a stranger, who pointed in the direction of a privy erected on the bank of the river at the further end of the platform, about fifty yards from the depot; and in trying to find it, he wandered beyond it in the dark, fell down the steep bluff, and sustained serious injuries. The railroad platform was well lighted, and extended from the depot to the river; but there was no light at the privy, and a house intervened between it and the lights on the platform. It was held, on these facts, that the plaintiff had no cause of action against the railroad companies who owned the property, as to them being a mere stranger; and that he could not recover against the Montgomery and Eufaula corporation, lessees of the property, because being acquainted with the locality, he was guilty of contributory negligence in attempting to find the privy without further inquiry. *Montgomery, &c. R. Co. v. Thompson*, 77 Ala. 448.

¹ *Armstrong v. N. Y. Central R. Co.*, 66 Barb. (N. Y.) 437; *affirmed*, 64 N. Y.

635. A passenger when taking or leaving a railroad car at a station has a right to assume that the company will not expose him to unnecessary danger, but will discharge its duty, which requires it to provide passengers a safe passage to and from the train. *Brassell v. N. Y. Central R. Co.*, 84 N. Y. 241. In this case there was nothing to indicate on which side the passengers were to alight; plaintiff alighted on a side where it was necessary to cross several tracks, and in crossing she was injured by an approaching engine. It was held that the question of her contributory negligence being a matter of doubt was for the jury. To permit a train to pass on a track between a depot and another track on which a passenger train was standing while discharging and receiving passengers, just as passengers were passing from the depot to take that train, and across which track they were obliged to walk to reach their train, without any provision having been made on the part of the company to avert danger, was held to have been actionable negligence. *Brassell v. N. Y. Central R. Co.*, 84 N. Y. 241; *Baltimore, &c. R. Co. v. State*, 60 Md. 449. The rule that any person who goes upon a railroad track incautiously, or without using all reasonable precaution to escape injury, assumes the hazard, and, if injury ensues, is without remedy, is to be applied in determining the liability of a railroad corporation where the injury is sustained by a person while crossing the track on a public highway; but it has no application to a case where, by the arrangement of the corporation, it is made necessary for passengers to cross the track in passing to and from the depot to the cars. *Klein v. Jewett*, 26 N. J. Eq. 474. If a person buys a ticket which entitles him to a passage over

of the tracks, two in number, running east and west, and just east of a highway crossing them. While the plaintiff was waiting there

a railway from A. to C., and stops at B., intending to resume his journey to C. the same day, leaves the station at B., and afterwards, while on his way to the station of another railway company near by, returns to the station which he had left, and is injured while crossing the tracks, through the negligence of the company which had sold him the ticket, when he might have crossed the track at a highway crossing, he is a trespasser, and cannot in the absence of evidence that the negligence was wilful, maintain an action for the injury, although the defendant's platforms extended between two highways crossing the track, and people have been accustomed to pass from the station on one railway to that on the other at that point, without objection by the company, and although his ticket does not forbid stopping over at B. *Johnson v. Boston, &c. R. Co.*, 125 Mass. 75. In the case of *Terbut v. Bristol, &c. Ry. Co.*, L. R. 6 Q. B. 73, the stations of the defendant and of two other railway companies at B. adjoin, and are open to one another, and the passengers of each company are in the habit of passing directly from one to the other, the whole area being used as common ground by the passengers of all three companies. While the plaintiff was standing on the defendant's platform, on his way from the terminus of one of the other companies to the booking-office of the other company, waiting for his luggage, a porter of the defendant negligently drove a truck laden with luggage, and a portmanteau fell off and injured the plaintiff. It was held that as the negligence complained of was an act of misfeasance by a servant of the defendant in the course of his employment, the maxim *respondent superior* applied; and that under the circumstances the defendant was liable. Although the agents and employes of a railway company may be guilty of gross neglect in the manner of operating its road, yet if a passenger, in passing from one train to another, recklessly, and without care, fails to pay heed to timely warnings, and attempts to cross the track in front of an approaching train that he in fact sees approaching, or

which he knows to be approaching, in dangerous proximity, and is killed or injured, such action is attributable, not to the negligence of the company, but to the reckless negligence of the injured party himself. *Baltimore & Ohio R. Co. v. State*, 60 Md. 449. In an action against a railway company for so negligently managing and lighting its station that the plaintiff, being a passenger, was thrown down while on his way to the carriages, the defendant's counsel having rested his defence on the ground that the accident was entirely owing to the want of ordinary care on the part of the plaintiff, and that there was no negligence on the part of the defendant, the judge left it to the jury to say whether the accident occurred from the alleged negligence of the defendant, or whether it was entirely the plaintiff's own negligence which caused it. There was a verdict for the plaintiff. On a motion for a new trial for misdirection, on the ground that the judge ought to have told the jury that, if the plaintiff contributed, by his own negligence, to the injury, the defendant was entitled to the verdict, although it might have been guilty of negligence, it was held that the defendant was not entitled to a new trial, the issue on which alone it rested its defence having been left to the jury. *Martin v. Great Northern Ry. Co.*, 16 C. B. N. s. 179. A passenger travelling by railway, whose train, from which he had alighted at a junction, was shunted to an unusual siding, out of sight from the platform on a dark night, was killed while crossing the main line. It was held that although there was no accommodation by a bridge for the passengers, and no servant of the company at hand to direct them, there was no evidence of positive negligence on the part of the company. *Falkner v. Great Southern, &c. Ry. Co.*, 5 Ir. Rep. C. L. 213. In the case of *Young v. Old Colony R. Co.*, 156 Mass. 178; 30 N. E. Rep. 560, it appeared that while at the station, plaintiff attempted to cross the tracks in front of an approaching train, which, it being broad daylight, she saw, and which was so near to her that, when she stumbled and fell on the track,

to take a passenger train going west, a freight train coming from that direction, and ringing its bell, ran by the station on the south track, at the rate of eight or ten miles an hour. Just before this train arrived at the station, the plaintiff's intestate started to cross the track to reach the passenger train which had arrived on the north track, had slowed down, and then started up to reach a milk-platform. As she crossed the south track she was struck by the engine of the freight train and killed. It was held that these facts established negligence on the part of the company.¹ Although a railway company is not bound to erect a foot-bridge over its line to give passengers access from one platform to the other, and the want of such a bridge will not *per se* make it liable for injuries received by the public on that account, still the absence of such a precaution throws a greater *onus* on the company to provide for the safety of the public.²

A railway company is under no duty, as to its stations or grounds, except as to passengers and those who are there upon business. Thus, the plaintiff, without invitation, and as a mere intruder, entered upon the unenclosed premises of the defendant, upon which was a building of the defendant in a visible state of decay. While there, a sudden storm blew a fragment of the dilapidated building against him, injuring him severely. The building had once been used as a freight-house, but had been long since abandoned as a place of public business, and was not so situated, with reference to any public way, as to endanger travellers thereon. It was held, in an action for damages for the injuries received, that the plaintiff could not recover.³

the engine struck her before she could recover herself; that it was due to her failure to make inquiry that she attempted to cross the tracks at all; and that defendant held out no invitation for her to cross there. It was held that she could not recover; that other passengers had crossed the track where she attempted to cross was no excuse for negligence.

¹ *Terry v. Jewett*, 17 Hun (N. Y.), 395; *Longmore v. Great Western Ry. Co.*, 19 C. B. N. S. 183.

² *Thomson v. North British Ry. Co.*, 4 Sc. Sess. Cas. (4th series), 115. See also *Welfare v. London, &c. Ry. Co.*, L. R. 4 Q. B. 693, where it appeared that plaintiff went to the defendant's station for the purpose of travelling by its railway, and

on making inquiries respecting the departure of trains, was directed by a porter of the defendant to look at a time-table suspended on a wall under a portico of the station. While there, a plank and a roll of zinc fell through a hole in the roof upon the plaintiff and injured him; at the same time a man was seen on the roof of the portico. It was held that there was no evidence that would have justified the jury in finding that the defendant was guilty of negligence, and that a non-suit was proper.

³ *Lary v. Cleveland, &c. R. Co.*, 78 Ind. 323. In another case, *Pittsburgh, &c. R. Co. v. Bingham*, 29 Ohio St. 364, the question was "Is a railroad company bound to exercise ordinary care and skill in the erection, structure, or maintenance

So, in an Ohio case,¹ it was held that a railway company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station-house, where, at the time of receiving the injury, such person was at the station-house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or on any business connected with the operation of the road. Nor is it liable to passengers even for injuries occasioned by its buildings or structures being blown down by storms, where it has used that care and skill, in their structure and maintenance, which men of ordinary prudence and skill usually employ; and it is error in such cases to charge the jury that the company is "bound to guard against all storms which can reasonably be anticipated."

If the company's employes permit or direct passengers to enter the car at some other place than the platform or place provided for such purpose, it is held to the utmost care in avoiding injuries to the passengers. And it must be determined, in view of all the circumstances of the case, whether the employé, after directing a passenger how to enter a car situated at a distance from the platform, had a right to suppose that his instructions were understood.² The actual purchase of a ticket on the entering of a car is not always necessary to constitute the relation of passenger, and place upon the railroad company that degree of care which a common carrier owes a passenger. That the plaintiff entered the office or waiting-room provided by the company for passengers, and informed the depot or

of its station-house or houses, as to persons who enter or are at the same, not on any business with the company or its agents, nor on any business connected with the operation of its road, but are there without objection by the company, and therefore by its mere sufferance or permission?" The court answered this question in the negative. In an English case, *Hounsell v. Smythe*, 7 C. B. N. s. 31, the plaintiff fell into a quarry, left open and unguarded on the unenclosed lands of the defendant, over which the public were permitted to travel; it was held that the owner was under no legal obligation to fence or guard the excavation, unless it was so near the public road as to render travel thereon dangerous; that the person so travelling over such waste lands must take the permission with its concomitant conditions,

and, it may be, perils. For similar cases see *Hardcastle v. South Yorkshire Ry. Co.*, 4 H. & N. 67; *Sweeney v. Old Colony R. Co.*, 10 Allen (Mass.), 368; *Knight v. Abert*, 6 Penn. St. 472; *Cauley v. Pittsburgh, &c. R. Co.*, 95 Penn. St. 398; 40 Am. Rep. 664; *Meeks v. Southern, &c. R. Co.*, 56 Cal. 513; 38 Am. Rep. 67; *McAlpin v. Powell*, 70 N. Y. 126.

¹ *Pittsburgh, &c. R. Co. v. Bingham*, 29 Ohio St. 364. And it has been held that persons not passengers, congregating at a station, not upon business, in such numbers as to break down the platform, cannot recover of the company for injuries resulting therefrom. *Gillis v. Pennsylvania R. Co.*, 59 Penn. St. 129.

² *Allender v. Chicago, &c. R. Co.*, 43 Iowa, 276.

ticket agent of her desire to become a passenger; that she, in good faith, placed herself under his direction, and that he directed her as to the manner in which she was to get on a caboose-car, on which she was to take passage, would, in itself, be sufficient to justify the jury in finding that the relation of passenger existed.¹ A railway company is liable for injuries resulting to a passenger who, on leaving the car at night, attempts, by direction of the brakeman in charge of the car, to cross a gully by way of a certain bridge maintained by another upon the company's grounds, and is injured by a defect in the bridge which could not then be seen.² But where a passenger was told by a brakeman to change cars at a way-station, and he entered another car, but was told by one of the company's servants that he could not remain inside the car as the train was not ready, and after remaining a short time on the platform of the car he alighted, and while standing on a track near that on which the car was, was injured by another train, it was held that his expulsion from the car was not the proximate cause of the injury.³ In an English case in an action to recover damages for the death of a passenger through the negligence of a railway company, it appeared that on the occasion of the casualty the deceased had taken a ticket for a special train at a cheap rate for harvestmen. He was unable to find accommodations in the special train, but remained on the platform until the arrival of the next ordinary train, together with a crowd composed of harvestmen who had also taken tickets for the special train, and of other persons, a large number of whom had entered the station without permission. The company had an extra number of porters at the station; but in consequence of the great disorderliness of the persons assembled on the platform, and by a sudden and violent rush of the crowd, the deceased was pushed on the line, and was killed by the engine of the ordinary train as it approached. At the trial the jury, *inter alia*, found that the deceased was not entitled to proceed by the ordinary train; that the accident was occasioned by the rush of the crowd; that the company had not taken due and reasonable precautions to prevent injuries from the crowding on the platform; and that, by using due and reasonable precautions, it might have prevented the rush of the crowd. It was

¹ Allender v. Chicago, &c. R. Co., 37 Iowa, 264. See also Shannon v. Boston, &c. R. Co., 78 Me. 60; 23 Am. & Eng. R. Cas. 511.

² Chance v. St. Louis, &c. R. Co., 10 Mo. App. 351.

³ Henry v. St. Louis, &c. R. Co., 76 Mo. 288.

held that even assuming the deceased to have been lawfully on the platform, the defendant was not liable for the accident which occasioned his death.¹ But it is held in this country that a railway company is bound to exercise due care in protecting its passengers *while they are waiting for its trains*, and it is liable for the consequences of a neglect to properly direct them respecting the mode of entering its cars.²

SEC. 311. False Announcement of Arrival of Trains.—A person who is familiar with the country through which a railway passes, and of the practice of the company to announce stations before they are actually reached, has no right to act upon such announcement against his own knowledge, and leave the train while it is yet in motion, and at a point other than at the station. Thus, the plaintiff's wife was a passenger on the defendant's train from Baltimore to Washington. When near its depot in the latter city, "Washington" was called by some one. She inquired of another passenger if they were in Washington, and was answered in the affirmative. She then prepared to leave the train. The night was dark. The announcement of "Washington" was not countermanded. No warning was given to passengers not to leave the train, and several passengers, in fact, left it. The plaintiff's wife lived near the depot, and had frequently been on the defendant's road. She was seen to go out of the car-door, when the train started and moved into the depot. She was afterwards found lying on the track about two squares outside of the depot so much injured that her death ensued in about ten days. In an action by the husband for the loss of service, the judge instructed the jury that the passenger had a right to presume that the train had stopped, and that the cry of "Washington" was made by the agent of the company. That it was the duty of the company to counteract a false proclamation of arrival, and to keep an agent in their reach to advise passengers of the truth or falsehood of a proclamation so made, or else the company would be derelict in its duty and chargeable with the consequences. This ruling was held to be erroneous, and a new trial was granted.³ But, except in peculiar

¹ Cannon v. Midland Great Western Ry. Co., L. R. 6 Ir. 199.

² Allender v. Chicago, &c. R. Co., 41 Iowa, 276; Bennett v. Railroad Co., 102 U. S. 577. See Smith v. Great Western Ry. Co., L. R. 2 C. P. 4, where it was held that the company could not be made responsible to a passenger for injuries re-

ceived from a vicious dog which wandered on the station premises. See also Ham-mack v. White, 11 C. B. N. S. 588; Byrne v. Boadle, 2 H. & C. 722; Scott v. London Dock Co., 3 H. & C. 596; 34 L. J. Exch. 220.

³ Pabst v. Baltimore & Ohio R. Co., 2 MacArthur (D. C.), 42. The company

cases like that just reviewed, a passenger has a right to rely upon the information given by a conductor or brakeman upon a train that the train has reached the station to which he is destined, and if relying upon such information he leaves the train at that place, which proves not to be the station which they informed him it was, the company is liable for all the proximate damages which ensue therefrom. Thus, where both the brakeman and conductor informed a passenger that the next station was her destination, when it was not, and she left the train at that place, and took a severe cold from unavoidable exposure, it was held that the company was liable.¹ So where a passenger, on alighting from a train, was directed by a brakeman to cross a bridge erected upon the defendant's land, but which was erected by third persons, and in doing so was injured, it was held that the company was liable.² So where a passenger was told by

cannot be held guilty of negligence merely because the conductor announced the name of the station about to be reached before the train has actually stopped. *Pennsylvania R. Co. v. Aspell*, 23 Penn. St. 147; 62 Am. Dec. 323.

¹ *Pennsylvania Co. v. Hoagland*, 78 Ind. 203; *Columbus, &c. R. Co. v. Farrell*, 31 Ind. 408. See also *Edgar v. Northern R. Co.*, 11 Ont. App. 452; 16 Am. & Eng. R. Cas. 342. In *St. Louis, &c. R. Co. v. Cantrell*, 37 Ark. 519, 40 Am. Rep. 105, a passenger was aroused at ten o'clock at night by the conductor, and informed that his station was reached, and told by him and the brakeman to hurry and get off. The train was moving very slowly and he stepped off, and as it had overshot the platform, he fell and was injured. It was held that an action was maintainable therefor. *HARRISON, J.*, said: "It was clearly the duty of those in charge of the defendant's train upon its arrival at Knoble to stop the same opposite the platform, that the plaintiff might get off. On the other hand, it may as a general proposition be said that it is imprudent, and a want of proper care to alight from a train while it is in motion; but whether it was so in a particular case must depend upon the circumstances under which the attempt was made. *Crissey v. Passenger R. Co.*, 75 Penn. St. 83. It would not be so if the train was moving so slowly that no damage could be reasonably apprehended. But though in fact it

may be hazardous, a passenger who does so at the instance or direction of the conductor or other employé in the management of the train, on whose opinion or judgment in the matter he has the right to rely, and where the risk or danger was not apparent, cannot be chargeable with negligence. *Filer v. New York Central R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327; *Lambert v. North Car. R. Co.*, 66 N. C. 499; 8 Am. Rep. 508. It would seem that the train, when the plaintiff attempted to jump upon the platform, was moving very slowly, as the conductor testified that after he fell it moved only fifteen or twenty feet before it stopped; and that the direct or immediate cause of the accident was that it had too far passed the platform when he leaped from the car for him to reach it. There was no evidence that he knew that there was any risk or hazard in the attempt to get off, or of any want of care in him, or of any negligence on his part which contributed to the accident; but it was proved that he was told by the conductor and brakeman 'to hurry and get off, the latter telling him also that they were in a hurry, and that he was urged by their impatience to make the attempt.' We can see no objection to any of the instructions the court gave the jury. In relation to the question of negligence they are in strict accordance with the views above expressed."

² *Chance v. St. Louis, &c. R. Co.*, 10 Mo. App. 351.

the conductor that a train would stop at a water-station, and as soon as the train stopped he attempted to step off, and the train started with a jerk, and he was injured, it was held that although if he had kept his seat he would not have been injured, the company was liable.¹ For, generally speaking, a passenger has a right to rely upon information derived from the servants of the company occupying a position which apparently clothes them with authority and knowledge in reference to a particular matter. Thus, railway passengers have a right to rely, until differently informed, upon information given by a ticket-agent in answer to an inquiry relative to the stoppage of a certain train at a particular station, and if a passenger does not disregard reasonable means of information, and relying upon the information so received, gets upon the train in question which does not stop at the station to which he is destined, the company is liable for the damages arising from its failure to take him to his destination, as agreed through its ticket-agent.² But the mere circumstance that information is given by an employé of the company is not sufficient; the employé at the time must apparently at least be in a position to warrant the passenger in relying upon it as authoritative. The company is therefore not liable for the false announcement of a station by a person not in its employ.³

SEC. 312. Overshooting Stations. — It is a part of the company's undertaking to carry safely that the train shall stop at the passenger's destination and at a point where there are proper facilities for enabling him to leave the train in safety. It has been seen that the company is responsible for all injuries sustained by its passengers by reason of insufficient or improperly maintained station facilities; it is equally responsible if, having provided these facilities, it does not stop its trains so that they are available.⁴ If then the train overshoots

¹ Wood v. Lake Shore, &c. R. Co., 49 Mich. 370.

² Lake Shore, &c. R. Co. v. Pierce, 47 Mich. 277; 3 Am. & Eng. R. Cas. 340; *post*, § 349. But it is the duty of the passenger to inform himself before starting as to whether the train on which he proposes to take passage will stop at his destination. Platt v. Chicago, &c. R. Co., 63 Wis. 511; 21 Am. & Eng. R. Cas. 319.

³ Columbus, &c. R. Co. v. Farrell, 31 Ind. 408.

⁴ Where the train overshoots or stops short of the station, and a passenger without

fault on his part alights, he is entitled to recover damages for the inconvenience and annoyance in having to walk to the station, and for all the injuries sustained as a proximate consequence of the company's wrongful act. International, &c. R. Co. v. Terry, 62 Tex. 380; Mobile, &c. R. Co. v. McArthur, 43 Miss. 180; Illinois, &c. R. Co. v. Chambers, 71 Ill. 519; Illinois, &c. R. Co. v. Able, 59 Ill. 131; East Tennessee, &c. R. Co. v. Lockhart, 79 Ala. 315; Memphis, &c. R. Co. v. Whitfield, 44 Miss. 466. And where the passenger is conveyed past his station and

or stops short of the platform at an unusual place, the company is bound to assist the passengers to alight, and in any event, in such a case it would be its duty either to back the train to the station, or to notify the passengers where and how to alight, and to warn them of any dangers incident to alighting at that point;¹ and if, through

then compelled to get off, the jury have a right to allow exemplary damages in addition to compensation for the injury sustained. *New Orleans, &c. R. Co. v. Hurst*, 36 Miss. 661; *Alabama, &c. R. Co. v. Sellers*, 93 Ala. 9; 9 So. Rep. 375 (in this case a female passenger was compelled to leave the train at a point several hundred yards beyond the station; exemplary damages were allowed, and evidence that she carried a baby in her arms was admitted in aggravation of the damages); *Chattanooga, &c. R. Co. v. Liddell*, 85 Ga. 482; 11 S. E. Rep. 853; *Georgia, &c. R. Co. v. McCurdy*, 45 Ga. 288. In the case of *Columbus, &c. R. Co. v. Farrell*, 31 Ind. 408, the train ran beyond the platform where passengers were usually landed, and stopped over a culvert, and the railroad hands, whose duty it was to announce the stations, announced the station. The plaintiff without fault on his part in getting off from the train (it being so dark that he could not see where the train was), fell into the culvert and was injured, and it was held that he was entitled to recover. In *East Tenn. &c. R. Co. v. Lockhart*, 79 Ala. 315, plaintiff, a young girl of eight years, was put off at a place with which she was not familiar, having been carried one mile past her destination. Being naturally frightened by her condition and surroundings, she walked to her station very rapidly, and as a consequence of the exertion and excitement was taken sick. It was held that a verdict in her favor should not be disturbed.

¹ *Memphis, &c. R. Co. v. Whitfield*, 44 Miss. 466; *Railroad Co. v. Johnston*, 79 Ala. 436. In *Siner v. Great Western Ry. Co.*, L. R. 3 Exchq. 150, an excursion train in which the plaintiffs (husband and wife) were passengers to Rhye, arrived at Rhye station, and the train being a long one, the carriage in which they were overshot the platform. It was then daylight. The passengers were not warned to keep

their seats, nor was any offer made to back the train to the platform, nor was it, in fact, ever so backed, nor did it move until it started for Bangor. After waiting a short time, the husband, following the example of other passengers, alighted, without any request to the company's servants to back the train, or any communication with them. The wife, standing on the iron step of the carriage, took both his hands and jumped down, and in so doing strained her knee. There was a foot-board between the iron step and the ground, which she did not use, but there was no evidence of any carelessness or awkwardness in the manner of descent, except such as might be inferred from the above facts. In an action brought for this injury, it was held that there was no evidence for the jury of negligence in the defendant; and that the accident was entirely the result of the plaintiffs' own acts. So where that part of a railway train including the carriage in which the plaintiff rode overshot the platform in daylight, and a porter called out several times the name of the station, and let out some of the passengers, who were departing from the station, and a reasonable time for backing the train had elapsed, and there was, apparently, no intention to back it, and there was at hand no servant of the company whom the plaintiff could request to have the train backed; and the plaintiff, though cautiously attempting to alight, fell, and was injured in the attempt, it was held that there was evidence of negligence on the part of the company. *Nichols v. Great Southern, &c. Ry. Co.*, 7 Ir. Rep. C. L. 40; *Thompson v. Belfast, &c. Ry. Co.*, 5 Ir. Rep. C. L. 517. In another case a train drew up at a small station with the engine and part of one of the carriages beyond the platform. A passenger in that carriage, having parcels in her hands, opened the door and waited on the iron step some time for assistance; but, no one coming to assist, she, fearing

no fault of the passenger, he is injured by alighting at that point, or in getting from there to the station or highway, the company is

that the train would move on, tried to alight by getting on the foot-board, and in so doing fell and injured herself, for which injury she brought an action against the company. It was held, affirming the decision of the Court of Queen's Bench, that, under the circumstances, there was evidence of negligence which should have been left to the jury. *Robson v. North Eastern Ry. Co.*, 2 Q. B. Div. 85. Any encouragement given to a passenger to attempt to get off a train at a place of danger, and not a stopping-place except for water, resulting in injury to him, cannot be imputed to the railway company as in any way its act, and it is not responsible for the same. *Illinois Central R. Co. v. Green*, 81 Ill. 19. One who has a railroad ticket and is present to take the train at the ordinary point of departure is a passenger, though he has not entered the cars. In duties towards him directly involving his safety, the company is bound to extraordinary diligence, and in those touching his convenience or accommodation, to ordinary diligence. *Central R., &c. Co. v. Perry*, 58 Ga. 461. The conductors of night trains, when stopping or starting, are bound to look out for the safety of passengers entering or leaving the cars, but they are not required to be on the lookout for passengers getting on from both sides of the train, and are not at fault for not discovering a passenger attempting to get on from the wrong side. *Michigan Central R. Co. v. Coleman*, 28 Mich. 440. See also *Chicago, &c. R. Co. v. Bonifield*, 104 Ill. 223, doctrine of comparative negligence applied; *Stewart v. International, &c. R. Co.*, 53 Tex. 289 (sufficiency of petition). In a New York case the plaintiff's intestate was a passenger on a western bound train for Otisville, of which place he was a resident; passengers arriving there from the east are compelled to alight upon a platform between the tracks and cross the eastern track, in order to reach the station. Plaintiff's intestate stepped from the smoking-car, at the end nearest the locomotive, upon the platform, and from thence upon the eastern track, when he was struck and killed by a train of coal-

cars going east, the engine of which had been switched off. There was no brakeman on the forward end of the coal-cars, nor was any signal given of their approach. The defendant claimed that the plaintiff's intestate was guilty of contributory negligence, as there was no evidence to show that he looked to the west before stepping on the track. It was held that the question of contributory negligence was, under the circumstances of the case, a question for the jury, and that it was error to direct a non-suit. *Green v. Erie R. Co.*, 11 Hun (N. Y.), 333.

The plaintiff was a traveller on the defendant's line by a train which arrived at the station for which the plaintiff was bound, at night. The part of the platform at that station at which passengers could alight was of sufficient length for the whole train to have been drawn up along-side of it, but in addition to that part the platform extended some distance, gradually receding from the rails. When the train drew up, the body of it was along-side the platform, but the last carriage, in which plaintiff rode, was opposite the receding part of the platform and about four feet from it. The night was very dark, and the place where the last carriage stopped was not lighted, though the rest of the station was well lighted with gas. There was no express invitation given to the plaintiff by the company's servants to alight, but the train had been brought to a final standstill and did not move on again until it started on its onward journey. No warning was given to the plaintiff that the carriage was not close to the platform or that care would be necessary in alighting. The plaintiff opened the carriage-door, and stepping out, fell into the space between the carriage and the platform, and sustained injuries, for which she brought an action against the company. It was held that there was evidence of negligence on the part of the defendant's servants to go to the jury. Bringing a railroad carriage to a standstill at a place at which it is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended he shall

liable therefore.¹ These principles apply as well to the carrying of passengers by freight as by passenger trains, subject only to such modifications as are made necessary by the nature of the business in which freight trains may be engaged. Where a freight train is accustomed to discharge its passengers at some other place than the platform, or where it is impracticable for it to reach the platform with its caboose, or other car in which its passengers are carried, it may require passengers to leave the train at some other appropriate and convenient place, not connected with the platform. In such an event, however, passengers are entitled to receive such care and attention as may be necessary to enable them properly to reach the station, and this is especially true where the place at which they are discharged is either inappropriate or inconvenient.²

get out, and that he may do so with safety, without any warning of his danger, amounts to negligence on the part of the company, for which, in the absence of contributory negligence on the part of the passenger, an action may be maintained. *Cockle v. London, &c. Ry. Co.*, L. R. 7 C. P. Cas. 321; *Central R. Co. v. Van Horn*, 38 N. J. L. 133. In another case the plaintiff was set down at T. after dark on the side of the line opposite to the station and place of egress. The train was detained more than ten minutes at T., and from its length blocked up the ordinary crossing to the station, which is on the level. The ticket collector stood near the crossing with a light, telling the passengers, as they delivered their tickets, to "pass on." The plaintiff passed down the train to cross behind it, and from the want of light stumbled over some hampers put out of the train and was injured. The practice of passengers had been to cross behind the train, when long, without interference from the railway company. It was held that these facts disclosed evidence for the jury of negligence on the part of the company. *Nicholson v. Lancashire, &c. Ry. Co.*, 3 H. & C. 534.

¹ *New York, &c. R. Co. v. Doane*, 115 Ind. 440; 1 L. R. A. 157 (quoting text); *White Water R. Co. v. Butler*, 112 Ind. 598; *Adams v. Missouri Pac. R. Co.*, 100 Mo. 555; *Galveston, &c. R. Co. v. Crispi*, 73 Tex. 236; *Winkler v. St. Louis &c. R. Co.*, 21 Mo. App. 99. In this last

case a passenger, through no fault of his own, was carried some distance beyond his station, on a dark night, and told to alight. In going back to the station he was injured by falling through a trestle. The court held that the company was liable; the injury was not a remote but a proximate consequence of the company's wrong-doing. See also, as to the rule of the text, *Woolery v. Louisville, &c. R. Co.*, 107 Ind. 381. On the arrival of a train at the railway terminus, there not being room for all the carriages to be drawn up to the platform, some of the passengers were required to alight upon the line beyond it, the depth from the carriage to the ground being about three feet. In so alighting, a lady, instead of availing herself of the two steps, with the assistance of a gentleman, jumped from the first step to the ground and sustained a spinal injury from the concussion. The jury having found that the company was guilty of negligence in not providing reasonable means for alighting, and that the lady had not by any misconduct on her part contributed to the injury, and having awarded her £500, the court held that there was evidence to warrant their finding, and declined to interfere with the amount of damages. *Foy v. London, &c. R. Co.*, 18 C. B. N. s. 225.

² *New York, &c. R. Co. v. Doane*, 115 Ind. 440; *Woolery v. Louisville, &c. R. Co.*, 107 Ind. 381; *Alabama, &c. R. Co. v. Sellers*, 93 Ala. 9; 9 So. Rep. 375.

IN an English case, where an action was brought by a widow to recover compensation for the death of her husband caused by the negligence of the defendant, the same rules have been applied. The facts of the case were that one of defendant's trains drew up at the Highbury station, — the last carriage, in which deceased was sitting, being in a tunnel, which terminated at the station and not at the platform. The name of the station was called out by a porter, and the deceased immediately got out and fell on the rails and was killed. The jury expressed a strong opinion that, the train having stopped, and the name of the station having been called out, the passengers had a right to presume that they might get out. BLACKBURN, J., however, non-suited the plaintiff, with leave to the plaintiff to enter a verdict for £1,200. Upon motion, the Court of Queen's Bench held that while the calling out of the name of the station did not necessarily entitle the passengers to get out, yet that under all the circumstances of the case, the case should not have been withdrawn from the consideration of the jury, there being some evidence of negligence.¹

The result of these cases, as bearing upon the question of the liability of railway companies for accidents occurring at stations in consequence of the drawing up of a train in such a way as to lead passengers to suppose that they are invited by the railway company's servants to alight, seems to be this, that *there must be sufficient evidence to induce a reasonable man to believe that the train is actually at the alighting platform and that the passengers are invited to alight; and at the same time there must be the exercise of such care upon the part of the passenger as will free him from the imputation of having contributed to the accident of which he complains.*² In one case, although

¹ Bridges v. North London Ry. Co., 7 Eng. & Ir. App. Cas. 213; L. R. 5 C. P. 459, n. See also Petty v. Great Western Ry. Co., L. R. 5 C. P. 461, n. Other cases have come before the court since this one in the Queen's Bench. See also Siner v. Great Western Ry. Co., L. R. 4 Exch. 117.

² St. Louis, &c. R. Co. v. Cantrell, 37 Ark. 519; 40 Am. Rep. 105; Com. v. Boston, &c. R. Co., 129 Mass. 500; 37 Am. Rep. 382; Smith v. Georgia Pac. R. Co., 88 Ala. 538; Crafter v. Metropolitan Ry., L. R. 1 C. P. 300; 35 L. J. C. P. 132. See also Blackman v. London, &c. Ry. Co., 14 W. R. 769; Leish-

man v. London, &c. Ry. Co., 22 L. T. N. S. 712. In the case of Praeger v. Bristol, &c. Ry. Co., 23 L. T. N. S. 366, 24 id. 105, it appeared that the plaintiff had been travelling as a second-class passenger from Clevedon to Bristol by the defendants' line of railway, and occupied the last compartment of the hindmost carriage of the train, which consisted of an engine and tender and two composite carriages. The journey from Clevedon is performed on a branch line as far as Yatton, at which place there are separate platforms for the branch and main lines. The branch platform at Yatton is about 130 feet long, and for about 100 feet of its

the train had drawn up at the platform, the name of the station had not been called out, and some of the judges of the Court of Common

length, from the inner, or Yatton end of it, runs quite straight or parallel with the branch-line rails, and for that distance the space between it and the carriages is about ten inches wide. The further or outer end of the platform is, for the purposes of the traffic, curved or bevelled off from the line of rails, so that at that part of it the space between it and the carriages is about eighteen inches wide. There is, however, attached to each carriage, immediately outside the door, an iron step, ten inches wide, so that the space between the platform and the carriages is thereby bridged over by the step, and reduced thereby to the width of eight inches. Upon the day in question it appeared that the train in which the plaintiff was travelling drew up at the branch platform, and was stopped about twenty feet short of the extreme end of it, where stationary buffers, or "dead ends," are fixed; and the compartment of the carriage in which the plaintiff was sitting was, when the train stopped, immediately opposite the curved or bevelled-off part of the platform described above. The name of the station was called out, and the door of the carriage was opened, and several of the plaintiff's fellow-passengers got out and alighted in safety on the platform. The plaintiff then proceeded to follow them, and stepped out of the carriage, as he had always before been in the habit of doing, without using the iron step, expecting to step as usual upon the platform, instead of which he stepped into the eighteen-inch vacant space between the carriage and the platform, and falling through received the injury for which he sought compensation in the action alluded to. It was admitted that he had often travelled by the same line before, and knew the nature of the platform, but he had never before travelled in the last compartment of the hindmost carriage, and was not aware that he had stopped opposite the curved part of the platform. There were paraffine-oil lamps on the platform, and one in the carriage itself, but it did not appear that the lights, whatever and wherever they were, were such as to enable a passenger clearly

to distinguish the vacant space from the solid platform. Negligence was charged by the plaintiff and denied by the defendants, and the defendants charged the plaintiff with contributory negligence. The jury found for the plaintiff for £1,600 damages. Upon a rule it was held that there was no evidence to go to the jury of negligence upon the part of the defendants. This decision was reversed in the Court of Exchequer Chambers where it was held that there was evidence of the negligence of the defendants to go to the jury, inasmuch as there was a clear invitation to the plaintiff to alight and no warning given, although in consequence of the insufficiency of light the danger was not apparent. In *Cornman v. Eastern Counties Ry. Co.*, 4 H. & N. 781, the defendants had on their platform standing against a pillar which passengers passed in going to and from the trains, a portable weighing-machine which was used for weighing passengers' luggage, and the foot of which projected about six inches above the level of the platform. It was unfenced, and had stood in the same position without any accident having occurred to persons passing it for about five years. The plaintiff, being at the station on Christmas Day inquiring for a parcel, was driven by the crowd against the machine, caught his foot in it, and fell over it. It was held that there was no evidence of negligence to go to the jury, the machine being in a situation in which it might have been seen, and the accident not being shown to be one which could have been reasonably anticipated. *BRAMWELL, B.*, said: "In such a case it is always a question whether the mischief could have been reasonably foreseen. Nothing is so easy as being wise after the event. Here the evidence was that the company might reasonably have anticipated that no mischief could occur, since no mischief had resulted from keeping the machine in the position in which it stood for so long a period." See also per *ERLE, C. J.*, in *Marfell v. South Wales Ry. Co.*, 8 C. B. N. s. 525, 534; *Rigg v. Manchester, &c. Ry. Co.*, 14 W. R. 834. See also *Martin v. Great Northern Ry. Co.*,

Pleas held that without some such announcement a passenger was not justified in getting out of the carriage; and that, having got out at a place where the platform was some feet from the carriage, and having fallen and been injured, she had been guilty of contributory negligence, which relieved the railway company from the responsibility of the acts of its servant the engine-driver.¹ In another case, however, where a long train of the defendant company was stopped at a platform, so that part of it was along-side the parapet of a bridge; and in the dark, the plaintiff, after the train had stopped, and the defendants' servants had called out the name of the station, stepped upon the parapet, believing it was the platform, and fell over, — it was held by the same court that, in an action brought to recover damages for the injuries sustained by the fall, the judge was right in leaving it to the jury to determine whether the circumstances amounted to an invitation to the plaintiff to alight; and further, that there was evidence of negligence on the defendants' part to justify the verdict which the jury found for the plaintiff.²

It is a part of a company's duty to announce a station which the train is approaching in order that passengers, whose destination it is, may prepare to alight,³ and the company cannot be held liable to a passenger injured by leaving a moving train on the ground that

16 C. B. 179; and *Leishman v. London, &c. Ry. Co.*, 19 W. R. 106.

¹ *Cockle v. London, &c. Ry. Co.*, 5 L. R. C. P. 457; 39 L. J. C. P. 226. In *Forsyth v. Boston, &c. R. Co.*, 103 Mass. 510, a passenger alighted from the train, on a dark night, at a station of the defendant, on one of two platforms extending along each side of the track to a highway which, as the plaintiff knew, crossed the railroad, and having a step at the end next to the highway. Instead of keeping on the platform he voluntarily stepped from it to cross the track to the highway, and in doing so stepped into a cavity dug across the track for a cattle-guard, and was injured. The court held that the company was not liable, as he was not at the time in the exercise of due care. A passenger has no business to leave the platform and cross a railway track at a point where the company has made no provision for such a crossing. The very circumstance that the platform leads to a place of exit from the station, is notice to a passenger that the railway com-

pany does not intend that he shall leave its premises at any other point; and if he fails to heed this warning, and is injured, he cannot visit the penalty upon the company.

² *Whittaker v. Manchester, &c. Ry. Co.*, 22 L. T. N. S. 545.

³ *Dawson v. Louisville, &c. R. Co. (Ky.)*, 11 Am. & Eng. R. Cas. 134; *Smith v. Georgia Pac. R. Co.*, 88 Ala. 538. In *Rose v. Northeastern Ry. Co.*, 2 Exch. Div. 248, a train drew up at a station with two of the carriages beyond the platform. The employes of the company called out to the passengers to keep their seats, but were not heard by the plaintiff and other passengers in one of these carriages. After waiting some little time, and the train not having put back, the plaintiff got out, and in so doing fell and was injured; for which injury she brought an action against the company. It was held, reversing the decision of the Exchequer Division, that there was evidence of negligence on the part of defendant to go to the jury.

such an announcement amounts to an invitation to alight. It is the stopping of the train after the announcement is made that constitutes the implied invitation.¹ If the stoppage is only temporary and not intended as an opportunity for passengers to leave the train, proper notice and warning must be given. For where a station is announced and the train stopped, a passenger has a right, in the absence of any warning to the contrary, to understand that he may safely alight; and if by reason of the train having stopped at a place other than the station, without fault on his part, he is injured, the company is responsible.² Where the passenger is not aware that he has been carried past his station, his failure to demand that the train be backed so as to allow him to alight safely cannot be considered as a waiver on his part of the company's obligation, though the contrary is true where he is fully aware of the circumstances.³ But it seems that the latter part of this rule must be modified in particular cases. There may be instances in which the timidity of a female or infant passenger would restrain them from making such a demand, particularly where the conductor (as he frequently does) wears a formidable appearance, and under such circumstances, it seems that a failure to demand that the train be moved ought not to operate as a waiver of the passenger's right to a safe and convenient place to alight. The compulsion used in requiring a passenger to alight at an improper place need not be actual force; if the alternative of getting off or of being carried to the next station is presented, it amounts to a compulsion, and a passenger's obedience does not constitute a waiver under such conditions.⁴

¹ WILLES, J., in *Bridges v. North London Ry. Co.*, L. R. 6 Q. B. 377, 383; *Smith v. Georgia Pac. R. Co.*, 88 Ala. 538.

² Thus, in an English case, on the approach to a station, the porter called out the name of the station, and the train was brought to a standstill. Hearing carriage-doors opening and shutting, and seeing a person alight from the next carriage, the plaintiff, who was a season-ticket holder, and accustomed to stop there, stepped out of a carriage; but the carriage in which he was overshot the platform, and he fell on to the embankment and was hurt. It was night, and there was no light near the spot, and no caution was given, nor anything done to intimate that the stoppage was a temporary one only, or that the

driver intended to back the train. It was held that there was evidence from which a jury might reasonably find negligence on the part of the company's servants, and no evidence of contributory negligence on the part of the plaintiff. *Weller v. London, &c. Ry. Co.*, L. R. 9 C. P. Cas. 126; s. p. in *Cockle v. London, &c. Ry. Co.*, L. R. 7 C. P. Cas. 321; *Central R. Co. v. Van Horn*, 38 N. J. L. 133.

³ *Winkler v. St. Louis, &c. R. Co.*, 21 Mo. App. 99 (opinion by THOMPSON, J.). See also *Blodgett v. Bartlett*, 50 Ga. 353.

⁴ *Alabama, &c. R. Co. v. Sellers*, 93 Ala. 9; 9 So. Rep. 375; *Galveston, &c. R. Co. v. Crispi*, 73 Tex. 236; *Georgia, &c. R. Co. v. Eskew*, 86 Ga. 641; 12 S. E. Rep. 1061.

What has been said applies only to cases in which the passenger is wrongfully carried beyond his station or his train stops short of it. If when the train stops at his station, he has abundant opportunity to leave the train, but neglects to do so, and after the train has started he is permitted, at his own request, to get off at an unusual point, he cannot hold the company responsible for injuries which result from his getting off there.¹ So, also, he cannot recover if he voluntarily leaves the train before it has reached the station, unless his action was induced by the company's agents or servants.² In every case the passenger is under obligation to use ordinary care to make the injury to himself as light as possible, and to avert, as far as possible, the harmful effect of the company's act.³ He cannot, therefore, recover for injuries to which his own negligence contributed as a proximate cause.⁴ Where a proper landing-place is provided, and the passenger knows or has the means of ascertaining its locality, he should make his exit at the place so provided; and if, in attempting to alight elsewhere, he unnecessarily and negligently exposes himself to danger, and is thereby injured, his injury is the result of his own act, and he cannot recover therefor against the railway company.⁵

¹ *Wilson v. New Orleans, &c. R. Co.*, 68 Miss. 9; 8 So. Rep. 330. In this case passenger was asleep when his station was reached and so failed to get off there. Soon after the train started the conductor awakened him telling him he was still near the station, and rather than be carried to the next station, he requested conductor to stop the train and allow him to get off, which was done. In returning to the station he had to cross a long bridge, and when partly over it, he saw an approaching freight train, and by running rapidly barely escaped being injured. He carried his child in his arms, and being feeble, the exertion and the excitement caused him to sustain injury to his health. The court held that he could not recover since his injuries were the consequence of his own negligence.

² See *Secor v. Toledo, &c. R. Co.*, 10 Fed. Rep. 15.

³ *Gulf, &c. R. Co. v. Head* (Tex. 1890), 15 S. W. Rep. 504; *Georgia, &c. R. Co. v. Eskew*, 86 Ga. 641; *Texas, &c. R. Co. v. Cole*, 66 Tex. 562.

⁴ *International, &c. R. Co. v. Folliard*, 66 Tex. 603. Where a train was stopped

at a station, but somewhat away from its usual place of stopping, and where there was not good ground for getting off, and a passenger, thinking the train would be moved up to the usual place, failed to get off, as he had intended, and after the train had left the station and was fairly on its way to its next stopping-place, the passenger himself seized the bell-rope, rang the engine-bell, and took his position on the lower step of the platform to get off, and the engineer having answered the bell, as the cars were coming to a stop, but before they were stopped, the passenger, deeming the motion slow enough for safety, undertook to step off, but just as he was stepping, he was by a sudden jerk of the cars thrown down, and his arm crushed by one of the wheels of the car passing over it, — it was held that the conduct of the passenger in ringing the bell, taking his position on the step, and undertaking to step off while the cars were still in motion, was a want of ordinary care, and showed gross negligence on his part. *Blodgett v. Bartlett*, 50 Ga. 353.

⁵ *Chicago, &c. R. Co. v. Dingman*, 1 Bradw. (Ill. App.) 162. A complaint for

Ordinarily, it is no part of the company's duty to awaken a sleeping passenger, nor is it bound by the conductor's promise to do so.¹ The rule, however, is different in the case of sleeping-car companies. These latter invite their passengers to sleep, and afford special accommodations therefor; it is, therefore, a part of their undertaking that the passenger shall be awakened at the proper time, and sufficiently early to enable him to be ready to leave the train by the time his station is reached.²

Where a company has discharged its duty in providing proper platforms and station facilities, and the train has been stopped, so that they are available to the passenger, it is not bound to go further

personal injury to a passenger, which does not allege generally that he was without fault, and alleges the facts to be that at the station the train slackened speed so that the plaintiff could have alighted without danger, if there had been a platform; that it was dark, windy, and raining, and the plaintiff had never been at the station; that the conductor informed him of arrival at the place and directed him to alight, and relying entirely on his order, he stepped off as directed, and by reason of there being no platform, as he supposed there was, he fell under the cars and was injured, is bad on demurrer, because it does not show that plaintiff was free from contributory negligence. *Cincinnati, &c. R. Co. v. Peters*, 80 Ind. 168. It is doubtful however whether this case states the general doctrine. See *post*, section on "PRESUMPTIONS" and "BURDEN OF PROOF."

Where a train has stopped, and a passenger, on stepping from the lowest step of the platform of the cars to the ground, fractures her knee-cap, without any apparent external cause, no presumption of negligence is raised. *Delaware, &c. R. Co. v. Napheys*, 90 Penn. St. 135. In *Lewis v. London, &c. Ry. Co.*, L. R. 9 Q. B. 66, the plaintiff was a passenger on the defendant's railway from A. to B.; while the train was passing through B. station the company's employes called out the name of the station, and shortly afterwards the train stopped. The carriage in which the plaintiff travelled stopped a little way beyond the platform, and several carriages and the engine, which were in front of that carriage, stopped at some distance from the

platform. The plaintiff, who was well acquainted with the station, in alighting from the carriage was thrown down and injured in consequence of the train being backed into the station for the purpose of bringing the carriages along-side the platform. A very short interval elapsed between the time that the train stopped and the time it was backed into the station. It was held that there was no evidence of negligence on the part of the company to render it liable.

In a New York case it appeared that the plaintiff, an infant twelve years of age, in the care of her parents, was a paying passenger upon defendant's cars. As the train approached the station where she was to alight, the conductor called out the name of the station and the cars stopped. It was evening and dark. Plaintiff and her parents arose to leave, but before they got out of the car the train started and moved slowly by the station. They, knowing the train was in motion, passed out on to the platform of the car, and while the train was still moving, and after it had passed the platform of the station, plaintiff's father took her under his arm, stepped from the car, fell, and she was injured. It was held that plaintiff, as matter of law, was chargeable with contributory negligence. *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Ohio, &c. R. Co. v. Stratton*, 78 Ill. 88.

¹ *Sevier v. Vicksburg R. Co.*, 61 Miss. 8; *Nunn v. Georgia R. Co.*, 71 Ga. 710; *Nichols v. Chicago, &c. R. Co. (Mich.)*, 51 N. W. Rep. 364.

² *Pullman Palace Car Co. v. Smith*, 79 Tex. 468; 14 S. W. Rep. 993; *Hutchinson on Carr.* (2d ed.), § 617 k.

and assist passengers in alighting.¹ But there may be an exception to this rule where the company has accepted as a passenger a feeble or infirm person who is unable to get on or off the train without assistance. In accepting such a passenger with a knowledge of his infirmity, the company impliedly agrees to render such assistance as he may reasonably require.²

SEC. 313. Liability of Railroad Corporations for Delay in running Trains. — A railroad company is held chargeable with damages for delay in the running of its trains according to schedule time, and any person sustaining damage from a failure on its part to run its trains *upon such time* is entitled to recover the same.³ By issuing

¹ Raben v. Central Iowa R. Co., 73 Iowa, 581; 74 Iowa, 732; Laffin v. Buffalo, &c. R. Co., 106 N. Y. 136.

² Hutchinson on Carriers (2d ed.), § 670; St. Louis, &c. R. Co. v. Finley, 79 Tex. 85; 15 S. W. Rep. 266; Foss v. Railroad Co. (N. H.), 21 Atl. Rep. 222; Sheridan v. Brooklyn City R. Co., 36 N. Y. 39; Louisville, &c. R. Co. v. Crunk, 119 Ind. 542. Compare, however, the language of SHACKLEFORD, C. J., in the case of New Orleans, &c. R. Co. v. Statham, 42 Miss. 613: "Railroad cars are not travelling hospitals, nor their employes nurses. Sick persons have the right to enter the cars of a railroad company; as a common carrier of passengers it cannot prevent their entering its cars. If they are incapable of taking care of themselves, they should have attendants along to care for them, or to render them such assistance as they may require in the cars, and to assist them from the cars at the point of their destination. It is not the duty of conductors to see to the debarkation of passengers. They should have the stations announced; they should stop the trains sufficiently long for the passengers at each station to get off. When this is done, their duty to the passengers is performed. All assistance that conductors may extend to ladies without escorts or with children, or to persons who are sick and ask his assistance in getting on and off trains, is purely a matter of courtesy, and not at all incumbent upon him in the line of his public duty." Quoted with approval in Nunn v. Georgia R. Co., 71 Ga. 713-714. See also Southern R. Co. v. Kendricks, 40

Miss. 374; Louisville, &c. R. Co. v. Fleming, 14 Lea (Tenn.), 128. But Mr. Hutchinson thinks that this view, as expressed in the Mississippi case, cannot be maintained. Hutch. on Carriers (2d ed.), § 670.

³ Sears v. Eastern R. Co., 14 Allen (Mass.), 433; 92 Am. Dec. 780. See also Wilsey v. Louisville, &c. R. Co., 83 Ky. 511; 26 Am. & Eng. R. Cas. 258; Hutchinson on Carriers (2d ed.), §§ 603, 605. In England the same doctrine is held; thus, in Buckmaster v. The Great Eastern Ry. Co., 23 Law J. Rep. N. S. Exch. 471, an action was brought for damages sustained by the plaintiff by reason of the company not starting a train as advertised in their time-bills, in which the plaintiff obtained a verdict. Baron MARTIN said that, "It was mere nonsense for companies to say, as in effect, the company in that case had said, 'We will be guilty of any negligence we think fit, and we will not be responsible.' And with respect to the notice in this case the learned judge of the Marylebone county court thus concludes: 'I am of opinion that it is *ultra vires* so far as it professes to attach to the right of travelling on their own line the condition that the company will not be responsible for any shortcomings of their servants not amounting to wilful misconduct, whatever that term may mean.' In this view as to the invalidity of the stipulation in question I fully concur. It seems to me to be a monstrous proposition that the railway companies, who are bound, by their special Acts and the Railway Clauses Consolidation Act, 1845, § 86, to carry passen-

its time-tables it is treated as contracting with its passengers that its trains shall leave and arrive at its stations at the time named therein, and failing to perform in this respect it is chargeable with the damages that ensue in consequence thereof.¹ It may change its schedule time, but, as to the holders of season-tickets, it is bound to give reasonable notice of such change, and a mere advertisement of such change in public journals, or posting notice thereof in its stations or cars, is held not sufficient to relieve it from liability. The company is liable even though the delay resulted from the wilful acts of its servants.² The issue of a time-table, indicating the time of the arrival and departure of trains, is held to amount to an express promise to run to the places and at the times named, and nothing but accidents resulting from causes which reasonable care could not have provided against, will excuse liability.³

gers at rates fixed within certain limits, should be able to affix to their contracts with the passengers a stipulation which, if valid, would deprive the passengers of their common-law right to the performance with due diligence of the company's contract with them. There is one other remark I would wish to add, namely, that the restrictions as to the company's liability for not corresponding with other trains contained in the notice and regulation in question only extends to cases where their trains fail to correspond with trains of other companies, and not with other trains of their own, which is the present case. Having stated my opinion as to the liability of the company at common law, and of the invalidity of the above notice and regulation so far as it restricts such liability in the present case, it still remains for me to consider the last point raised by the defendants, namely: Whether, if the notice and regulation were valid, and the plaintiff was bound by it to show wilful misconduct on the part of the defendants' servants, he has shown it in the present case; in other words, whether the absence of the porters through their own fault, or by the orders of superior servants of the company, was, under all the circumstances of the present case, in point of law, 'wilful misconduct,' and I think with some doubt that it ought to be so held; and on this point I wish to refer once more to the judgment of the learned judge of the

Marylebone county court in *Turner v. The Great Western Railway Company*, and the authorities therein cited as to the legal interpretation of the words 'wilful misconduct.' The only case that I am aware of that militates against my view is that of *Russell v. The Great Western R. Co.*, before the learned judge of the Bath county court, — to whom I have already referred, — in which he held that the altered notice or regulation was valid and operative to restrict the defendants' liability to cases of proved wilful misconduct on the part of their servants, but from what I have said it will be seen that I cannot concur in his view. Upon the whole I am in favor of the plaintiff on all the points of law and facts involved in this case, and a verdict will, therefore, be entered for the plaintiff for the amount claimed, with costs, and with liberty to the defendants to appeal within one month."

¹ *Gordon v. Manchester, &c. R. Co.*, 52 N. H. 596; 13 Am. Rep. 97.

² *Sears v. Eastern R. Co.*, 14 Allen (Mass.), 433; 92 Am. Dec. 780.

³ *Weed v. Panama R. Co.*, 17 N. Y. 362; 72 Am. Dec. 474; *Denton v. Great Northern Ry. Co.*, 5 El. & Bl. 860. In *Turner v. Great Western Ry. Co.*, decided in the Marylebone county court (England), in May, 1874, *WHEELER, J.*, said: "The question of reasonable time is no longer left at large, but is, in fact, fixed by the companies themselves, sub-

SEC. 314. Duty to Protect Passengers from Assault by Strangers.
 —Not only is a railroad company or other carrier of passengers

ject, of course, to accidents which reasonable care could not provide against. In the present case it is quite clear that the absence of porters at the Reading station, which reasonable care might (as far as appears) have prevented, occasioned the detention of the plaintiff at Twyford, and as he was able to procure a conveyance by which he got to Henley, substantially half an hour sooner than the railway company were prepared to convey him by the next train, I think that he was justified in hiring it, and that (subject to the next question) he is entitled to recover its cost against the defendants. The next question which remains for me to consider is, whether the notice and regulation contained in the defendants' tables deprive the plaintiff of his right to recover against the defendants. Now, this notice and regulation, as altered, came before the learned judge of the Marylebone county court in the case I have already referred to, and he there commented upon it so fully and so ably that I cannot do better than quote his remarks. Referring to the notice and regulation which came before him in Mr. Forsyth's case, he observes: "The company's notice of August commenced with these words, "Every attention will be paid to insure punctuality as far as practicable." This really is all that the law requires. "But," continued the notice, "the directors do not undertake that the trains shall arrive at the time specified in the time-table." Here I may remark that, irrespective of any notification by the company, the law does not imply any such undertaking, its requisitions being simply that there shall be no failure of punctuality for want of reasonable care and diligence. The notice then adds, "Nor will the directors be accountable for any loss, inconvenience, or injury which may arise from delay or detention;" and subject to their paying every reasonable attention they have expressly fixed on, which, if not so fixed, juries may determine. Before the introduction of railways there were frequently coach-proprietors who agreed to perform their promises in so many hours, and, therefore, to use every reasonable

means and diligence for that purpose; and if, by reason of their neglect of such means or want of such diligence, they failed to complete their contracts, there can be no doubt that actions must have lain against them. Of course the condition of the roads, which were not under their control, and many other circumstances, and especially sudden accidents, would have been valid defences to such actions; and, therefore, they were often very difficult to try. Moreover, the proprietors seldom, if ever, entered into these special contracts as to time, excepting when there was great competition and then they used their best endeavors, as did also their servants (who were often stimulated by a system of premiums or fines), to perform these contracts with the greatest exactitude. Actions for the breach of such contracts were consequently very rare, and I have not been able to find a report of any case of the kind. In most cases, however, the coach-proprietors merely contracted to convey, and would not be accountable for the consequences of any delay or detention. Since August the notice has been materially changed. The passage about paying every attention to insure punctuality is omitted, and the company expressly promise nothing; but the omission is immaterial, because what they do not promise the law implies against them. The next change is the addition to the stipulation that they will not be responsible for delay, in the words, "unless upon proof that it arose from the wilful misconduct of their servants." Upon the faith of their present notice, the defendants contend in effect that they are unfettered as to times of starting and arrival, notwithstanding their time-tables, in the absence of proof of wilful misconduct on the part of their servants. To such a proposition it is somewhat difficult to listen with patience." See also *Burke v. Great Western R. Co.*, London Law Jour. for October 24, 1874, in which the court considered the questions involved as to the actual contract of the company and their liability under it. The court said: "The duty is expressly declared by sect. 89 of the Railway Clauses

bound to exercise proper care to prevent injury to its passengers *while upon its premises, in going to or from its trains, but it is also bound to exercise reasonable care and diligence in protecting them from insults or injury from other passengers, while riding thereon, as well as from its own servants.* It is not held to the same degree of care in this respect as it is held to in the selection of the agencies of its business, but it is bound to exercise that degree of care that a man of ordinary prudence would exercise under similar circumstances in the conduct of his own business. The mere fact that one passenger is injured by an assault committed by another does not of itself constitute even a *prima facie* cause of action; but if it is also shown that the person who committed the injury *was improperly admitted upon the train, being drunk and disorderly at the time, or was improperly permitted to remain there, because of his riotous or improper conduct after he got upon the train,* the company is liable for all the consequences.¹

Act, 1845 (which, I presume, is incorporated in the Great Western Railway Act; at all events, so far as the Henley Branch Railway); but, independently of that clause, I do not think that railway companies would be further liable than any other carriers of passengers at common law. What, then, is the liability of carriers of passengers at common law? Simply to use all reasonable means to convey passengers to their destinations in the reasonable times which the passengers to a particular place desire, without specifying any time; and they were only bound to perform their contract within a reasonable time, which, as I have already said, was for a jury to determine, regard being had to all the circumstances of the case. Railway companies, on the other hand, have invariably fixed their own times of arrival, and thereby fixed what are reasonable times, and if they fail, from want of due diligence, to perform their contracts, I think that they are clearly liable in the same manner as coach-proprietors under similar contracts. *Having the absolute control of their lines, and their lines being less liable to be affected by the weather than the roads, they have in these respects much less difficulty in performing their express contracts than coach-proprietors. On the other hand, they are open probably to more numerous and*

serious accidents as to their engines and carriages than the coach-proprietors were as to their coaches and horses. But, however this may be, the effect of weather on the lines, and accidents of many kinds, will doubtless constitute valid defences to actions brought against them, as they did against actions brought against coach-proprietors under similar circumstances."

¹ Goddard v. Grand Trunk R. Co., 57 Me. 202; 2 Am. Rep. 39; New Orleans R. Co. v. Burke, 53 Miss. 200; Ill. Central R. Co. v. Minor (Miss.), 11 So. Rep. 101; Pittsburgh R. Co. v. Pillow, 76 Penn. St. 510; 18 Am. Rep. 424; Milwaukee, &c. R. Co. v. Finney, 10 Wis. 388; Moore v. Fitchburg R. Co., 4 Gray (Mass.), 465; Ramsden v. Boston, &c. R. Co., 104 Mass. 117; 6 Am. Rep. 200; Holly v. Atlanta St. R. Co., 61 Ga. 215; 34 Am. Rep. 97; Putnam v. Broadway, &c. R. Co., 55 N. Y. 108; 14 Am. Rep. 190; Weeks v. New York, &c. R. Co., 72 N. Y. 50; 28 Am. Rep. 104; Chicago, &c. R. Co. v. Flexman, 103 Ill. 546; 8 Am. & Eng. R. Cas. 354; Mullane v. Wis. Central R. Co., 46 Minn. 474; Shirley v. Billings, 8 Bush (Ky.), 147; 8 Am. Rep. 451; Bryant v. Rich, 105 Mass. 180; 8 Am. Rep. 311; Holmes v. Wakefield, 12 Allen (Mass.), 580; Duggins v. Watson, 15 Ark. 118; Passenger R. Co. v. Young, 31 Ohio St. 518; 8 Am. Rep.

The liability of a railroad company to its passengers is predicated upon a different ground from its liability to its own or servants' agents, or others who do not occupy that relation to it. The rule is that where a person or corporation by contract or statute is bound to do certain things, they are absolutely responsible for the manner in which the duty is performed, and cannot excuse themselves from liability because they have committed the duty to others who were believed to be possessed of superior qualifications for performing such duties. A carrier is bound to discharge his legal obligation to the passenger, and if he commits this duty to another, he does it at his peril.¹ By the sale of a ticket, or the receipt of the price for

78; *Baltimore, &c. R. Co. v. Blocher*, 27 Md. 277; *Nieto v. Clark*, 1 Clifford (U. S.), 145; *Flint v. Norwich, &c. Transp. Co.*, 34 Conn. 554; *Seymour v. Greenwood*, 7 H. & N. 355; *Pennsylvania R. Co. v. Vandiver*, 42 Penn. St. 365; *Landreaux v. Bel*, 5 La. o. s. 434; *Pittsburgh R. Co. v. Hinds*, 53 Penn. St. 512; 91 Am. Dec. 224; *Day v. Owen*, 5 Mich. 520; *Atlantic, &c. R. Co. v. Dunn*, 19 Ohio St. 162; 2 Am. Rep. 382; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110; 2 Am. Rep. 373; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116; 10 Am. Rep. 103; *Craker v. Chicago, &c. R. Co.*, 36 Wis. 657; 17 Am. Rep. 504 (the famous kissing case); *Chamberlain v. Chandler*, 4 Mason (U. S.), 242; *Stephen v. Smith*, 29 Vt. 190; *Railroad Co. v. Anthony*, 43 Ind. 183; *Bayley v. Railway Co.*, L. R. 7 C. P. 415; *Coleman v. New York, &c. R. Co.*, 106 Mass. 160; *Brand v. Railroad Co.*, 8 Barb. (N. Y.) 368; *Weed v. Panama R. Co.*, 17 N. Y. 362; 72 Am. Dec. 474. In the case of *Britton v. Atlanta, &c. R. Co.*, 88 N. C. 536, 43 Am. Rep. 749, 18 Am. & Eng. R. Cas. 391, the plaintiffs, colored persons, purchased tickets over the defendant's road, upon an excursion train, and took seats in a car with white persons. There were separate cars provided for colored people, but they did not know it. The white persons annoyed and insulted them, and they complained to the conductor. He accepted their tickets and said they might sit in that car, but that as it was an excursion train he could not control the conduct of the other passengers, and that they might expect rude treatment. The treatment continuing,

similar appeals to the conductor met with a refusal of protection. Subsequently, the white passengers violently ejected the plaintiffs from that car, and they entered one furnished for colored people, but were obliged to stand up for some time. The instructions of the company to conductors were to advise colored passengers found in cars set apart for white persons to go to the cars provided for colored persons, but if they declined to do so to allow them to remain. It was held that the defendant was liable for the assault. See also *Royston v. Illinois Central R. Co.*, 67 Miss. 376, where a colored passenger was not allowed to recover for an assault, it appearing that he was partly intoxicated and had been acting boisterously, although the assault might not have occurred had the company complied with its statutory duty to supply separate accommodations for its white and colored passengers.

¹ *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; 2 Am. Rep. 39; *Milwaukee R. Co. v. Finney*, 10 Wis. 388; *Moore v. Fitchburg R. Co.*, 4 Gray (Mass.), 465; 64 Am. Dec. 83. In one case the conductor and several passengers frightened the plaintiff, a passenger, by telling him they were going to rob him and throw him out of the car, so that he jumped from the train and was injured. The company was held liable. *Spohn v. Missouri Pac. R. Co.*, 87 Mo. 74; 26 Am. & Eng. R. Cas. 252. So where a passenger and the conductor conspire to eject a fellow-passenger from the coach, the company is responsible for the injury. *Murphy v. Western, &c. R. Co.*, 23 Fed. Rep. 687; 21 Am. & Eng. R. Cas. 258.

transportation from one point to another, a railway company expressly contracts to carry such person to the point covered by the contract. In addition to that, the law *impliedly* raises a contract on its part to carry such person safely, so far as human foresight reasonably exercised can guard against disaster; to carry him in the usual and ordinary mode incident to such travel; to treat him respectfully, and protect him, so far as reasonable care on its part can do so, from injury from other persons riding by the same conveyance.¹ These are among the *implied* obligations imposed, and they are absolute duties that cannot be shirked or evaded, and for a failure in the observance of which it is liable to the passengers, whether such failure results from its own act or the act of those to whom it has committed the duty.² In a Pennsylvania case,³ this question was ably considered. In that case an action was brought for an injury to the plaintiff's wife by the fighting of passengers among themselves. It appeared that drunken and quarrelsome men intruded themselves into the ladies' car in large numbers at one of the stations, where an agricultural fair was in progress, and a fight ensued, during which the plaintiff's arm was broken. The company was held responsible because the conductor paid no attention to the matter, but went on collecting fares instead of stopping the train and expelling the rioters, or making some effort to stop the disorder.⁴ In a case in

Compare the case of *Batton v. South, &c. R. Co.*, 77 Ala. 591; 23 Am. & Eng. R. Cas. 514. In *Flint v. Transportation Co.*, 34 Conn. 554, where the plaintiff was injured by the discharge of a gun dropped by some soldiers engaged in a scuffle, the court held that passenger-carriers are bound to exercise the utmost vigilance and care to guard those they transport from violence from whatever source arising; and the plaintiff recovered a verdict for \$10,000.

¹ *King v. Ohio, &c. R. Co.*, 22 Fed. Rep. 413; 18 Am. & Eng. R. Cas. 386.

Its duty is, therefore, to expel a passenger who is likely, from his being intoxicated, or from any other condition, to be a source of annoyance or injury to passengers. *Atchison, &c. R. Co. v. Weber*, 33 Kan. 543; 52 Am. Rep. 543; 21 Am. & Eng. R. Cas. 418. In the case of *King v. Ohio, &c. R. Co.*, 22 Fed. Rep. 413; 18 Am. & Eng. R. Cas. 386, there was a drunken and riotous passenger on the train whom the conductor and brakeman removed to a

rear coach. Afterwards the conductor and the brakeman were changed, but the new officers were not told of the dangerous passenger except by a slight remark made by the conductor, "there was a drunken man on the train who had given them some trouble, but who had quieted down." The drunken passenger soon after shot and killed a fellow-passenger. The court held that it was the duty of the company's agents to have confined the drunken passenger or have expelled him, and not having done so, the company was liable for the death of the passenger killed by him.

² See *Moore v. Fitchburg R. Co.*, 4 Gray (Mass.), 465; 64 Am. Dec. 83; *Pennsylvania R. Co. v. Vandiver*, 42 Penn. St. 465; *Seymour v. Greenwood*, 7 H. & N. 355. The subject of assaults committed by the company's servants is examined further on. *Post*, §§ 315, 316.

³ *Pittsburgh, &c. R. Co. v. Hinds*, 53 Penn. St. 508; 91 Am. Dec. 224.

⁴ *Pittsburgh, &c. R. Co. v. Hinds*, 53

Illinois the court held that the company was liable for an injury sustained by a passenger upon one of its regular passenger trains

Penn. St. 503; 91 Am. Dec. 224. In the course of the opinion, WOODWARD, C. J., speaking for the court, said: "There is no such privity between the company and the disorderly passenger as to make them liable on the principle of *respondet superior*. The only ground on which they can be charged is a violation of the contract they made with the injured party. They undertook to carry the plaintiff safely, and so negligently performed this contract that she was injured. This is the ground of her action; it can rest upon no other. The negligence of the company or of their officers in charge of the train is the gist of the action, and so it is laid in the declaration. And this question of negligence was submitted to the jury in a manner of which the company have no reason to complain. The question for us as a court of error, therefore, is whether the case was, upon the whole, one that ought to have been submitted. The manner of the submission, having been unexceptionable, was there error in the fact of submission? The learned judge reduced the case to three propositions. He said the plaintiff claims to recover: 1. Because the evidence shows that the conductor did not do his duty at Beaver station, by allowing improper persons to get on the cars. 2. Because he allowed more persons than was proper under the circumstances to get on the train and to remain upon it. 3. That he did not do what he could and ought to have done to put a stop to the fighting upon the train which resulted in the plaintiff's injury. As to the first of the above propositions, the judge referred the evidence to the jury especially with a view to the question whether the disorderly character of the men at Beaver station had fallen under the conductor's observation so as to induce a reasonable man to apprehend danger to the safety of the passengers. The evidence on this point was conflicting, but it must be assumed that the verdict has established the conclusion that the conductor knew that drunken men were getting into the cars. Let it be granted also as a conclusion of law that a

conductor is culpably negligent who admits drunken and quarrelsome men into a passenger-car. What then? The case shows that an agricultural fair was in progress in the vicinity of Beaver station; that an excited crowd assembled at the station rushed upon the cars in such numbers as to defy the resisting power at the disposal of the conductor, and that the man who commenced the fight sprang upon the platform of the hindmost car after they were in motion. Of what consequence, then, was the fact that the conductor knew these were improper passengers? It is not the case of a voluntary reception of such passengers. If it were, there would be great force in the point; for more improper conduct could scarcely be imagined in the conductor of a train than voluntarily to receive and introduce among quiet passengers, and particularly ladies, a mob of drunken rowdies. But the case is that of a mob rushing with such violence and in such numbers upon the cars as to overwhelm the conductor as well as the passengers. It is not the duty of railroad companies to furnish their trains with a police force adequate to such emergencies. They are bound to furnish men enough for the ordinary demands of transportation, but they are not bound to anticipate or provide for such an unusual occurrence as that under consideration. When passengers purchase their tickets and take their seats they know that the train is furnished with the proper hands for the conduct of the train, but not with a police force sufficient to quell mobs by the wayside. No such element enters into the implied contract. It is one of the incidental risks which all who travel must take upon themselves, and it is not reasonable that a passenger should throw it upon the transporter. These observations are equally applicable to the second proposition. The conductor did not 'allow' improper numbers, any more than improper characters, to get upon the cars. He says he took no fare from them, and in no manner recognized them as passengers. To allow undue numbers to enter a car is a great wrong, — almost as great as know-

which was voluntarily stopped at certain docks, not a regular station, in the midst of an excited mob of striking workmen, where a number of those composing the mob were allowed to board the train and enter plaintiff's coach, no warning whatever having been given to him of the danger. Under such circumstances the company is properly charged with negligence in stopping its train at such a place and allowing any part of the lawless and excited mob to board the train.¹

ingly to introduce persons of improper character; and, in a suitable case, we would not hesitate to chastise the practice severely. But this is not a case in which the conductor had any volition whatever in respect either to numbers or characters. He was simply overmastered; and the only ground upon which the plaintiff could charge negligence upon the company would be in not furnishing the conductor with a counter force sufficient to repel the intruders. This was not the ground assumed by the plaintiff, and it would scarcely have been maintainable had it been assumed. Taking the case as it is presented in the evidence, we think it was error for the court to submit the cause to the jury on these two grounds. But upon the third ground we think the cause was properly submitted. *If the conductor did not do all he could to stop the fighting, there was negligence.* Whilst a conductor is not provided with a force sufficient to resist such a raid as was made upon the train in this instance, he has, nevertheless, large powers at his disposal, and, if properly used, they are generally sufficient to preserve order within the cars, and to expel disturbers of the peace. His official character and position are a power. Then he may stop the train and call to his assistance the engineer, the fireman, all the brakemen, and such passengers as are willing to lend a helping hand; and it must be a very formidable mob indeed, more formidable than we have reason to believe had obtruded into these cars, that can resist such a force. Until at least he has put forth the forces at his disposal, no conductor has a right to abandon the scene of conflict. To keep his train in motion and busy himself with collecting fares in forward cars whilst a general fight was

raging in the rearmost car where the lady passengers had been placed, was to fall far short of his duty. Nor did his exhortation to the passengers to throw the fighters out come up to the demands of the hour. He should have led the way, and no doubt passengers and hands would have followed his lead. *He should have stopped the train and herded a passage through the intrusive mass until he had expelled the rioters, or had demonstrated, by an earnest experiment, that the undertaking was impossible.*"

¹ Chicago & Alton R. Co. v. Pillsbury, 123 Ill. 9; 31 Am. & Eng. R. Cas. 24. The opinion of the court discusses the question at some length; a former decision in the same case, reported in 8 N. E. Rep. 803; 26 Am. & Eng. R. Cas. 241, was overruled.

But the company cannot be held liable for an assault upon a passenger by one not an employé in its service when there was no negligence on its part in not providing against it. Thus where a passenger while standing on the platform and about to enter the car is knocked down and robbed by an unknown person there is no ground upon which the company can be held liable. *Sachrowitz v. Atchison, &c. R. Co.*, 37 Kan. 212; 34 Am. & Eng. R. Cas. 382. So where a passenger was thrown from the car by his fellow-passengers, the company cannot be held liable, it having had no reason to anticipate such an assault. *Felton v. Chicago, &c. R. Co.*, 69 Iowa, 577; 27 Am. & Eng. R. Cas. 229. So also where a female passenger waiting at the station is insulted by intruders who came into the waiting-room, the company cannot be held liable, it being shown that there was no ground for anticipating such an occurrence. *Batton v. South, &c. R. Co.*, 77 Ala. 591; 23 Am. & Eng. R. Cas. 514.

SEC. 315. **Liability for Wilful Injury to Passengers by Its Servants.**

—A person who employs servants is bound by the acts of those servants in the line of their employment, whether they are tortious or otherwise, under the maxim *qui facit per alium facit per se*; and this rule of liability applies with increased force where, as in the case of railway companies, the operation of their road, and the discharge of all its subsidiary functions must be performed by employes. It is among the implied provisions of the contract between a passenger and a railway company that the latter has employed suitable servants to run its trains, and that passengers shall receive proper treatment from them; and a violation of this implied duty or contract is actionable in favor of the passenger injured by its breach, although the act of the servant was wilful and malicious, — as, for a malicious assault upon a passenger,¹ committed by any of the trainhands, whether within the line of his employment or not. *The duty of the carrier towards a passenger is contractual, and among other implied obligations is that of protecting a passenger from insults or assaults by other passengers, or by their own servants.* In an Illinois case,² CRAIG, C. J., quite clearly and accurately states the obligation,

Nor is the company liable when there was no reason to anticipate the wrongful act of the fellow-passenger, and where the conductor interferes as speedily as possible in order to prevent the injury. *Mullan v. Wisconsin Central R. Co.* (Wis.), 49 N. W. Rep. 249. See also *Mulligan v. New York, &c. R. Co.*, 129 N. Y. 506. An instruction that "railroad companies are bound to exercise very great vigilance and care in maintaining order, and guarding passengers against violence from whatever source arising," is erroneous. Reasonable care and diligence under all the circumstances is all that can be required. *Illinois Central R. Co. v. Minor*, 69 Miss. 710.

¹ *Stewart v. Brooklyn, &c. R. Co.*, 90 N. Y. 388; 43 Am. Rep. 185; *Wabash, &c. R. Co. v. Rector*, 104 Ill. 296; *Chicago, &c. R. Co. v. Flexman*, 103 Ill. 546; 42 Am. Rep. 33; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; 2 Am. Rep. 39; *Hanson v. European, &c. R. Co.*, 62 Me. 84; *Bryant v. Rich*, 106 Mass. 108; 8 Am. Rep. 311; *Shirley v. Billings*, 8 Bush (Ky.), 147; *Craker v. Chicago, &c. R. Co.*, 36 Wis. 657; 17 Am. Rep. 504;

New Orleans, &c. R. Co. v. Burke, 53 Miss. 200; *Arasmith v. Temple*, 11 Ill. App. 89; *Rounds v. Delaware, &c. R. Co.*, 64 N. Y. 121. In *Ramsden v. Boston, &c. R. Co.*, 104 Mass. 117, 6 Am. Rep. 117, the plaintiff (a woman) was a passenger upon the defendant's railroad, and upon being called upon for her fare by the conductor, paid it to him. Soon after, the conductor called upon her again for her fare, and she declined to pay him. Thereupon the conductor used very abusive and insulting language to her, and demanded that she should give him her parasol to keep as security for her fare, which she refused to do; and the conductor thereupon took hold of her parasol and forcibly wrenched it from her possession. The court held that the company was liable for the assault.

² *Chicago, &c. R. Co. v. Flexman*, 103 Ill. 546; 42 Am. Rep. 33. In this case a brakeman upon a freight train assaulted the plaintiff, who was a passenger, because he accused him of stealing his watch; and the company was held liable for the assault.

and the rule of liability in such cases, thus: "The law required the appellant, as a common carrier, to use all reasonable exertion to protect its passengers from insult or injury from fellow-passengers who might be on the train; and if the agents of the appellant in charge of the train should fail to use reasonable diligence to protect its passengers from injuries from strangers while on board the train, the company would be liable. So, too, the contract which existed between the appellant as a common carrier, and the appellee as a passenger, was a guaranty on behalf of the carrier that the appellee should be protected against personal injury from the agents or servants of the appellant in charge of the train. The company placed these men in charge of the train. It alone had the power of removal, and justice demands that it should be held responsible for their wrongful acts towards passengers while in charge of the train. Any other rule might place the travelling public at the mercy of any reckless employé a railroad company might see fit to employ, and we are not inclined to establish a precedent which will impair the personal security of a passenger."

In an Indiana case,¹ the brakeman wilfully turned a jet of water upon the plaintiff, a passenger, for refusing to pay him for watering his hogs, and the court held that the company was liable. In a recent case in New York,² the driver of a horse-car attacked and assaulted the plaintiff, who was a passenger upon the car, and cruelly beat him, because the passenger expostulated with the driver for an assault made by him upon a third person outside the vehicle. The trial court dismissed the complaint, upon the ground that in making the assault the servant was not acting within the scope of his employment; but the Court of Appeals reversed this ruling, — TRACY, J., saying: "Had the person assaulted been one to whom the defendant owed no duty, the dismissal of the complaint would probably have been correct; *but the rule which applies in such a case has no application as between a common carrier and his passenger.* In such a case a different rule prevails. By the defendant's contract with the plaintiff it had undertaken to carry him safely, and to

¹ Terre Haute, &c. R. Co. v. Jackson, 81 Ind. 19. See also Louisville, &c. R. Co. v. Wood, 113 Ind. 544, where the company was held liable for the wilful act of the conductor in pulling passenger off a moving train.

² Stewart v. Brooklyn, &c. R. Co., 90 N. Y. 588; 43 Am. Rep. 185. See also

Schultz v. Third Ave. R. Co., 89 N. Y. 242. A different doctrine was at one time maintained in New York. Isaacs v. Third Ave. R. Co., 47 N. Y. 122, where the court refused to hold the carrier liable for a wilful assault by the conductor. But the doctrine of this case is repudiated in the later Stewart case, cited *supra*.

treat him respectfully; and while a common carrier does not undertake to insure against injury from every possible danger, *it does undertake to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which a carrier owes to the passenger.*"¹ In a former work written by us,² we laid down the rule applicable in such cases as follows: "If a carrier of goods for hire should commit the carriage of them to a servant, and the servant should steal them, or wantonly destroy them, or through his negligence injure, or suffer them to be injured, there is no question but that the master would

¹ See Hutchinson on Carr. (2d ed.), §§ 595 *et seq.* In *Milwaukee, &c. R. Co. v. Finney*, 10 Wis. 388, the plaintiff was unlawfully put out of a car by the conductor; in *Seymour v. Greenwood*, 7 H. & N. 355, a passenger was assaulted and put out of the defendant's omnibus by one of its servants; in *Moore v. Fitchburg R. Co.*, 4 Gray (Mass.), 465, the plaintiff, a passenger, was forcibly expelled from the defendants' train by the conductor; and in all these cases the company was held responsible. So, in *Penn. R. v. Vandiver*, 42 Penn. St. 365, a passenger received injuries of which he died, by being thrown from the platform of a railroad-car because he refused to pay his fare or show his ticket, he averring he had bought one but could not find it. The evidence showed he was partially intoxicated. It was urged in defence that if the passenger's death was the result of force and violence, and not the result of negligence, then (such force and violence being the act of the agents alone without any command or order of the company) the company was not responsible therefor. But the court held otherwise. "A railway company," said the court, "selects its own agents at its own pleasure, and it is bound to employ none except capable, prudent, and humane men. In the present case the company and its agents were all liable for the injury done to the deceased." In *Weed v. Panama R. Co.*, 17 N. Y. 362, the jury found specially that the act of the servant by which the plaintiff was injured was wilful. The court held the wilfulness of the act did not defeat the plaintiff's right to look to the railroad company for redress. In *Philadelphia, &c. R. Co. v. Derby*, 14

How. (U. S.) 468, where the servant of a railroad company took an engine and ran it over the road for his own gratification, not only without consent, but contrary to express orders, the Supreme Court of the United States held that the railroad company was responsible. In *Landreaux v. Bel*, 5 La. o. s. 434, the court say that carriers are responsible for the misconduct of their servants towards passengers to the same extent as for their misconduct in regard to merchandise committed to their care; that no satisfactory distinction can be drawn between the two cases. In *Chamberlain v. Chandler*, 3 Mason (U. S.), 242, Judge STORY declared, in language strong and emphatic, that a passenger's contract entitles him to respectful treatment; and he expressed the hope that every violation of this right would be visited, in the shape of damages, with its appropriate punishment. In *Nieto v. Clark*, 1 Cliff. (U. S.) 145, where the steward of the ship assaulted and grossly insulted a female passenger, Judge CLIFFORD declares, in language equally emphatic, that the contract of all passengers entitles them to respectful treatment and protection against rudeness and every wanton interference with their persons from all those in charge of the ship; that the conduct of the steward disqualified him for his situation, and justified the master in immediately discharging him, although the vessel was then in a foreign port. *Bryant v. Rich*, 106 Mass. 180, was a very similar case. See also *Baltimore, &c. R. Co. v. Blocher*, 27 Md. 277.

² Wood's Law of Master and Servant, 648 *et seq.*

be liable therefor;¹ and it would be a singular rule, and an absurd one, that did not hold the carriers of passengers, intrusted not only with their comfort, but the safety of their persons and their lives, during the journey, to as strict performance of this duty as of the other, and it will be seen by an examination of the better class of cases that they are so held. They are bound to look out for the comfort of their passengers, and, as far as possible, save them from annoyance."² This rule has been held to extend to cover an implied stipulation that such carriers are bound to protect passengers against "obscene conduct, lascivious behavior, and every immodest and libidinous approach;³ and this has been held to amount to a contract duty. In the language of STORY, J.,⁴ "It is a stipulation, not for toleration, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evil without reluctance, and that promptitude which administers aid to distress." In respect to females, it proceeds yet further; it includes an implied stipulation against general obscenity, that immodesty of approach that borders on lasciviousness, and that wanton disregard of the feelings which aggravates every evil.⁵ In com-

¹ Alden v. Pearson, 3 Gray (Mass.), 342; Klauber v. Am. Express Co., 21 Wis. 21; Am. Express Co. v. Sands, 55 Penn. St. 140.

Day v. Owen, 5 Mich. 520.

² Nieto v. Clark, 1 Cliff. (U. S.) 145. See also as to the liability of a carrier by water, Springer Transp. Co. v. Smith, 16 Lea (Tenn.), 498.

³ Chamberlain v. Chandler, 3 Mason (U. S.), 242.

⁵ The liability of a carrier of passengers for insults inflicted upon its passengers was considered in a Wisconsin case, Craker v. The Chicago, &c. R. Co., 36 Wis. 657; 17 Am. Rep. 504. In that case the plaintiff, a young lady, was a passenger upon the defendant's road, and for a portion of the way was the only passenger on the car, and while so pursuing her journey, the conductor of the train, without her consent, forcibly kissed her. In an action against the railroad company, to recover for the injury, a verdict for \$1,000 was rendered in her favor, which was sustained upon appeal. In a Maine case, Goddard v. Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39, the

liability of a railroad company for an assault committed by its servants upon a passenger was ably discussed. In that case it appeared that the plaintiff was a passenger in the defendant's train, and that, on request, he surrendered his ticket to a brakeman employed on the train, who in the absence of the conductor, was authorized to demand and receive it; that the brakeman afterwards approached the plaintiff, and, in language coarse, profane, and grossly insulting, denied that he had either surrendered or shown him his ticket, that the brakeman called the plaintiff a liar, charged him with attempting to avoid the payment of his fare, and with having done the same thing before, and threatened to split his head open and spill his brains right there on the spot; that the brakeman stepped forward and placed his foot upon the seat on which the plaintiff was sitting, and leaning over the plaintiff, brought his fist close down to his face, and shaking it violently, told him not to *yip*, if he did, he would *spot* him; that he was a damned liar; that he never handed him his ticket; that he did not believe he paid his fare either way; that

menting upon the rights and duties of carriers of passengers, SHAW,

this assault was continued some fifteen or twenty minutes, and until the whistle sounded for the next station; that there were several passengers present in the car, some of whom were ladies, and that they were all strangers to the plaintiff; that the plaintiff was at the time in feeble health, and had been for some time under the care of a physician, and at the time of the assault was reclining languidly in his seat; that he had neither said nor done anything to provoke the assault; that, in fact, he had paid his fare, had received a ticket, and had surrendered it to this very brakeman who delivered it to the conductor only a few minutes before, by whom it was afterwards produced and identified; that the defendants were immediately notified of the misconduct of the brakeman, but, instead of discharging him, retained him in his place; that the brakeman was still in the defendants' employ when the case was tried, and was present in court during the trial, but was not called as a witness, and no attempt was made to justify or excuse his conduct. Upon this evidence the defendants contended that they were not liable, because the brakeman's assault upon the plaintiff was wilful and malicious, and was not directly nor impliedly authorized by them; that the master is not responsible as a trespasser, unless, by direct or implied authority to the servant, he consents to the unlawful act. "The fallacy of this argument, when applied to the common carrier of passengers," said WALTON, J., "consists in not discriminating between the obligation which he is under to his passenger, and the duty which he owes a stranger. It may be true that if the carrier's servant wilfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult,

from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insult of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the wilful misconduct of the carrier's servant, the carrier is necessarily responsible. And it seems to us it would be cause of profound regret if the law were otherwise. The carrier selects his own servants, and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they execute their trust. To their care and fidelity are intrusted the lives and limbs and comfort and convenience of the whole travelling public, and it is certainly as important that these servants should be trustworthy as it is that they should be competent. It is not sufficient that they are capable of doing well, if in fact they choose to do ill; that they can be as polite as a Chesterfield, if, in their intercourse with the passengers, they choose to be coarse, brutal, and profane. The best security the traveller can have that these servants will be selected with care is to hold those by whom the selection is made responsible for their conduct." Still further on in the course of his opinion, he summarizes the rule of liability thus: "The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of, to make his passenger's journey safe. Whoever engages in the business impliedly promises that his passengers shall have this degree of care. In other words, the carrier is conclusively presumed to contract to give the passenger this degree of care; we say *conclusively* presumed, for the law will not allow the carrier, by notice or special contract even,

C. J.,¹ said: "An owner of a steamboat or railroad is in a condition somewhat similar to that of an inn-keeper whose premises are open to all guests, yet he is not only empowered, *but he is bound* so to regulate his house, — as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, — as to repress and prohibit all disorderly conduct therein; and, of course, he has a right, and is bound, to exclude from his premises all disorderly persons not conforming to the regulations necessary and proper to secure such quiet and good order."²

From these brief extracts from the opinions of eminent jurists, as well as from an examination of the cases referred to in the notes to this section, it will be seen that *in all cases where the master owes a duty to third persons or the public, he cannot shirk or evade it by committing its performance to another, but is bound absolutely to perform the duty, and is liable for a failure so to do, in any respect whereby injury results to others, whether such failure results from the negligence or from the wilful, wanton, or criminal conduct of the agent to whom the duty is committed.*³ This rule was well illustrated in the case referred to in the last note. In that case the plaintiff, with his wife, took passage on the defendants' train, and, through the

to deprive his passenger of this degree of care. If the passenger does not have such care, but on the contrary is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains. The passenger's remedy may be either in assumpsit or tort, at his election. In the one case he relies upon a breach of the carrier's common-law duty in support of his action; in the other upon a breach of his implied promise. The form of the action is important only upon the question of damages. In actions of assumpsit, the damages are generally limited to compensation. In actions of tort, the jury are allowed greater latitude, and in proper cases, may give exemplary damages."

¹ Com. v. Power, 7 Met. (Mass.) 601.

² See Markham v. Brown, 8 N. H. 523.

³ Weed v. Panama R. Co., 17 N. Y. 362. In the case of Steamboat Co. v. Brockett, 121 U. S. 637, the court held that "a common carrier undertakes abso-

lutely to protect its passengers against the misconduct or negligence of its own servants, employed in executing the contract of transportation and acting within the general scope of their employment." And Mr. Taylor, in his work on Corporations (2d ed.), § 347, states a very stringent rule: "While a carrier does not insure his passengers against every conceivable danger, he is held absolutely to agree that his own servants engaged in transporting the passenger shall commit no wrongful act against him. . . . Recent cases state this liability in the broadest and strongest language; and, without going beyond the actual decisions, it may be said that the carrier is liable for every conceivable wrongful act done to a passenger by its train-hands and other employés while they are engaged in transporting him, no matter how wilful and malicious the act may be, or how plainly it may be apparent from its nature that it could not have been done, in furtherance of the carrier's business." See also Peavey v. Georgia, &c. R. Co., 81 Ga. 485; Harrison v. Fink, 42 Fed. Rep. 787.

wilful conduct of their conductor and servant, the train was detained over night in an unhealthy locality, and the passengers were thereby exposed to great dangers and hardships. The plaintiff's wife, in consequence of such exposure and hardships, was taken ill during the night and suffered greatly. In an action to recover for the injury, the defendants were held liable, notwithstanding the injury arose from the wilful act of the conductor, the court very properly holding that the defendants were bound to discharge their contract with the plaintiff absolutely, and could not defend upon the ground that they had committed its performance to an agent who had wantonly disregarded the duty. In reference to the application of this rule, so far as railroad companies and carriers of passengers are concerned, it may be said that they are not only bound to protect their passengers against injury and unlawful assault by third persons riding upon the same conveyance, so far as due care can secure that result, but they are bound absolutely to see to it that no unlawful assault or injury is inflicted upon them by their own servants. In the one case their liability depends upon the question of negligence,—whether they improperly admitted the passenger inflicting the injury upon the train,¹—*while in the other, the simple question is, whether the act was unlawful; and the question of negligence is not an element of liability.*² In a Massachusetts case,³ the plaintiff was a passenger upon the defendants' steamboat from Boston to Gardiner, Maine, and while upon the trip he was unlawfully assaulted by the steward of the boat and some of the table waiters. In an action to recover for the injuries, the plaintiff had a verdict for \$8,000, which was upheld on appeal, — CHAPMAN, J., remarking: "As a general rule, the master is liable for what his servant does in the course of his employment; but, in regard to matters wholly disconnected from the service to be rendered, the master is under no responsibility for what the servant does or neglects to do. The reason is that, in respect to such matters, he is not a servant."⁴ If, therefore, any of the officers or men connected with the running of the defendants' boat had met the plaintiff in the street or elsewhere, in a position wholly

¹ Pittsburgh, &c. R. Co. v. Hinds, 53 Penn. St. 512; 91 Am. Dec. 224; Stephen v. Smith, 29 Vt. 160.

² Goddard v. Grand Trunk R. Co., 57 Me. 202; 2 Am. Rep. 39; Sherley v. Billings, 8 Bush (Ky.), 147; Bryant v. Rich, 106 Mass. 180. See New Orleans, &c. R.

Co. v. Jopes, 142 U. S. 26, where this passage is quoted with approval.

³ Bryant v. Rich, 106 Mass. 180; 8 Am. Rep. 311.

⁴ Aldrich v. Boston, &c. R. Co., 100 Mass. 31.

disconnected with their duties to the defendants, and committed an assault and battery upon him, it is clear that the defendants would not have been liable.

"There are two views which may be taken in the present case. One is the view which was taken by the court in a leading case decided in the Supreme Court of the United States.¹ The plaintiff in that action was riding gratuitously, and the court held that the company were liable to him, not on the ground of a contract between the parties, but because he was injured by their carelessness when he was where he had a lawful right to be. But as the plaintiff in this case was a passenger for hire, we think it better to consider what the contract was between them. This has been discussed in the following cases.² . . . These cases were cited by CLIFFORD, J.,³ and the terms of the contract for carriage by water are well stated by him in conformity with the authorities as follows: 'Passengers do not contract merely for ship-room and transportation from one place to another, but they also contract for good treatment, and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the ship or other conveyance. In respect to such treatment of passengers, not merely the officers but the crew are the agents of the carriers.' In a case in the United States Circuit Court,⁴ STORY, J., says: 'Kindness and decency of demeanor is a duty not limited to the officers, but extends to the crew.' This interpretation of the contract of the carrier is not unreasonable. It is not more extensive than the necessities of passengers require; nor is it difficult to perform. The instances in which it is violated by servants, even of the lowest grade, on board a ship or engaged in the management of a railroad train are rare, and the carrier rather than the passenger ought to take the risk of such exceptional cases, the passenger being necessarily placed so much within the power of the servants. In this case,⁵ the servants who committed the wrong, being the steward and table waiters, were those who were engaged in providing meals,

¹ Philadelphia, &c. R. Co. v. Derby, 14 How. 468.

² Chamberlain v. Chandler, 3 Mason (U. S.), 242; Nieto v. Clark, 1 Cliff. (U. S.) 145; Baltimore & Ohio R. Co. v. Blocher, 27 Md. 277; Pittsburgh, &c. R. Co. v. Hinds, 53 Penn. St. 512; Simmons v. New Bedford, &c. Steamboat Co., 97

Mass. 361; 100 Mass. 34; Milwaukee, &c. R. Co. v. Finney, 10 Wis. 388.

³ Pendleton v. Kinsley, 3 Cliff. (U. S.) 124.

⁴ Chamberlain v. Chandler, 3 Mason (U. S.), 242.

⁵ Bryant v. Rich, 106 Mass. 180.

waiting on the tables, and collecting the pay for meals. They were treating the plaintiff's relative with gross rudeness in connection with this business, and the plaintiff interfered only by a remark that was proper, whereupon the assault was committed. It was not as if a quarrel had occurred on shore and disconnected with the duties of persons on shipboard. *It violated the contract of the defendants as to how the plaintiff should be treated by their servants who were employed on board the ship, and during the passage.* For a violation of such a contract, either by force or negligence, the plaintiff may bring an action of tort or an action of contract." In this class of cases the question of the servant's authority is not involved. Indeed, it is presumed that the acts were not authorized, unless the company, by retaining the servant in its employment after it has knowledge of his act, can impliedly be regarded as ratifying his act.¹ The action is predicated upon the breach of an absolute duty to protect the passenger from insult or danger so far as possible, and the breach consists in its not having done so. The fact that it employs agents to discharge this duty, and has selected with due care, and instructed them properly, does not relieve it in any measure from liability. *Its contract, so far as its agents have the power to do so, must be performed at all hazards."*²

¹ *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; 2 Am. Rep. 39. In *Keokuk Northern Line Packet Co. v. True*, 88 Ill. 608, it was held that a steamboat company, as a carrier of passengers for hire, is, through its officers and servants, bound to the utmost practicable care and diligence to carry its passengers safely to their place of destination, and to use all reasonably practicable care and diligence to maintain among the crew of the boat, including deck-hands and roustabouts, such a degree of order and discipline as may be requisite for the safety of its passengers. The same rule that governs a steamboat company must also be applied to a railroad company, as the duties and obligations resting upon the two are the same, or any other company which carries passengers for hire.

² In *Chicago, &c. R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33, *CRAIG, C. J.*, upon this question, said: "But it is said that if the plaintiff was injured by a servant of the appellant, it was an act outside of the employment of the

servant who committed the act, and not in furtherance of his employment by the master. This position is predicated upon *McManus v. Crickett*, 1 East, 106, and other cases which have followed it. In the case cited, Lord KENYON said: 'It is laid down by HOLT, C. J., as a general proposition, "that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him." Now when a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him; and according to the doctrine of Lord HOLT, his master will not be answerable for such act.' The doctrine announced is no doubt correct when applied to a proper case. If, for example, a conductor or brakeman in the employ of a railroad company should wilfully or maliciously assault a stranger, — a person to whom the railroad company owed no obligation whatever, — the master

The rule then is that a railroad company is civilly liable *for all the unlawful acts of its servant, done in the prosecution of the business entrusted to him* if its passengers are injured thereby, and good faith and motives on the part of the servant are not a defence. The company is, therefore, liable for acts of injury and insult by an employé, although in departure from the authority conferred or implied, if they occur in the course of the employment.¹

The principles announced are not, however, to be construed as making the company liable for every assault committed by its servants upon a passenger. It must always be shown, in order to fix the company's responsibility, that the alleged assault was a wrongful act. Therefore where the conductor in order to protect himself shoots a passenger who is threatening him with an uplifted weapon there is no liability on the part of the company.² So also where the

in such a case would not be liable for the act of the servant; but when the same doctrine is invoked to control a case where an assault has been made by the servant of the company upon a passenger on one of its trains, a different question is presented, — one which rests entirely upon a different principle." The court then reviews *Keokuk Packet Co. v. True*, 88 Ill. 608; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Craker v. Chicago, &c. R. Co.*, 36 Wis. 657, and other cases previously cited, approving the doctrine upheld by them.

In an English case the guard in slamming the door of the coach without warning caught the hand of a passenger between the door and the frame, and severely injured it. The company was held liable for the injury. *Fordham v. Railway Co.*, L. R. 4 C. P. 619. There are several cases in this country in which the railway company has been held liable for a similar injury. *Texas, &c. R. Co. v. Overall*, 82 Tex. 247; 18 S. W. Rep. 583; *Mackin v. People's St. R. Co.*, 45 Mo. App. 82; *Kentucky, &c. Bridge Co. v. Quinkert*, 2 Ind. App. 244 (door suddenly shut by a jerk of the train).

¹ In the case of *Palmeri v. Manhattan R. Co.*, 133 N. Y. 261, the plaintiff purchased a ticket of the defendant's agent at one of its stations, and, after some altercation about the amount of the change, passed through the gate to take a train.

The agent followed her out upon the platform, charged her with having passed upon him a counterfeit twenty-five-cent piece, and demanded another in its place. She refused, insisting that her money was genuine, and refused to give back the change received. The agent called her a counterfeiter and a common prostitute, placed his hand upon her, and told her not to stir until he had procured a policeman to arrest and search her. He detained her on the platform for a while, but, not getting an officer, let her go. It was held that an action for damages was maintainable; that, in the acts complained of, the agent was engaged about the defendant's affairs, in endeavoring to protect and recover its property, and so it was responsible for its acts. The court distinguished the case of *Mulligan v. New York, &c. R. Co.*, 129 N. Y. 506. See also *Stewart v. Brooklyn, &c. R. Co.*, 90 N. Y. 588.

² Thus in the case of *New Orleans, &c. R. Co. v. Jones*, 142 U. S. 18, the evidence showed that J., the plaintiff in the case, got into an altercation with the conductor and in the course of it approached him with an open knife in his hand, and in a threatening manner; that the conductor in order to protect himself shot the plaintiff, seriously wounding him. The trial court instructed the jury that if C. (the conductor) "shot under the mistaken belief, from J's. actions, that he was in danger of great bodily harm then about to be

passenger, in any other way, himself provokes the attack, he cannot hold the company liable if his action is resented by its agent.¹ In an Ohio case, an altercation occurred between the passenger and a baggage-master which resulted in an attack by the latter upon the passenger from which he sustained severe injuries. The court held that the act was entirely beyond the scope of the servant's authority, and not being immediately connected with the company's obligation to carry, afforded no ground for a recovery against the company.² The rule as to exemplary damages against the company is the same as that where a private person is sued for the tort of his agent.³

While a common carrier of passengers, by his contract of transportation, undertakes to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants when engaged in the performance of their duties, to warrant a recovery of damages alleged to have been caused by a breach of the

done him by J., when in fact J. was not designing or intentionally acting so as to indicate such design, the plaintiff should be entitled to compensatory damages." The Supreme Court held that this instruction was wrong; that the conductor having done the shooting in self-defence and while acting under a reasonable belief that his life was in danger, there was no wrongful act and therefore no liability on the part of the company. The case of *Steamboat Co. v. Brockett*, 121 U. S. 637, was distinguished.

¹ *Scott v. Central Park R. Co.*, 53 Hun (N. Y.), 414; *New Orleans, &c. R. Co. v. Jopes*, 142 U. S. 18; *Mars v. Delaware, &c. Canal Co.*, 54 Hun (N. Y.), 625; *Ricketts v. Chesapeake, &c. R. Co.*, 33 W. Va. 433.

² *Little Missouri R. Co. v. Wetmore*, 19 Ohio St. 110. See the same principle applied, and the company held not liable, where a station-agent arrested the passenger without right, in *Poulton v. London, &c. Ry. Co.*, L. R. 2 Q. B. 534; and where a street-car driver assaulted a passenger after the latter had left the car and was on his way to the company's office to report some misconduct on the part of the driver, *Central R. Co. v. Peacock*, 69 Md. 257. But in *Savannah, &c. R. Co.*, 86 Ga. 312; 12 S. E. Rep. 307, the company was held liable for both assaults, where the conductor assaulted a passenger on the car and then

followed him to the office, where he went to report the former's misconduct and assaulted him again. And it has several times been held that the company is liable for the false imprisonment of a passenger by its agent. *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77; 43 Am. Rep. 141. A passenger cannot claim damages on account of the conductor's drawing a pistol on him, and speaking of him as a coward to the other passengers, if the conductor's conduct was provoked by passenger's own acts. *Harrison v. Fink*, 42 Fed. Rep. 787; *Scott v. Railroad*, 54 Hun (N. Y.), 414. But it has been held that words of provocation alone will not justify an assault upon a passenger by the conductor, though it may be considered in mitigation of damages. *Haman v. Omaha Horse R. Co.*, 52 N. W. Rep. 830. This, however, would depend properly upon what words of provocation were used. A street-railway company is liable for damages to the feelings and reputation of one of its passengers caused by the threats and insolence of a car-driver. *Lafitte v. New Orleans, &c. R. Co.*, 43 La. An. 34; 8 So. Rep. 701. See also *Conger v. St. Paul, &c. R. Co.*, 45 Minn. 207. As to exemplary damages, see *Louisville, &c. R. Co. v. Whitman*, 79 Ala. 228.

³ *Louisville, &c. R. Co. v. Whitman*, 79 Ala. 228.

undertaking, the negligence or wilful misconduct must not only be shown, but it must also appear that the servant was acting at the time in the course of his employment,¹ or that the company was negligent in failing to provide against such an injury.

SEC. 316. Rule as to Acts of Servants to those not Passengers. —

While, in the case of passengers, because of the contractual duty existing upon the part of the company, the question as to whether the servant committing the injury had authority, express or implied, to do so, or, in other words, whether it was an act done within the line of his duty, is not material, yet, when the question arises between a trespasser, or one to whom this duty is not owed, and the company, a different question is presented, and the company can only be made liable when authority, express or implied, to do the act is shown. Thus, the conductor of a train, being in charge of, and having full control over it, for the time represents the company as to any matter connected with its management and control, and for an act done by him in the line of his duty, as by the ejection of a trespasser from the train, etc., the company would unquestionably be liable; but for the act of a brakeman of the train, who, without the direction of the conductor, should remove a trespasser from the train, the company would not be liable, unless express authority to do an act to which the act complained of is incident is shown;

¹ In an action to recover damages for alleged unlawful arrest and imprisonment, these facts appeared: plaintiff, accompanied by a friend, purchased two passenger-tickets of defendant's ticket-agent, to whom he gave a five-dollar bill, and received the change with the tickets. A short time before a detective had left with the agent a circular describing three men, who, it stated, were engaged in passing counterfeit five-dollar bills; the detective told the agent to look out for these men, and if they appeared to have them arrested. The agent took the bill of the plaintiff, supposing him and his companion to be two of the men, and that the bill was counterfeit. After testing it, he sent word to a detective. In consequence of this, a police officer came; the agent, according to the plaintiff's testimony, pointed out the plaintiff, who was sitting at the time outside the station, and directed his arrest; he was thereupon arrested and brought into the ticket-office. The agent charged him

with having passed a counterfeit bill, which the plaintiff denied, but gave the agent another bill in its place. He was then taken to the police court, and upon examination was discharged, the first bill having been found to be good. It was held that the defendant was not liable, that the agent was not acting in the line of his duty so as to make his principal responsible for his acts; that he took the bill supposing it to be counterfeit; and so not in the course of his business, or in the discharge of his duties as agent, but to entrap the plaintiff and to aid the police, and that he was not engaged in the discharge of any duty as agent when he pointed out the plaintiff and directed his arrest; also, that the defendant was not liable to the plaintiff for any breach of its contract with him as a passenger, or for neglect of any duty growing out of the relation of passenger and carrier. *Mulligan v. New York, & R. Co.*, 129 N. Y. 506.

because the act is not one which comes within the scope or line of his duty.¹ Thus, in an Iowa case,² a brakeman, without the direction of the conductor, removed a trespasser from a freight train, and in an action for injuries received by him in being so removed with undue force, the company was held not liable, because the act was one wholly outside the scope of the brakeman's duties.³ In a New

¹ *Marion v. Chicago, &c. R. Co.*, 59 Iowa, 528; *Peck v. N. Y. Central R. Co.*, 70 N. Y. 587; *Rounds v. Delaware, &c. R. Co.*, 64 N. Y. 129; *Walker v. South-eastern Ry. Co.*, 23 L. Times Rep. 14. In the case of *Denver, &c. R. Co. v. Harris*, 122 U. S. 596, it appeared that the Atchison company were in peaceful possession of a railroad, and while so in possession, the Denver company (the defendant) by an armed force of several hundred men, acting as its agents and employés, and under its vice-president and assistant general manager, attacked with deadly weapons the employés of the Atchison company having charge of the road, and forcibly deprived them of possession of the road. There was a demonstration all along the line of the road, and while all this was going on and the seizure was being made, the plaintiff, an employé of the Atchison company, while on the road and pursuing his employment, was fired upon and seriously injured. Immediately upon this seizure the Denver company took charge of the road and continued in possession for some time. In an action by the plaintiff to recover for the injuries received it was held that the Denver company was liable for the unlawful acts of its agents. Admitting that their acts were unauthorized, there was an implied ratification of all they had done. Punitive damages were allowed.

² *Marion v. Chicago, &c. R. Co.*, 59 Iowa, 528. In the case of *Farber v. Missouri Pac. R. Co.* (Mo.), 22 S. W. Rep. 631, it appeared that the plaintiff was forcibly expelled by a brakeman from a freight train on which he was attempting to steal a ride. The train was in motion at the time and, in consequence of the rough and dangerous expulsion, plaintiff sustained severe injuries. In an action for damages the court held, 1. That the provision of the Missouri Constitution that railways within the State are public highways, did

not authorize any person to ride thereon without the payment of fare, or in defiance of the reasonable regulations of the company. 2. That any liability of the company for the act of its brakeman in forcing the plaintiff, a trespasser, from the train was rested not on the law of carriers but of that on *agency*. 3. That it could not be assumed, in the absence of proof, that a brakeman on a freight train has any authority to remove trespassers, and that it was not competent to prove the duties of a brakeman by the testimony of one who has only been around trains a few times, and who testified that he had no other knowledge of their duties than what he had observed and what he had been told by railroad men that they were supposed to be. The action of the circuit court in allowing judgment for the company was therefore affirmed. In support of the first proposition see also *Hyde v. Railroad Co.* (Mo.), 19 S. W. Rep. 483; *Whitehead v. Railroad Co.*, 99 Mo. 263. In support of the second proposition the court cited *Bess v. Chesapeake, &c. R. Co.*, 35 W. Va. 492; 14 S. E. Rep. 234; *International, &c. R. Co. v. Anderson*, 82 Tex. 516. Compare *Hoffman v. N. Y. Central R. Co.*, 87 N. Y. 25, where the plaintiff, a boy eight years of age, jumped upon the steps of a car in a passenger train on defendant's road, and sat down upon the platform of the car; he was kicked from the car by the conductor or a brakeman, while the train was running at a speed of about ten miles an hour, and was injured. It was held that the case was properly submitted to the jury, and the evidence justified a verdict for the plaintiff, since it was within the implied authority of the conductor or brakeman to remove trespassers.

³ See *Brand v. Schenectady, &c. R. Co.*, 8 Barb. (N. Y.) 368; *Meyer v. Second Ave. R. Co.*, 8 Bosw. (N. Y.) 305, *affirmed* 17 N. Y. 362.

Jersey case¹ the master of a ferry-boat left the owner's wharf without the direction of the owners' agent, — who alone possessed authority

Where a female servant, having authority to light fires in a house, but not to clean the chimneys, lighted a fire for the sole purpose of cleaning a chimney, it was held that her employer was not liable for an injury caused by her negligence in lighting the fire. *Mackenzie v. McLeod*, 10 Bing. 385. See also *Towando Coal Co. v. Heenan*, 86 Penn. St. 418. In our opinion the court erred in the instruction given, and in refusing the instruction asked by the defendant." See *Noblesville, &c. Co. v. Gause*, 76 Ind. 142, 40 Am. Rep. 224; *Quinn v. Power*, 87 N. Y. 535, 41 Am. Rep. 392. In *Terre Haute & Indianapolis R. R. Co. v. Jackson*, 81 Ind. 19, the action was for injuries alleged to have been sustained by the appellee whilst a passenger upon a train of the appellant. The particular injury charged was the throwing of a jet of water from a water-tank upon the appellee, it being alleged in one paragraph of the complaint that it was done wrongfully and purposely by the servants of the defendant in charge of the train, and in a second paragraph, that it was done carelessly and negligently. The court said: "The doctrine is now well settled, 'that a corporation is liable for the wilful acts and torts of its agents committed within the general scope of their employment, as well as acts of negligence; and that the corporation is thus bound, although the particular acts were not previously authorized, nor subsequently ratified by the corporation.' *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; *American Express Company v. Patterson*, 73 id. 430, and cases cited: It is therefore immaterial whether the conductor or brakeman had been required or authorized to wash out the cars of the company for any purpose. The appellant had undertaken to carry the plaintiff, as a passenger, upon its train, and was bound to do it safely. For this purpose, the appellant was represented by its agents in charge of the train, and if they did anything inconsistent with the safe carriage

and delivery of the plaintiff at his destination, unharmed, the appellant, upon the plainest principles of law as well as good policy, is liable for the injury. The drenching of a passenger with water, either negligently or wilfully, is a clear and direct breach of the duty to carry safely, and it is immaterial upon the question of the company's liability, whether it resulted from the fault of the brakeman alone, or of the conductor, or of both of them. They were each agents of the company for the running of the train, and the company was therefore responsible for the acts of either, or both, in so far as such acts affected the passenger. It follows that if the conductor was faultless in raising the valve and in throwing the water into the caboose, — which could hardly be, when he knew there was a passenger there liable to be injured, — and the brakeman designedly procured the plaintiff to go to the door of the caboose in order that the water might strike him, the company is clearly liable for the injury; that the evidence tends to show this state of facts is not disputed." In *Galveston, &c. R. R. Co. v. Donahoe*, 56 Tex. 162, a railway conductor, to whom the plaintiff had given a \$20 bill for his fare, went before a magistrate at a station, charged him with passing counterfeit money, and had him arrested and ejected from the cars. The court said: "In the case before us it is distinctly alleged that the conductor was acting within the scope of his authority in making the affidavit, causing appellee to be arrested and wrongfully confined in prison; and for that reason the corporation was liable for the injuries resulting from each and all of these acts of the conductor. As a matter of law, it cannot be said that it was within the scope of the power and duty of the conductor as agent of the corporation, to institute the prosecution, and to cause appellee to be confined in the county jail. These are questions of fact to be determined by the jury from the evidence. If, as a matter of fact,

¹ *Aycriggs v. Hudson, &c. R. R. Co.*, 30 N. J. L. 460.

to start the boat upon each trip, — and took in tow a burning barge. After towing the barge some distance, he was compelled to cut it loose, and it floated against the plaintiff's yacht and injured it. It was held that the master of the boat was not, at the time the injury occurred, acting within the scope of his authority, and that the owners of the ferry-boat were not liable. So where a watchman who was employed to watch the defendant's freight-house cut loose from the defendant's wharf a boat which had taken fire, but which did not endanger the freight-house, and the boat drifted away and was burned, when it could have been saved if it had not been cut

the conductor wrongfully expelled the appellee from the cars, or procured it to be done by others, or wrongfully prevented the appellee from going on to the point of destination, or procured it to be done by others, the company, as a matter of law, would be liable to appellee for the actual damages resulting therefrom. So also, if the corporation had expressly empowered or instructed the conductor to instigate legal proceedings against passengers, and cause them to be arrested and confined in prison upon such charges, it would undoubtedly be liable for the acts of the conductor coming within the scope of such authority. And notwithstanding the general rule that the principal is not liable in exemplary damages for the unauthorized malicious acts of the agent, still, if the principal should ratify or accept such acts of the agent, it thereby becomes liable for the damages, as well exemplary as actual, resulting from the act. As an illustration of this doctrine, if the prosecution instigated against appellee by the conductor was malicious and unfounded, and instituted without the authority of the corporation, still, if it afterward took up and carried on that prosecution, this would constitute a ratification of the act of the agent. For upon sound, equitable considerations, the corporation would not be allowed to accept the benefits resulting from the malicious acts of its agent without being compelled to assume the burdens justly attaching to the acts. Under the issues as presented by the respective pleading of the parties, the testimony excluded by the court should have been admitted : for it was asserted by the appellee that the acts of the conductor

throughout came within the scope of his authority as agent of the company, while it is claimed by the appellant that the conductor was acting throughout beyond and outside of the limits of his agency. The issue thus made was one of fact, to be determined by the evidence, and that offered by appellant and excluded by the court was pertinent to the issue. Besides, the court instructed the jury that if they believed from the evidence 'that the agents or employés of the company, under the guise of acting in discharge of the duties of their station, did wantonly and maliciously, and without probable cause, expel the plaintiff from the cars after he had paid his fare in good and lawful money, and had him arrested upon a criminal charge without probable cause, the company would be liable to the plaintiff for such wanton and malicious action of its agents and employés, not only for the actual damages sustained by the plaintiff, but the jury are authorized to give such punitive damages as the jury in their discretion may deem right.' This charge is in direct conflict with doctrine announced in the case of *Hays v. Houston, &c. R. R. Co.*, 46 Tex. 280. It is there held that the principal, whether a natural or artificial person, is not liable in exemplary damages for the unauthorized malicious acts of the agent, unless such acts had been ratified or accepted by the principal. The error arising from the exclusion of the evidence offered by appellant was intensified by the error contained in the charge." *Murdock v. Boston, &c. R. Co.*, 41 Am. Rep. 57, note ; *Chicago City R. Co. v. McMahon*, 103 Ill. 485.

loose, the company was held not to be liable, because the act was one which did not come within the scope of either the express or implied powers of the servant.¹ These cases sufficiently illustrate the rule that the doctrine of *respondeat superior* does not apply simply from the circumstance that at the time when an injury is inflicted the person inflicting it was in the employment of another; but that, in order to make the master liable, the act inflicting the injury must have been done in pursuance of an express or implied authority to do it. That is, *it must be an act which is fairly incident to the employment*; in other words, an act which the master has set in motion. Thus, where a corn-factor employed a tipsy porter to carry something, which the porter put on a vehicle not used in the corn-factor's business, and left it standing in the highway, and a person driving along the road with a chaise ran upon it and was injured, the corn-factor was held liable, upon the ground that by the employment of the tipsy porter to carry his merchandise upon the highway he had set the whole thing in motion.² It is true, the corn-factor did not employ the porter to leave the vehicle and goods in the highway, but he did employ him to carry them, and whatever was done by him in the execution of that employment, and pertaining to it, he was responsible for. In another English case,³ Lord BROUGHAM said: "I am liable for what is done for me, and under my orders, by the man I employ, for I may turn him off from that employ when I please; and the reason that I am liable is this, that by employing him I set the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it."

The fact that the act was done against the master's orders does not affect his liability; the master is bound to see that his orders are obeyed, and is liable if injury results from the acts of the servant in the line of his duty. Thus, in a leading case before the Federal Supreme Court,⁴ Mr. Justice GRIER said: "Such a qualification of the maxim *respondeat superior* would, in a measure, nullify it. A large proportion of the accidents on railroads are caused by the negligence of the servants or agents of the company; nothing but the most stringent enforcement of discipline and the most exact and perfect obedience to every rule and order emanating from a superior

¹ Thames Steamboat Co. v. Housatonic R. Co., 24 Conn. 40.

² Wanstall v. Pooley, 6 Cl. & F. 910.

³ Duncan v. Findlater, 6 Cl. & F. 910.

See also Anderson v. Brownell, 1 Shaw (Sc.), 474.

⁴ Philadelphia, &c. R. Co. v. Derby, 14 How. (U. S.) 468.

can insure safety to life or property. . . . If such disobedience could be set up by a railroad company as a defence when charged with negligence, the remedy of the injured party would, in most cases, be illusive, discipline would be relaxed, and the danger to the life and limbs of a traveller greatly enhanced. Any relaxation of the stringent policy and principles of the law affecting such cases would be highly detrimental to the public safety."

In an English case,¹ the plaintiff having taken a return ticket from the London station of the defendant's railway, at the end of the return journey gave up an old half-ticket, which he had put into his pocket by mistake, for the right one, whereupon the ticket collector took the plaintiff to the ticket-office, where he explained how the mistake had occurred; he then went with the collector to the inspector of police in the defendant's station, and they all went together to the superintendent of the line, who, after hearing the matter, said: "I think you had better take him, but you had better first obtain the concurrence of the secretary." The inspector then left, and on his return he directed a police constable to take the plaintiff to the public police-station, and charge him with having travelled on the defendant's road without having paid his fare, with intent to avoid paying it. The plaintiff was taken to the station in obedience to these instructions, and before a magistrate, who, upon hearing the plaintiff's story proved true, dismissed the complaint. The police inspector and constable were both in the pay of the defendants. In an action against the defendants for false imprisonment, it was held that inasmuch as the statute imposes a penalty on any person travelling on a railway without having paid his fare, with intent to avoid the payment thereof, and empowers all officers and servants on behalf of the company to apprehend such person until he can conveniently be taken before a justice, it might reasonably be assumed that a railway company carrying passengers would, in the ordinary course of business, have on the spot officers with authority to determine without delay whether the company's servant should or should not on the company's behalf apprehend a passenger accused of the offence; and that the fact that all subordinate servants of the company referred to the superintendent of the line as the superior authority, was sufficient evidence that he was an officer having authority from the company to act for them in the matter; and the fact that the officer sent the plaintiff to the police-station without having

¹ *Goff v. Great Northern Railway Co.*, 3 El. & El. 672.

the concurrence of the secretary as directed by the superintendent, did not relieve the company from liability.¹

In a Scotch case,² a question as to the liability of the master arose in this form: The master sent his servant with a horse to sell at a fair. The horse was afflicted with the glanders, and the servant on his way to the fair put up the horse in the plaintiff's stables, and as a consequence the disease was communicated to three mares of the plaintiff, and afterward by the mare to a cow and two queys. In an action for the damages, the Lord Ordinary held that the master would not be liable, unless, at the time he sent the servant with the horse, *he knew* that it had the disease; but upon appeal it was held that the master was liable, whether he knew that the horse was diseased or not, as the putting up of the horse was in the line of his servant's duty and in strict performance of it. And generally, where the injury results from the execution of the employment, the master is liable. Thus, a person who employs servants to blast in a quarry is liable for their negligence in the adoption of proper precautions to prevent injury to others from the blasts.³ A canal company which employs a draw-bridge tender is liable for injuries inflicted by him in improperly raising the bridge.⁴ So, when a master intrusted his cart to a servant, he was held liable for his negligent or improper management of it.⁵ So, for injuries inflicted by the careless or reckless conduct of the driver of a stage-coach upon a passenger or others.⁶ So, where a person is employed to cut trees, if he, through mistake, cuts trees upon the land of another, the master is liable therefor, even though he gave no authority to cut any trees except upon his own estate.⁷ So a master was held liable for the acts of his servants employed to clear land for him, in setting fires to burn the brush, whereby the forests were injured; and this even when the fires were built against his orders.⁸ So, where a clerk of a distiller sold a cask of whiskey to a dealer who had no license, and, at his request sent it to him with a permit obtained in the name of another person, it was held

¹ *Green v. London General Omnibus Co.*, 7 C. B. (N. S.) 290; *Cosgrove v. Ogden*, 49 N. Y. 256; 10 Am. Rep. 361; *Garretzen v. Duenckel*, 50 Mo. 104.

² *Baird v. Graham*, 1 Stuart (Sc.), 578.

³ *Sword v. Cameron*, 1 D. (Sc.) 439.

⁴ *Hunter v. Glasgow, &c. Canal Co.*, 14 S. (Sc.) 717.

⁵ *Baird v. Hamilton*, 4 S. (Sc.) 790; *McLaren v. Roe*, 4 Murr. (Sc.) 381.

⁶ *Brown v. McGregor*, 17 F. C. (Sc.) 232.

⁷ *Hilt v. Merricks*, Hume (Sc.), 397; *Smith v. Webster*, 23 Mich. 298; *Luttrell v. Hazen*, 3 Sneed (Tenn.), 20.

⁸ *Keith v. Kier*, 16 F. C. (Sc.) 679; *Simons v. Monier*, 29 Barb. (N. Y.) 419; *Lerandant v. Saisse*, L. R. 1 C. P. 152.

that the act being done in the line of his duty, and being within the scope of his employment, the master was liable for the statute penalty.¹ But the rule would have been otherwise if the act had been outside the scope of his employment.² So, where a hostler at an inn negligently omitted to put the bits in the mouth of a guest's horse, and in consequence the horse became unmanageable and damaged the plaintiff and his buggy, the master was held chargeable.³ So, where a servant, without the knowledge of his master, piled wood in the highway whereby the plaintiff in passing along the highway was injured, it was held that, although not directed or expressly authorized by the master to put the wood there, yet, as the master himself for many years had piled wood there, the servant must be regarded as impliedly authorized to do so.⁴ And in this case, there can be no question but that the master would have been liable even though he had never piled wood there before, and had even expressly directed the servant *not* to pile wood there, if the act was *bonâ fide* done in pursuance of the master's business and in furtherance of it. Indeed, where a servant, in the prosecution of his master's business, deviates from his instructions as to the manner of doing it, or even acts directly contrary thereto, the master is still liable, if the act was *bonâ fide* done in furtherance of his business. Thus, in a New York case,⁵ an action was brought for injuries inflicted upon the plaintiff,

¹ Advocate-General v. Grants, 15 D. (Sc.) 980.

² The Queen v. Gilroys, 4 Macph. (Sc.) 656.

³ Hall v. Warner, 60 Barb. (N. Y.) 198.

⁴ Harlow v. Humiston, 6 Cow. (N. Y.) 189.

⁵ Cosgrove v. Ogden, 49 N. Y. 255 ; 10 Am. Rep. 361. In Phelan v. Stiles, 43 Conn. 426, a servant employed by a flour-merchant to deliver his goods, having started out with a wagon-load for different customers, left by the road-side several bags of bran, while he went up a side road to deliver a quantity of flour, intending to take the bran on his return ; his object being to save an unnecessary transportation of the bran, and thus to finish the delivery sooner and get time to attend to some private business of his own. It was held that in leaving the bags by the road-side he was to be regarded as acting in the master's employment, and

that the latter was liable for an injury caused by the fright of a horse in being driven by. PARK, C. J., said : " The defendant claims that those acts were performed by him on his own account ; that he was desirous to take a train for Hartford later in the day on his own private business ; and that he left the bags by the road-side to enable him to make his delivery more rapidly and return earlier, so that he could accomplish his purpose. But what business of his own was he then doing ? He was not then attending to private business in going to Hartford. That was to be undertaken later in the day. He left the bags to expedite the delivery. Did it make the business his own because he dispatched it more speedily than it would naturally have been done ? He was sent by the defendant to deliver the flour and bran. Did he do anything else than deliver them ? His whole object in leaving the bran by the side of the road was to gain time. Suppose he had driven

a boy about six years old, under the following circumstances: The defendants were proprietors of a lumber-yard in the city of New

the horse with such speed as amounted to carelessness in order to gain time, and had injured a person by so doing, would he be transacting his own business while driving so rapidly, so that the defendant would not be liable? Suppose he had left the bran out of consideration for his horse, and the same result had followed, would the defendant be excused? He was under the necessity of taking the bran to Mr. King's, or of leaving it by the side of the road until his return; suppose he had taken the latter course without any special object in view, would it make any difference in the case? We think all that can be said of the matter is, that Babcock performed the defendant's business in delivering the bran in a shorter time than he would have done had he not intended to go to Hartford later in the day; and certainly the rapidity with which the business was transacted cannot operate to excuse the defendant." In *Howe v. Newmarch*, 12 Allen (Mass.), 49, it was held that the master is liable for the consequences of the servant's act even if it is one that is forbidden by law, provided it is done in the course of the employment, and without malice. The defendant was a baker, who employed a person to drive his wagon and deliver bread to his customers in Cambridge. The city ordinances forbade riding or driving upon any sidewalk. The plaintiff, while passing upon a sidewalk in the city, saw the defendant's horse and wagon standing on the same sidewalk in front of a house near by and facing him. He walked on, and when about twelve feet from the horse, the defendant's driver came out from the house, threw a basket on the wagon, and jumped for the seat, when the horse started and struck and injured the plaintiff. The defendant was held liable. The master is not responsible as a trespasser unless by direct or implied authority to the servant he consents to the wrongful act. But if he gives an order to a servant which implies the use of force and violence to others, leaving to the discretion of the servant when the occasion arises to which the or-

der applies, and the extent and kind of force to be used, he is liable, if the servant in executing the order makes use of force in a manner or to a degree which is unjustifiable. In *Nashville, &c. R. R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296, the person in charge of an engine standing on the track of the defendant's road near a crossing, wilfully and maliciously blew the whistle and made a great noise as the plaintiff was crossing the track, thereby frightening the plaintiff's horses and causing them to run away and injuring the plaintiff. The court held that the company was liable. See also *Chicago, &c. R. R. Co. v. Dickson*, 63 Ill. 151; *Croaker v. Chicago, &c. R. R. Co.*, 36 Wis. 657; *Redding v. South Carolina R. R. Co.*, 3 S. C. 1; *Shea v. Sixth Ave. R. R. Co.*, 62 N. Y. 180; *Weeks v. N. Y., &c. R. R. Co.*, 72 N. Y. 50; *Mott v. Consumers Ice Co.*, 73 id. 543; *Peck v. N. Y. Central R. R. Co.*, 70 N. Y. 587; *Day v. Brooklyn City R. R. Co.*, 12 Hun (N. Y.), 435; *McKinley v. Chicago, &c. R. R. Co.*, 44 Iowa, 314; 24 Am. Rep. 314; and, even though the master may not be liable in the first instance for the consequences of the servant's wrongful acts, yet it seems that he may ratify them so as to become liable therefor, by his retention of the servant after knowledge of such acts. Thus, in *Bass v. Chicago, &c. R. R. Co.*, 42 Wis. 654, a passenger on a railroad entered without let or hindrance a car reserved for ladies and took a seat, there being no vacant seats in the other cars except the smoking-car. A brakeman, afterward and without having requested the passenger to leave the car, ejected him while the train was in motion, using no more force than was necessary. The conductor was informed of the facts. The brakeman was retained in the service of the company, and was promoted after this action was commenced. It was held that notice to the conductor was notice to the company; and that the retention and promotion of the brakeman was a ratification of his act, and that the company was therefore liable.

York, which was in charge of one Brown, as their agent and foreman. He had entire charge of removing lumber and timber from the docks to the yard, and piling it up in the yard, and of selling and delivering it to customers. In the prosecution of this business, Brown caused a quantity of lumber to be piled upon or near the sidewalk, nearly opposite the house where the plaintiff's parents resided, about a block distant from the defendants' yard. Brown testified that he piled it there because it was more convenient than to pile it in the yard; that he had no authority from the defendants to pile it there; but that one of the defendants told him not to do it. The plaintiff was about six years of age, and in the habit of going unattended into the street, which was a quiet one, where there was but little if any more danger to be apprehended than upon an ordinary country road. It was held that the defendants were responsible for this act of Brown. It was an act done by him in the prosecution of their business, and a departure by him from their instructions in the manner of doing it did not relieve them from responsibility therefor. If the act was one not fairly within the express or implied authority growing out of the master's express orders or of the employment itself, then the master cannot be held chargeable,¹ because the act is, in that event, the act of the servant himself, and not that of the master. Thus, if a clerk in a store, employed to sell goods, suspecting that a person has committed a larceny of his employer's goods, causes his arrest, the master cannot be held chargeable for false imprisonment or for

¹ In *McClenaghan v. Brock*, 5 Rich. L. (S. C.) 17, the plaintiff's slave was on board a steamboat as a passenger, and the second engineer of the boat, by negligently discharging a gun, wounded him while he was alongside upon a lighter. In an action against the captain for the injury it was held that he was not liable, because the discharge of the gun by the engineer was not an act done in the course of his employment or in discharge of any duty connected with the service. In *McKenzie v. McLeod*, 10 Bing. 385, the servant was employed to light fires in the house, and she lighted furze and straw with a view to clean a chimney that smoked, and in doing so the house caught fire and was destroyed. It was held that as the duty was simply to light fires in the house, the lighting of furze and straw to clean the chimney was an act done outside the

scope of her employment, and that the master was not liable therefor. In *Sheridan v. Charlick*, where a carman having finished the business of the day returned to his employer's shop with the horse and cart, and obtained the key of the stable, which was close at hand, but instead of going there at once and putting up the horse, as it was his duty to do, he *without his master's knowledge or consent*, drove a fellow-workman to Easton square, and on his way back ran over and injured the plaintiff and his wife, — it was held (all the judges concurring) that inasmuch as the carman was not at the time of the accident engaged in the business of his master, he was not responsible for the consequences of this unauthorized act. See also, to same effect, *Mitchell v. Crassweller*, 16 Eng. Law & Eq. 448; *Cox v. Keahey*, 36 Ala. 340.

the assault, because the act was one which the clerk had no authority to do for the master.¹ Where a clerk in the service of a railway company, whose duty it was to issue tickets to passengers and receive the money for them, and keep it in a till under his charge, suspecting that a person had attempted to rob the till, *after the attempt had ceased*, gave the person into custody, it was held that the master could not be held chargeable, as no authority from the master could be implied to do the act.² It was his duty to protect the money in the till, and to that end to do any act *necessary*, or which he deemed necessary, for its protection; but, in order to charge the master with liability for his act, the act must have been done *to protect the money*, and as the act was not done *until after the attempt to take money had ceased*, it was not an act done for its protection, and consequently was wholly without authority,—as was said by BLACKBURN, J.: “There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something, with reference to the property, which he has not done. The act of punishing the offender is not anything done *with reference to the property*, it is done for the purpose of vindicating justice. . . . There is an implied authority to do all those things that are *necessary* for the protection of the property intrusted to a person, *or for fulfilling a duty which the person has to perform*.”³ So, where a policeman is employed by a railway company to watch their station, it cannot be presumed that he was authorized by the company to make an illegal or unwarranted arrest, but that he was simply authorized by the company to do that which was incident to his powers and duty as a policeman, and to make arrests only where the arrest was lawful, and in the manner prescribed by law; because, being an officer whose duties are prescribed by law, in the absence of express orders to the contrary it is presumed that his employment simply contemplated the exercise of

¹ *Mali v. Lord*, 39 N. Y. 381.

² *Allen v. London, &c. Ry. Co.*, L. R. 6 Q. B. 65.

³ *Poulton v. Great-Western Ry. Co.*, L. R. 2 Q. B. 534; *Goff v. Great Northern Ry. Co.*, 3 E. & E. 672; *Edwards v. London, &c. Ry. Co.*, L. R. 5 C. P. 445; *Limpus v. General Omnibus Co.*, 1 H. & C. 526. In *Porter v. Cedar Rapids, &c. R. Co.*, 41 Iowa, 358, the defendants' employés, finding the track obstructed, and

the plaintiff near by under suspicious circumstances, they arrested him, and took him before the United States authorities, and no evidence being produced against him he was discharged; and in an action against the company for false arrest and assault, it was held that the act was not within the scope of the employment of the defendants' servants, and consequently that the company was not liable therefor.

such powers as the law confers upon him;¹ and the master cannot be held chargeable for an illegal or unwarranted arrest made by him.²

In order to fix the liability of a master for the act of the servant, it is not enough that the act was done with the attempt to benefit him, or to serve the master. *It must be something done in doing what the master has employed the servant to do;*³ and if, in the regular

¹ *Edwards v. London, &c. Ry. Co., L. R. 5 C. P. 445.*

² *Allen v. London, &c. Ry. Co., L. R. 6 Q. B. 65*; *Roe v. Birkenhead, &c. Ry. Co., 7 Eng. L. & Eq. 546*. Thus, in *Poulton v. London, &c. Ry. Co., L. R. 2 Q. B. 534*, the defendants' servant, who was the defendants' station-agent, gave the plaintiff into custody for not paying the fare of a horse which he was taking to an agricultural fair. The statute authorized the defendants to give any person into custody who should refuse to pay his fare. But the statute did not authorize the giving of a person into custody because he refused to pay the fare *upon property being taken by him over the road*; and the court held that, inasmuch as there was a right conferred upon the master by statute, the servant, in furtherance of their business within the powers given by the statute, could bind the master; but, inasmuch as the master could not go beyond the powers given by the statute and give the plaintiff into custody for a cause not provided by statute, the servant could not bind them by the doing of an act clearly in excess of the statute and not warranted thereby, — the law not implying an authority on the part of a servant to do an act wholly unlawful.

³ *Limpus v. The General Omnibus Co., 1 H. & C. 526*. Thus, in *Burns v. Poulson, 42 L. J. C. P. 302*, one W. was employed to cart certain iron to a wharf, and the defendant, a stevedore, to ship it on board a ship alongside. The defendant's foreman, who was acting for him, being dissatisfied with the uncarting of the iron by W.'s carters, got into the cart, and in throwing out some of the iron injured the plaintiff. It was shown to be W.'s duty to uncart the iron, and the defendant's duty only to take it when so uncartered by W.'s carters. In reference to the liability of the defendant to respond for

injuries received by reason of his servant having undertaken to perform duties that devolved upon another, and in nowise pertained to the duties of his employment, BRETT, J., said: "What the defendant was employed to do — what he might according to that employment himself have done — he employed Malone to do. He employed Malone to carry the iron rails, after they were on the ground at the quay, thence into the ship and there stow them. For anything done by Malone in carrying or stowing the rails, or anything done by Malone with the rails after they were on the ground *with the intent to carry out his orders*, to take them into the ship and stow them there, the defendant would have been liable. . . . Anything voluntarily done by Malone before the rails were on the ground, *though done with intent to serve the defendant*, was not a thing done which the defendant had employed Malone to do. . . . The judge was bound, in my opinion, to say what was done by Malone was done before his employment by the defendant was called into play, that is, that it was a thing which the defendant had not employed Malone to do." The plaintiff was nonsuited. It is proper to say that DENMAN, J., entertained a contrary view, holding that it was entirely a question of fact for the jury to say whether the servant was acting within the scope of his employment, and he relied upon the following cases to sustain his position: *Storey v. Ashton, 38 L. J. (N. S.) Q. B. 223*; *Joel v. Morrison, 12 C. & P. 501*; *Whatman v. Pearson, 7 B. & S. 137*; *Mitchell v. Crassweller, 13 C. B. 237*. But it will be observed by examination of the opinion delivered by the judge, and of the cases cited by him, that he failed to make the necessary distinction between the doctrine of the cases referred to and the case in hand. In the cases relied upon there was no claim that the servant was

course of his employment, he does an act which produces injury to another, even though the act amounts to a trespass, yet if he can justify himself to the master, the master is responsible for the damages.¹

A servant of a railroad company took down the bars in a fence on the side of the track, and left them down, whereby horses escaped at night from an adjoining field, upon the track, and were killed by an engine of the company. It appeared that at the time of taking down the bars he was engaged in a business which concerned himself, and in which the company had no interest; but it was understood, by virtue of the employment of the servant by the company, that if the former, at any time after his day's labor was over, saw anything amiss, he was required to give the necessary attention to it without being specially directed so to do. In an action to recover the value of the horses killed, it was held that the servant was acting in the course and scope of his employment in leaving the bars down, and that the company was liable in damages therefor.² In another case, a watchman employed to watch the defendant's freight-house, cut loose the plaintiff's steamboat that took fire in the night-time near the freight-house. The boat drifted away and was burned. It appeared that the fire did not endanger the freight-house and could easily have been extinguished. No evidence of any authority for the act of the watchman was given, except such as might be implied from the business. It was held that the act was not within the scope of the servant's implied authority.³ Another apparent exception to the general rule is, where, though the person causing the injury is engaged upon the business of another, he is not in fact the servant of that other, but of a third party. Thus, if a carriage and horses are let out to hire by the day, week, month, or job, and the driver is selected and appointed by the owner of the carriage, the latter is responsible for all injury resulting from the negligent and careless driving of the vehicle, although the carriage may be in the possession and under the control of the hirer.⁴

acting for any other person than the master, while in the case in hand he was volunteering to serve another to perform a duty with the discharge of which the master was not charged. In many of its features this case is identical with *Stevens v. Armstrong*, 6 N. Y. 435.

¹ *Harlow v. Humiston*, 6 Cow. (N. Y.) 189.

² *Chapman v. New York, &c. R. R. Co.*, 33 N. Y. 369.

³ *Thames Steamboat Co. v. Housatonic R. R. Co.*, 24 Conn. 40.

⁴ *Laugher v. Pointer*, 5 B. & C. 572; *Smith v. Lawrence*, 2 Moo. & Rob. 2; *Dean v. Branthwaite*, 5 Esp. 36.

A master is liable for the act of his servant, done in the course of his employment about his master's business.¹ But he is not responsible for an act done outside of his employment;² nor for the wanton violation of the law by the servant.³ Thus, the owner of a raft, although not present, is liable for any damage which may be done to the property of others upon the river, occasioned by the negligent or unskilful management of his pilot.⁴

But for an act which is not expressly or impliedly authorized by the employer, the latter is not responsible; nor for an act done at a time when the servant is not engaged in his service. Thus, where the master gave his servant a holiday and let him take his horse and cart to attend a fair, it was held that the master was not liable for injuries inflicted by him with the horse and cart during his absence.⁵ So, where the master sent his servant with his cart to get the goods of B. only, and he undertook to carry the goods of C. also, it was held that the master was not liable for the loss of C.'s goods.⁶ In these cases there was no act done *for* the master, but the servant was acting for himself. In an English case, the plaintiff, who was travelling on the defendants' line, on arriving at a station, took part verbally in a dispute going on between some other passengers and the defendants' servants, relative to a railway ticket; thereupon the defendants' servants seized him, ran him down an incline, pushed him out of the station, and as he passed through the door, gave him a kick. It was held that the company was responsible for this assault. The plaintiff, when outside the station, was desirous of coming back into the station for the purpose of complaining to the station-master of the assault. While he was standing outside the station, some of the defendants' servants came out struggling and fighting with other persons. Ultimately, the servants who were police-constables in the service of the company, secured two of the persons, and then one of these servants of the company, who was drunk, seized the plaintiff, and took him, together with the others, to the police station, where he charged all three with having been drunk and disorderly. As the inspector refused to take this charge, the company's servant then charged them with having assaulted the officers of the company, and obstructed them in the execution of

¹ *Priester v. Angley*, 5 Rich. (S. C.) 44.

² *McClenaghan v. Brock*, 5 Rich. (S. C.) 17; *Aldrich v. Boston, &c. R. R. Co.*, 100 Mass. 31; *Bryant v. Rich*, 106 id. 311.

³ *Moore v. Sanborne*, 2 Mich. 519.

⁴ *Shaw v. Reed*, 9 W. & S. (Penn.) 72.

⁵ *Bard v. Yohn*, 26 Penn. St. 482.

⁶ *Satterlee v. Groot*, 1 Wend. (N. Y.)

their duty. The plaintiff and the others were then taken into custody on this charge, and locked up. In the instructions issued by the defendants to the policemen in their service such policemen were authorized to take into custody any one whom they might see commit an assault upon another at any of the defendants' stations, and for the purpose of putting an end to any fight or affray; but they were enjoined to use this power with extreme caution, and not at all if the fight or affray was at an end before they interfered. It was held that the acts of the company's policemen were beyond the scope of their authority, and that the defendants were not responsible for them.¹ But if the plaintiff was to be regarded as a passenger while waiting at the station, would not the defendant have been liable whether the act of the policemen was authorized or not?

In one case an engineer, while his locomotive was standing near a street-crossing, at the instant a person was crossing the track in front of his engine, negligently or maliciously caused the steam to escape, whereby the team was made to run away and injury was inflicted. It was held that the company were liable.² But where the plaintiff employed the defendant to remove her goods in his cart for hire, and with the consent of the defendant's carman, the plaintiff got on the cart with the goods, and on the way the cart broke down, and the plaintiff was seriously injured, and her goods broken, it was held that the plaintiff was not entitled to recover damages for the personal injury.³ Where a servant on a steamboat discharged a gun and injured the plaintiff's slave, who was upon a lighter along-side, it was held that the master was not liable.⁴ So, where an injury was inflicted by the servant in doing an errand for the master, by riding the master's horse, which he took without any authority from, or the knowledge of, the master;⁵ where an injury was inflicted while firing a salute with a cannon, on board the master's boat, the salute being fired without the knowledge or direction of the master;⁶ where the plaintiff was injured by reason of the escape of the defendant's horses from the control of the servant in charge of them, because they were struck by another servant of the defendant, who had no authority or control over the horses;⁷ where a servant who had

¹ Walker v. The South-Eastern Railway Co., C. P. 23 L. T. R. 14.

² Toledo, W. & W. R. R. Co. v. Harmon, 47 Ill. 298.

³ Lygo v. Newbold, 24 Eng. Law & Eq. 507.

⁴ McClenaghan v. Brock, 5 Rich. (S.C.) L. 17.

⁵ Goodman v. Kennell, 3 C. & P. 168.

⁶ Haack v. Fearing, 5 Robt. (N.Y.) 528.

⁷ Weldon v. N. Y. Central R. Co., 5 Bosw. (N. Y.) 576.

been sent to moor a vessel in the river, took a boat without leave to return in;¹ where a servant driving his master's horse got off the carriage and took hold of a horse standing before a van, and caused the van to move so as to make room for the carriage to pass, whereby a packing-case fell from the van and broke the thills of the plaintiff's gig;² where the servant, employed to work upon the plaintiff's house, wilfully bespattered the walls,³ or while driving the master's cart assaulted a person,⁴ — it was held that the master was not liable for the injury. Thus it will be seen that in the absence of express orders to do an act, in order to render the master liable the act must not only be one that pertains to the business, but must also be fairly within the scope of the authority conferred by the employment. When the act of the servant is not fairly within the scope of his implied authority, or is not directed by the master, the act is that of the servant, and the master cannot be held chargeable simply because it was done while in his employment and for his benefit.⁵ But the fact that the servant did not do the act as ordered or contemplated by the master is no defence.

In order to charge the master, the injury must arise from an act done in the service of the master, and from the doing of an act which the master was bound to perform, or which he had directed the servant to do. If the service is rendered for another, or in doing that which some other person is bound to perform, he is acting as the servant of him on whom the duty rested. Thus, where the defendant sent his servant to B.'s store to get a box which he had bought of B., and the box being in the loft of the store, the servant by B.'s permission, went into the loft to get the box, and letting it down by means of a tackle and fall, the box, through the servant's negligence, slipped out of the fall and fell upon the plaintiff and injured him seriously, — in an action against the master, it was held that the servant was acting as the servant of B., when the injury was inflicted, and that the defendant was not liable therefor.⁶

As has previously been stated, it is not the instructions of the master that determine the extent and limit of the servant's au-

¹ *Brown v. Purviance*, 2 H. & G. (Md.) 316.

² *Lamb v. Palk*, 9 C. & P. 629.

³ *Garvey v. Dung*, 30 How. Pr. (N. Y.) 315.

⁴ *Baird v. Hamilton*, Hay (Sc.) 29.

⁵ *Mackenzie v. McLeod*, 10 Bing. 885; *Satterlee v. Groat*, 1 Wend. (N. Y.) 273;

Bard v. Yohn, 26 Penn. St. 482; *Steele v. Smith*, 3 E. D. S. (N. Y.) 321; *Keith v. Keir*, Hayes, 8.

⁶ *Stevens v. Armstrong*, 6 N. Y. 435; *Brown v. Poulson*, 2 H. & G. (Md.) 316; *Cosgrove v. Ogden*, 49 N. Y. 255; 10 Am. Rep. 361.

thority, but the nature of the employment, the character of the service required, the character of the act done, and the circumstances under, and purpose for which it was done. In determining the question of authority, regard must be had to the object, purpose, and end of the employment. When a person employs another to drive his carriage, it is not to be presumed that he employs him to drive it purposely and intentionally against the carriage of another, when such act is wholly unnecessary to carry out any purpose of his master; but if the servant, in driving the carriage, finds himself involved in a position of danger, either to himself or the team, and in extricating himself purposely drives against the carriage of another and overturns it, this is most certainly a part of his duty, and is within the scope of his authority, because he is presumed to be clothed with authority to do everything essential to effectuate the purpose and ends of his employment.¹

It may be said to be well settled that the master is not only responsible for the negligence or misfeasance or malfeasance of his servant in respect of the discharge of duties expressly imposed upon him, but also in all cases where the act of the servant is within the scope of his implied authority; and in determining this, the nature of the employment, and the ends and purposes sought to be attained, are material elements, and the real test of liability.² *Prima facie*, when the act is one which the master himself might have done, it will be presumed that it was an act within the scope of the servant's authority, and the burden of proving want of authority rests upon the defendant.³ In the first case cited in the last note, the plaintiff brought an action for an assault committed upon him by the defendant's servant, a brakeman, in forcibly ejecting him from one of their passenger-cars. It appeared that the defendants set apart a car for ladies, and gentlemen accompanied with ladies. The servant was stationed at the entrance of the cars to direct passengers what cars to take. The plaintiff, not being accompanied by

¹ *Limpus v. General Omnibus Co.*, 129; *Peck v. H. R. & N. Y. C. R. Co.*, 6 T. & C. (N. Y.) 436; 70 N. Y. 587; *Seymour v. Greenwood*, 6 H. & N. 359; *Croft v. Alison*, 4 B. & Ald. 590.

² *Ramsden v. Boston & Albany R. Co.*, 104 Mass. 117; *Howe v. Newmarch*, 12 Allen (Mass.), 49; *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180; *Goddard v. Grand Trunk R. Co.*, 87 Me. 202; *Rounds v. Lackawanna, &c. R. Co.*, 64 N. Y. 587. See, similar in its facts and doctrine, *Bass v. Chicago, &c. R. Co.*, 42 Wis. 654; *Jackson v. Second Ave. R. Co.*, 47 N. Y. 274; *Higgins v. Watervliet Turnpike Co.*, 46 id. 23; *Cosgrove v. Ogden*, 49 id. 225.

a lady, entered the car reserved for ladies, and the servant directed him to get into another car. This the plaintiff refused to do, and the assault complained of was committed in forcibly removing him. In defence it was urged that the servant exceeded his powers, and was not authorized to remove the plaintiff from the car, but only to direct him what car to take. Upon this question JAMES, J., said: "That a master is not liable for the wrongful acts of his servant, unless done in his service and within the scope of his employment, will not be disputed. If the employé who removed the plaintiff is to be regarded as a brakeman unauthorized to perform any duties other than such as pertained to that office, and volunteered the act in question without other authority or direction, then the defendant was not liable in this case. But as brakeman he was an employé of the company, subject to its authority and the direction of its officers; and as such employé he was directed, by the person in charge, to see that gentlemen without ladies did not enter that car; and it was in the performance of that service he did the act complained of. It is true he was not ordered to remove persons from the car; his orders were to notify gentlemen not in charge of ladies that such car was reserved, and direct them to cars forward; so that in removing the plaintiff he clearly exceeded the orders given him. But this fact the plaintiff could not know; as between him and the company, it was enough that the act was done in the prosecution of the master's business, and if the servant deviated from or exceeded his instructions, that fact did not excuse the master from responsibility. The order to the brakeman, and his performance, warrant the conclusion, even as a matter of law, that he was acting within the scope of the employment he was then set to perform, if persons disregarded his directions and persisted in entering that car. The defendant had the right to set apart a car for lady passengers, and exclude other persons from it; if other persons, after notice, persisted in entering it, the defendant had the right to enforce their removal, using no more force than necessary for that purpose. The brakeman did no more than the master had the right to do under the circumstances, and the presumption is that in doing it he was acting within the scope of his then employment."

A distinction is made between a special and a general service in some of the cases, but it is not clear that any such distinction is tenable. Thus, it has been held that where a person directs another to do a specific act, not pertaining to his general employment, the

master is only responsible for an actual execution of the order,—as, where a servant is sent to drive a beast, trespassing upon the master's premises, out of a certain field, that the master is not liable if the servant drives it elsewhere;¹ or if he is sent to distrain cattle, *damage feasant*, that the master is not liable if they are distrained by him in any other manner.² But the doctrine of these cases is wholly untenable, both upon principle and authority; because the master having expressly directed the doing of the act from the wrongful execution of which injury results, he, in law, is treated as having authorized all that was done by the servant strictly in furtherance of the end sought by his orders, and with a *bond fide* purpose on the servant's part to execute them; and the rule applicable in cases of agency does not seem to apply. For instance, if a master sends his servant to drive another's cattle out of his lot, and while the servant is engaged in this duty, he carelessly throws a stone at one of them, and lames or kills it, the master is liable for the injury. True, he did not direct the servant to throw the stone, or to injure or kill the cattle; possibly he directed him to drive them out with the utmost care; but by his order to the servant to do the act, he set in motion the agency that produced the mischief, and made it possible for the wrong to be inflicted, and must, in law, be regarded as having authorized it.³ The question of authority does not depend upon the master's instructions to the servant, is not to be measured by the power expressly delegated to him, but also by the nature and character of the service with which he was intrusted, and the possible results of leaving the duty to be performed by him.⁴ Baron PARKE, in the case first cited, enunciated the true rule of a master's liability thus: "Whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it." The law presumes a master to be acquainted with the acts of his servant in the course of his business,⁵ and he is chargeable with liability for all his acts, done in the course of his employment, which are fairly in-

¹ Oxford v. Peter, 28 Ill. 434; Pritchard v. Keefer, 53 id. 117.

² Lyons v. Martin, 8 Ad. & El.

³ Shea v. Sixth Ave. R. R. Co., 62 N. Y. 180; Higgins v. Watervliet Turnpike Co., 46 id. 23; Meyer v. Second Ave. R. R. Co., 8 Bosw. (N. Y.) 305; Jackson v. Second Ave. R. R. Co., 47 N. Y. 274; Croft v. Alison, 4 B. & Ald. 590; Wanstall v.

Pooley, 6 Cl. & F. 910, n.; Garretzen v. Duencel, 50 Mo. 104; 11 Am. Rep. 405; Howe v. Newmarch, 12 Allen (Mass.), 49.

⁴ Joel v. Morison, 6 C. & P. 501; Booth v. Mister, 7 id. 66; Wanstall v. Pooley, 6 Cl. & F. 910, n.; Sleath v. Wilson, 9 C. & P. 612.

⁵ Rex v. Almon, 5 Burr. 2686.

cident to the business and grow out of its execution.¹ It is not essential, in order to charge the master, that the act should be *necessary* for the proper performance of the duty, or that it should be in conformity to the master's directions;² but if it was done in the course of his employment, and arises from the *manner* in which the servant undertook to, or in fact did, execute the duty assigned him, and it was an act in any sense warranted by the express or implied authority conferred upon him by the employment, the master is liable, even though the act was ill-advised, unnecessary and improper.³

When a person puts another in his place to do certain acts in his absence, he necessarily leaves him to determine for himself, according to his judgment and discretion, according to circumstances and exigencies that may arise, when and how the act is to be done, and trusts him for its proper execution; consequently, he is answerable for the wrongful execution of the act, either in the manner or occasion of doing it, provided it is done *bonâ fide* in the prosecution of his business, and within the scope of the servant's express or implied authority, and not from mere caprice or wantonness, and wholly outside the duties imposed upon him by the master.⁴ Thus, in an English case,⁵ the plaintiff, a passenger on the defendants' line of railway, sustained injuries in consequence of being violently pulled out of a railway carriage by one of the defendants' porters, who acted under an erroneous impression that the plaintiff was in the wrong carriage. The defendants' by-laws did not expressly author-

¹ *Bryant v. Rich*, 106 Mass. 180; *Alldrich v. Boston, &c. R. R. Co.*, 100 Mass. 31; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23.

² *Limpus v. Gen. Omnibus Co.*, 7 C. B. (N. S.) 290; *Minter v. Pacific R. R. Co.*, 41 Mo. 503.

³ *Ramsden v. Boston & Albany R. R. Co.*, 104 Mass. 117; *Howe v. Newmarch*, 12 Allen (Mass.), 49; *Shea v. R. R. Co.*, 62 N. Y. 180; *Garretzen v. Duenckel*, 50 Mo. 104; *Limpus v. General Omnibus Co.*, *ante*; *Sullivan v. R. R. Co.*, 11 Iowa, 421.

⁴ *Limpus v. General Omnibus Co.*, 7 C. B. (N. S.) 290; *Howe v. Newmarch*, 12 Allen (Mass.), 49; *Holmes v. Wakefield*, 12 Allen (Mass.), 580; *Suydam v. Moore*, 8 Barb. (N. Y.) 358; *Weed v. Panama R. R. Co.*, 17 N. Y. 362; *Rams-*

den v. Boston & Albany R. R. Co., 104 Mass. 117; *Sherley v. Billings*, 8 Bush (Ky.), 147; *Goddard v. Grand Trunk R. R. Co.*, 57 Me. 202; *Garretzen v. Duenckel*, *ante*; *Wanstall v. Pooley*, 6 C. & F. 910, n; *Keith v. Keir*, Hayes, 8; *Croft v. Wilson*, *ante*; *Shea v. R. R. Co.*, 62 N. Y. 180; *Bryant v. Rich*, 106 Mass. 180; *Higgins v. Watervliet T. Co.*, 46 N. Y. 23; *Minter v. Pacific R. R. Co.*, 41 Mo. 503. Where the master gives general directions to his servant, trusting to the discretion of the latter, he may become liable for his action; but when the directions are specific, and the servant transcends his directions, the master does not become liable. *Pritchard v. Keefer* 53 Ill. 117.

⁵ *Bayley v. Manchester, &c. Ry. Co.*, L. R. 7 C. P. 415.

ize the company's servants to remove any person being in a wrong carriage, but they provided that no person should be permitted to enter any carriage or to travel therein without having first paid fare and taken a ticket, and that the porters should act under the orders of the station-master. It was held by the court that the company was liable.¹

In a New York case,² the plaintiff, a boy twelve years old, jumped on the baggage-car of the defendants' passenger train, to ride down to the round-house. A quantity of wood was piled along the track. While the train was being backed down, and when it arrived at the wood-pile, the baggageman in charge of the train discovered the boy on the car and ordered him off. The boy responded that he could not get off because the wood was right there. The baggage-master, with an oath, kicked the plaintiff off the car, and, falling against the wood, one of his legs was thrown under the car and crushed. A notice, as follows, was posted in the baggage-car: "No person will be allowed to ride in this baggage-car, except the regular train-men employed thereon. Conductors and baggagemen must see this order strictly enforced." Still another notice was printed in the posted time-cards as follows: "Train baggagemen must not permit any person to ride in the baggage-car, except the conductor and news-agent connected with the train. Conductors and baggagemen will be held alike accountable for a rigid enforcement of this rule." In an action to recover for the damages inflicted by the injury, the court held that the defendants were liable. COUNTRYMAN, J., in a very able and carefully considered opinion, reviewed the cases bearing upon these questions, and, among other things, said: "The servant, in thus removing the plaintiff, was engaged in the line of his duty and obeying the instructions of the defendant; and to shield it from liability the instructions must have been reasonable and proper

¹ Jeffersonville, &c. R. R. Co. v. Rogers, 38 Ind. 116; 10 Am. Rep. 103; Ramsden v. Boston, &c. R. R. Co., 104 Mass. 117; 4 Am. Rep. 117; Holmes v. Wakefield, 12 Allen (Mass.), 580.

² Rounds v. Del. & Lackawanna R. R. Co., 5 T. & C. (N. Y.) 475, 64 N. Y. 129. See also Hoffman v. N. Y. Central, &c. R. R. Co., 87 N. Y. 25, 41 Am. Rep. 25, where it was held that a boy eight years old who had jumped upon the steps of a passenger railway and sat on the platform to steal a ride, but was kicked

off by the conductor or brakeman and was injured, could recover therefor. See also Penn. R. R. Co. v. Toomey, 91 Penn. St. 256, where it was held that a railway company was liable for injuries inflicted by a conductor in removing a *trespasser* from the platform of a car. But see Allegheny Valley R. R. Co. v. McLain, 91 Penn. St. 442, where it was held that a railway company is not liable to a *passenger* who is wrongfully removed from the cars upon which he has a right to ride. But this is hardly accurate.

with reference to the rights of the plaintiff, and must have been executed, under all the circumstances, in a reasonable and proper manner. Having made suitable regulations, the defendant was also bound to see that they were properly executed. The principal must necessarily be answerable within reasonable limitations for the manner in which his instructions are carried into effect. . . . And the principal must necessarily be bound by any lack of judgment or discretion of the agent, whereby he acts improperly and inflicts unnecessary injury.”¹

The fact that the order is proper, and only contemplated a proper execution on the part of the servant, is of no account. Having clothed the servant with authority to do an act at all, the master is bound at his peril to see that it is properly executed, and is liable alike for mistakes of judgment, or infirmity of temper, on the part of his servant. Thus, a driver of horse-cars, whose duty it is to keep trespassers from riding on the platform, would naturally be expected to execute the order in a proper and lawful manner; but if he in fact executes it in an improper and unlawful manner, the master is liable therefor, because he takes the risk upon himself, by reposing any authority at all in the servant to do an act which, if improperly done, may result in injury to others. In a case of this character,² the plaintiff, a boy of ten years of age, wrongfully got upon the defendant's street-railway car while it was in motion, and was permitted to ride some distance, when, while the car was running at such a rate of speed as to make it unsafe for him to do so, he was ordered by the driver to jump off, which he did, and in doing so was thrown down, and his right arm being thrown under the car was run over and crushed, so that amputation was rendered necessary; and the court held that the defendant was responsible for the injury, the order of the driver “to jump off,” considering the age of the plaintiff, being equivalent to a forcible ejection.³

¹ Lovett v. Salem, &c. R. Co., 9 Allen (Mass.), 557; Holmes v. Wakefield, 12 Allen (Mass.), 580; Kline v. Central Pac. R. Co., 37 Cal. 400; Sanford v. Eighth Ave. R. Co., 23 N. Y. 343.

² Lovett v. Salem, &c. R. Co., 9 Allen (Mass.), 557.

³ In Shea v. Sixth Ave. R. Co., 62 N. Y. 180, one of the defendants' horse-cars was standing at the corner of a street in New York, so as to prevent persons

from passing across the street on the walk. The plaintiff, being desirous of passing, stepped upon the platform of the car for that purpose, when the driver pushed her off, and in falling, she broke her arm. The court held, that inasmuch as it was the duty of the driver to keep trespassers off the platform, he was acting in the scope of his employment, and that the defendants were liable for the assault.

In a Missouri case,¹ the application of this rule was well illustrated. In that case the defendant was the proprietor of a gun store, and his clerk, upon one occasion, when showing a gun to a customer, at his request, and being informed by the purchaser that he would not purchase the gun unless it was loaded, loaded the gun, and, while being examined by the customer, it was accidentally discharged and injured the plaintiff, who was sitting at a window on the opposite side of the street. The master had expressly instructed the servant not to load any of the fire-arms, and it was urged in defence that the act of the servant being in conflict with, and contrary to the master's orders, it was not an act within the scope of the servant's authority; but the court held that notwithstanding the express orders of the master, the act was done in the prosecution of his business, and therefore was within the scope of his authority.²

Where the act is within the scope of the servant's authority, express or implied, it is immaterial whether the injury resulted from his negligence, or from his wilfulness and wantonness.³ Nor is it necessary that the master should have known that the act was to be done. It is enough if it was within the scope of the servant's authority. Thus, where a servant of a railway company employed to clean and secure its cars, and keep persons out of them, kicked a boy eleven years old from a railing, while the cars were in motion, whereby he was thrown under the cars and killed, it was held that the act, although in nobody's line of duty, being done in the course of the servant's employment, the company was chargeable therefor.⁴

A master cannot screen himself from liability for an injury committed by his servant within the line of his employment, by setting up private instructions or orders given by him, and their violation by the servant. By putting the servant in his place, he becomes responsible for all his acts within the line of his employment, even though they are wilful and directly antagonistical to his orders. The simple test is, whether they were acts *within the scope of his employment*; not whether they were done while prosecuting the

¹ Garretzen v. Duenckel, 50 Mo. 104; 11 Am. Rep. 405.

² Croft v. Allison, 4 B. & Ald. 590; Minter v. Pacific R. R. Co., 41 Mo. 503.

³ Weed v. Panama R. R. Co., 17 N. Y. 362; Howe v. Newmarch, 12 Allen (Mass.), 49; Shirley v. Billings, 8 Bush (Ky.), 147; Ramsden v. Boston, &c. R. R. Co., 104 Mass. 117; Rounds v. Del. & Lack. R. R.

Co., 64 N. Y. 129; Goddard v. Grand Trunk R. R. Co., 57 Me. 202; Holmes v. Wakefield, 12 Allen (Mass.), 580; Bryant v. Rich, 106 Mass. 180; Tuller v. Voght, 13 Ill. 277.

⁴ Northwestern R. R. Co. v. Hack, 66 Ill. 238; Rounds v. Delaware, &c. R. R. Co., 64 N. Y. 129; Peck v. N. Y. Central R. R. Co., 70 N. Y. 587.

master's business, *but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him.* By *authorized* is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and positive orders. Thus, when a horse railroad company, among other things, requires its drivers to keep trespassers off from the platform, it is liable for the act of the driver in expelling a person therefrom, even though the act is *wilful and wanton*, and although the person expelled is not a trespasser.¹ The master can never escape liability for an *abuse* of authority by the servant;² therefore, the question always is, whether there was *any* authority, express or implied, on the part of the servant to do the act?³ If so, the master is liable; if not, he is not liable, even though the act was done by the servant while performing his master's service.⁴ In ascertaining this fact, the nature of the service, its character and incidents, as well as the orders of the master, if any, are all to be considered. To illustrate: a person employed as a conductor upon a railroad, whose duty it is to collect the fares of passengers, is, even though not specially directed so to do, by his employment and the very nature of his duties, impliedly clothed with authority to eject a person from the cars, who shall neglect or refuse to pay his fare, and it is one of his duties, implied from the very nature of the employment and the character of the service; therefore, if in the performance of this duty, he uses more force than is necessary;⁵ or if he assaults or insults a person who has in fact

¹ *Shea v. Sixth Ave. R. R. Co.*, 62 N. Y. 180.

² *Higgins v. Watervliet Turn. Co.*, 46 N. Y. 23; *Shea v. Sixth Ave. R. R. Co.*, 6 N. Y. 180; *Phila. & Read. R. R. Co. v. Derby*, 14 How. (U. S.) 468; *Steam Tow Boat Co. v. Phila., &c. R. R. Co.*, 23 id. 209.

³ *Shea v. Sixth Ave. R. R. Co.*, *ante*; *Baldwin v. Cassella*, 21 W. R. 16.

⁴ In *Oliver v. Northern Transportation Co.*, 3 Oreg. 84, the defendants' servant injured the plaintiff by the careless discharge of a signal gun. The defendants claimed that they were not liable, because the servant disobeyed their instructions as to the firing of the gun. The court held that, inasmuch as the servant was authorized to

discharge the gun by the defendants, they were liable for the *manner* in which he discharged it, whether in violation of their instructions or not. *Enos v. Hamilton*, 24 Wis. 658; *Horner v. Lawrence*, 37 N. J. L. 46; *Case v. Mechanics' Bank*, 4 N. Y. 166; *Hynes v. Jungren*, 8 Kan. 391; *Cosgrove v. Ogden*, 49 N. Y. 255; *Tucker v. Woolsey*, 64 Barb. (N. Y.) 142; *Ryan v. H. R. R. R. Co.*, 33 N. Y. Superior Ct. 137; *North River Bank v. Aymar*, 3 Hill (N. Y.), 262; *McClanathan v. R. R. Co.*, 1 T. & C. (N. Y.) 501.

⁵ *Jackson v. Second Ave. R. R. Co.*, 47 N. Y. 274; 7 Am. Rep. 448; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23; 7 Am. Rep. 293.

paid his fare, and is lawfully entitled to be upon the train;¹ or if he ejects a person from the train at a place where, by law, he has no right to eject him, — the corporation is liable for his acts as much as though the act had been specially directed and authorized by it.

SEC. 317. Damages for Injuries to Passengers.² — In actions for damages resulting from personal injuries, it may be said that the person injured is entitled to recover all the actual damage which is sustained, which includes loss of time, expenses of medical attendance, nurses, as well as for bodily pain and anguish of mind induced by the hurt, and all the damages present and prospective which are the natural and proximate consequences of the act done and injuries received.³ Not only present loss or that which has already accrued

¹ *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; 2 Am. Rep. 39; *Peck v. N. Y. C. R. Co.*, 6 Th. & C. (N. Y.) 436; *Limpus v. Omnibus Co.*, 7 C. B. N. s. 290; *Seymour v. Greenwood*, 7 H. & N. 355; *Moore v. Railway Co.*, 21 W. R. 145; *Bayley v. Manchester, &c. Ry. Co.*, L. R. 7 C. P. 415.

² As to damages for injuries resulting in death, see *post*, § 414.

³ *Rowley v. London, &c. Ry. Co.*, 5 C. P. Div. 280; *Tatten v. Penn. R. Co.*, 11 Fed. Rep. 564; *Indianapolis, &c. R. Co. v. Stables*, 62 Ill. 313; *Ohio, &c. R. Co. v. Dickinson*, 59 Ind. 317; *Pittsburgh, &c. R. Co. v. Sponier*, 85 Ind. 165; *Salen v. Virginia, &c. R. Co.*, 13 Nev. 106; *Fry v. Dubuque, &c. R. Co.*, 45 Iowa, 416; *Bay Shore R. Co. v. Harris*, 67 Ala. 6; *Indianapolis, &c. R. Co. v. Birney*, 11 Ill. 391; *Porter v. Hannibal, &c. R. Co.*, 71 Mo. 66.

It seems that the value of medical services rendered to the injured person may be recovered though they were gratuitously rendered, since it must be presumed that the physician intended to aid the injured party and not the defendant. *Indianapolis v. Gaston*, 58 Ind. 277; *Pennsylvania Co. v. Marion*, 104 Ind. 239. So also the fact that the salary of a person sustaining personal injury through the negligence of another is continued by his employer during the time he is disabled cannot mitigate the damages that the injured party may recover in an action therefor. *Ohio, &c. R. Co. v. Dickinson*, 59 Ind. 317.

Where a young man, thirty years of age,

engaged in an employment which had a regular system of promotions, and earning \$540 a year, was permanently disabled, a verdict of \$11,000 in an action for damages therefor was held not to be excessive. *Belair v. Chicago, &c. R. Co.*, 43 Iowa, 662; *Delie v. Chicago, &c. R. Co.*, 51 Wis. 400. A verdict for \$8,000 for the loss of a hand was held not to be excessive. *Chicago, &c. R. Co. v. Wilson*, 63 Ill. 167. Where the plaintiff, a girl of seven years of age, was run over by a railroad car, and had one leg cut off and her right hand so crushed as to cause the amputation of two fingers, besides being otherwise injured, a verdict for \$8,100 was held not to be unreasonable. *Chicago, &c. R. Co. v. Murray*, 71 Ill. 601; *Chicago, &c. R. Co. v. Becker*, 84 Ill. 483. In an action for permanent injuries to the person, courts will seldom disturb the award of damages, where the evidence tends to support the verdict. Thus, the plaintiff, when injured, was a farmer, sixty-two years of age, and previous to the injury he was an able-bodied, healthy man, possessed of a strong constitution, working regularly on his farm, and able to do "a good day's work — a man's work;" and there was evidence which would have justified the jury in finding that the plaintiff's injury was permanent, and would practically disable him for labor during the remainder of his life. It was held that a verdict for \$1,600 damages should not have been set aside as excessive. *Duffy v. Chicago, &c. R. Co.*, 34 Wis. 188. Where the plaintiff suffered

from the incapacity of the injured party to attend to his ordinary pursuits and the expense which he has incurred for medical atten-

injuries that disabled him for life, and which were attended with great bodily suffering, a verdict of \$9,000 was held not to be excessive. *Deppe v. Chicago, &c. R. Co.*, 38 Iowa, 592. In a New York case, evidence was given tending to show that the plaintiff, a man about forty years old, in the full vigor of health, was injured by a collision which occurred upon the defendant's railroad; that besides many lesser injuries the accident produced a concussion of the spine, the result of which has been chronic inflammation of the membranes which envelope the spinal cord; that the disease was a progressive one; that it had already largely impaired his faculties, both mental and physical, and that it would probably progress until paralysis and premature death ensued. It was held that a verdict in the plaintiff's favor for \$30,000 would not be set aside as excessive. *Harrold v. New York El. R. Co.*, 24 Hun (N. Y.), 184. Just before the injury complained of, the plaintiff was a laborer, a strong, healthy man, thirty-four years of age, and he has a wife and four children. The injury made it necessary to amputate one leg above the knee; at the time of the trial, nearly a year after the accident, he was unable to do any work, and he testified that if he walked, stood, sat, or kept his leg down for any length of time he became dizzy. In view of these facts, and of the physical and mental suffering involved in the injury, the court held a verdict of \$11,000 did not show such evidence of prejudice, passion, or improper bias in the jury as justified it in reversing a judgment for that sum. *Berg v. Chicago, &c. R. Co.*, 50 Wis. 419. In view of the plaintiff's age and business at the time of the injury, his previous ability to earn money by his labor, the permanent disablement of his right hand by the accident, the pain and suffering endured, the court held that a verdict for \$4,500 should not be disturbed. *Schultz v. Chicago, &c. R. Co.*, 48 Wis. 475. Where the deceased was a young man, unmarried, and earning about \$25 a month, with two brothers and a sister residing in Germany, a verdict of \$5,000 was held not

excessive. *Bierbauer v. New York Central R. Co.*, 15 Hun (N. Y.), 559; *affirmed*, 77 N. Y. 588. In an Illinois case, a young woman, in attempting to go upon a railway-car, stepped into an opening in the station platform, injuring her knee and leg, and it appeared that, at the trial, about three years after the accident, she had not fully recovered, but yet walked naturally and gracefully, and it was not probable the injury would be permanent, and she was not, in consequence of the injury, deprived of any business or calling by which to earn money, and it also appearing that her poor health at the time of the injury prevented as quick a recovery as otherwise might have been expected, and it not appearing that she had suffered any extreme pain, or the injury was serious, it was held that \$2,500 damages were excessive. *Chicago, &c. R. Co. v. Payzant*, 87 Ill. 125. In a California case, a verdict for \$10,000 for an injury which necessitated the amputation of an arm, where the defendant was guilty of gross negligence, was held not excessive. *Robinson v. Western Pacific R. Co.*, 48 Cal. 409. In an action by a female passenger against a railroad company for carrying her beyond her station, the plaintiff had judgment for \$1,000. There was no circumstance of malice, insult, wantonness, violence, oppression, or inhumanity practised by the company's servants towards the plaintiff, but, on the contrary, their conduct was polite and considerate. It was held that the judgment was excessive in amount, and must, for that reason, be reversed. *Trigg v. St. Louis, &c. R. Co.*, 74 Mo. 147. In an action brought by a brakeman for personal injuries resulting in the loss of the thumb and first finger of the right hand, by reason of which he was laid up a little over a month and could do but little work for three or four months, a verdict of \$6,500 was held to be so excessive as to show that it was given under the influence of passion or prejudice, and ought to be set aside. *Kansas Pacific R. Co. v. Peavey*, 29 Kan. 169. But a verdict of \$8,000 for the death of a passenger was held not excessive. *Cook v. Clay Street*

tion or other necessary outlay, but, as only one action can be brought and only one recovery had, it is proper to include in the estimate of damages compensation for whatever it may be reasonably certain will result from future incapacity as a consequence of his injury; so, also, his loss of capacity for work or attention to his ordinary business must be included, whether it be physical or mental, present or prospective.¹ Very little can be said with certainty as to damages for personal injuries inflicted by negligence. Loss of time during the cure, and expenses incurred in respect of it, are of course matters of easy calculation, but for the pain and suffering undergone by the plaintiff, which are also a ground of damages, no adequate measure exists, and the compensation therefore is necessarily left to the judgment and discretion of the jury. And in this point such an action differs from one brought by the personal representatives where a death has ensued. Any permanent injury, especially when it causes a disability for future exertion, and consequently pecuniary loss, is also a ground of damage. This is one of the cases in which damages most signally fail to be a real compensation for the loss sustained. In one case, PARKE, B., said: "It would be most unjust, if, whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think is equivalent for the mischief done. Scarcely any sum could compensate a laboring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life. No rule can be laid down in such a case; and although a jury are frequently cautioned not to let their verdict be influenced by the poverty of the plaintiff and the wealth of the

Hill R. Co., 60 Cal. 604. So a verdict for \$3,500 for personal injuries was held not excessive. *Klutts v. St. Louis, &c. R. Co.*, 75 Mo. 642. The sum of \$2,500 was held not to be excessive damages for the breaking of the arm of an old lady, sixty-two years of age, the injury being permanent. *Pittsburgh, &c. R. Co. v. Sponier*, 85 Ind. 165. A verdict of \$7,000 for a personal injury to a passenger was held not excessive. *Lambkin v. Southeastern Ry. Co.*, L. R. 5 App. Cas. 352. Where, without fault, the plaintiff's son, aged sixteen years, was seriously injured by the negligent management of a train, so as to be unconscious for a time and disabled for some weeks, a verdict for \$530 was held not excessive. *Indianapolis, &c. R. Co.*

v. McClain, 82 Ind. 435. A verdict for \$1,400 damages, in an action to recover for gross negligence, causing the death of the plaintiff's intestate, even if the Supreme Court may review the case as to damages, was held not to be so large as to require a reversal. *Chicago, &c. R. Co. v. Bonifield*, 104 Ill. 223. So a verdict for \$5,000 actual damages for personal injuries, caused by the negligence of the employees of a railway company, was held not to be so excessive as to require a reversal therefor. *Houston, &c. R. Co. v. Boehm*, 57 Tex. 152.

¹ *Hutchinson on Carriers* (2d ed.), § 806; *Toledo, &c. R. Co. v. Baddely*, 54 Ill. 19; *Kansas, &c. R. Co. v. Pointer*, 9 Kan. 620. See also cases cited further on.

defendant, yet the caution is probably seldom much attended to.”¹ Lord COLERIDGE, in a leading English case,² laid down the rules which should guide the jury in such cases, most admirably. He said to the jury, after stating that there was no answer to the *prima facie* case of negligence, “It is therefore, really and truly in fact, a mere question of the assessment of damages,—what, under the circumstances, it is fair and reasonable the defendants should pay to the plaintiff by way of compensation for the injuries he has sustained. . . . It is to be such compensation as, under all the circumstances of the case, the jury who have to assess it think is fair and reasonable; and with every desire to assist you . . . I am afraid anything more definite or intelligible I am unable to lay down. It is a matter which, really, the common-sense of the country, as represented by you twelve gentlemen in the jury-box, must determine. . . . An absolute compensation is not the true measure of damages in this case; . . . it is not to be an absolute compensation, but a fair and reasonable amount of damages under the circumstances of the case. Now what is really that fair and reasonable amount? It must be made up of several ingredients. I do not mean that if you give, I will take a round sum, say £100, . . . you must go so far as to give £25 for pain and suffering, £25 for loss and damage, £25 for future suffering, and £25 for the chance of not doing work again. By saying the compensation consists of so many ingredients I do not mean to say you must put a fixed sum against each of these, but there are certain leading considerations to be taken into account by you in arriving at the lump sum which at last it will be your duty to assess in this case. Now, one of these is the pain and suffering; as to that there is no question; . . . pain and suffering of a most acute kind Dr. Phillips has sustained; that has not been seriously disputed, and compensation for that pain and suffering he is undoubtedly entitled to. That is a serious, manifest, and undisputed fact. Then there is the loss, at any rate for two years, of his business. Now, what is that business?” He then directed the attention of the jury to the evidence as to the plaintiff’s professional income, the effect of which was to show that during the three years before the accident, his net earnings, after deducting all the expenses incurred in carrying on his profession, had been about £5,000 a year. He then proceeded as follows; “But then it is said that is too much, because some of these are large pay-

¹ Ashworth v. Southeastern Ry. Co.,
18 Q. B. 104.

² Phillips v. London, &c. Ry. Co., 42
L. T. Rep. N. S. 6.

ments which have come from nine clients, and in the nature of things it is not likely that these sums will recur. This £1,300 from one person in three years, that £400 from another in two years, £360 from another in two years, and nearly £500 from another in three, all these and other sums are not likely to recur. Now, I do not see at all why the confidence of the gentlemen who make these large payments should diminish, or their generosity either, and I do not quite see why, in the class of patients this gentleman had, people who send £1,000 and £500, and so on (£5,000 in one case) to their doctor, without inquiry, to pay for the number of visits that had been had, I do not see why the same gentleman should not pay, £5,000 over again; . . . it is a lucky thing, if Dr. Phillips should recover, that his practice is among patients who do not care about money. . . . I really do not see why these should be the only nine people in the world who do these things, and who will continue to do them, and why, if they cease to do so, they should not be succeeded by others equally generous; but you must give it such weight as you think fit. Subject to that observation it comes to this, that it is about £5,000 a year, and it has been an increasing practice. . . . There is no doubt that from that time in 1877 [the time of the accident] to this he has not earned a shilling, and for that some very considerable compensation is to be awarded by the company. Now then comes a far more important question, and that is, what is to be his future?"¹

He then commented on and compared the evidence given by the medical witnesses with regard to the condition of the plaintiff, and

¹ In an action against a railway company by a lady passenger, for a personal injury caused by gross negligence, and where it appeared the injury was severe, her spine being injured permanently, she being a person of education and a teacher by profession, \$8,958 damages, while considered large, was held not so excessive as to warrant a reversal of the judgment *Illinois Central R. Co. v. Parks*, 88 Ill. 373. In an action to recover for injuries caused by gunshot wounds inflicted by defendant's servants, evidence of the loss of power to have offspring, resulting as a proximate consequence of the injuries, may be received and considered by the jury as an element of damage, and this although the declaration does not specify such loss

as one of the results of the wound. *Denver, &c. R. Co. v. Harris*, 122 U. S. 197. In action for damages against a railroad company, the admission of testimony, not as an element of damage but in the nature of an index to the pain and suffering of the plaintiff, that the injuries required the use of opiates by her, and she was thus acquiring the opium habit, that she had had great pleasure in her household duties, but has not and never will have that pleasure again, and that from the effects of the nervous prostration resulting from the injury she has not the energy to work or to enjoy society, is held not to be erroneous. *Chattanooga, &c. R. Co. v. Liddell*, 85 Ga. 482.

the opinions which they expressed as to the possibility of recovery. He then proceeded as follows: "Gentlemen, that really is the whole case. I do not know that I could usefully occupy your time any further. I have placed before you the principles upon which you ought to give this compensation. I have placed before you, as far as I can, the law which you are to take into consideration in granting that compensation, and now I leave it to you, under all the circumstances of the case, to give such fair and reasonable compensation to Dr. Phillips as you think he deserves, I do not mean morally, but as you think the circumstances of the case warrant you in giving. Of course, in awarding that compensation you will be mainly influenced by the view you take of the probability of his being able in eighteen months' or two years' time, or possibly even in less, or it may be more, to resume the lucrative practice which certainly, for a time, beyond all question, he has been deprived of by the action of the defendants. I think I may direct you to be good enough to find for the plaintiff, and your duty is to say what amount of damages, under the circumstances, you will give."

As to expenses, he directed the jury to give what they thought fair and reasonable, adding: "If you think that he was put to any extra expense, that his living, his journeys, or his carriages or horses were seriously increased, or that he was put to expense by the action of the company, that is an element that you ought to take into your consideration. He puts it at £1,000, and you will say, upon the whole, whether you think that is too much or too little."

The jury found a verdict for the plaintiff for \$80,000 damages, and a new trial was refused by the appellate courts.

Damages for bodily and mental pain and suffering induced by the injury, according to its intensity and duration, are proper elements, and are necessarily so immeasurable, and incapable of strictly accurate estimation, that they are left largely to the discretion of the jury.¹ *But unless physical injury is connected with the mental pain*

¹ Phillips v. South-Western Ry. Co., 4 Q. B. Div. 406; Morris v. Chicago, &c. R. Co., 45 Iowa, 29; Chicago, &c. R. Co. v. Elzeman, 71 Ill. 131; Mason v. Ellsworth, 32 Me. 271; McLaughlin v. Corry, 77 Penn. St. 109; Wade v. Blackwood, 48 Ark. 396; Sheridan v. Hibbard, 119 Ill. 307. The jury are properly instructed, in an action for a negligent injury that, if they find for the plaintiff "they should

allow, in estimating the damages, not only for the direct expenses incurred by the plaintiff by reason of the injury, but also for the privation and inconvenience he is subjected to, and for the pain and suffering he has already endured bodily and mentally, and which he is likely to experience, as well as the pecuniary loss he has sustained and is likely to sustain during the remainder of his life from his disabled

there can be no recovery therefor, as the latter alone does not constitute either a ground of action or an element of damage, unless accompanied by circumstances of malice, insult, or inhumanity.¹ In a note to Mayne on Damages,² we said: "But we do not apprehend that the rule has any such force as to enable a person to maintain an action where the only injury is mental suffering, as might be thought from a reading of the loose *dicta* and statements of the court in some of the cases. So far as I have been able to ascertain the force of the rule, the mental suffering referred to is *that which grows out of the sense of peril, or the mental agony at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury, and the apprehension and anxiety thereby induced*. In no well-considered case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action;"³ and this has been cited by

condition." *Scott v. Montgomery*, 95 Penn. St. 444. Where the injury is permanent, compensation is properly allowed for the pain which it is reasonably certain the plaintiff will suffer in future. *Filer v. N. Y. Central R. Co.*, 49 N. Y. 42; *Frink v. Schroyer*, 18 Ill. 416; *Memphis, &c. R. Co. v. Whitfield*, 44 Miss. 466; *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541; *Fry v. Dubuque, &c. R. Co.*, 45 Iowa, 416; *Spicer v. Chicago, &c. R. Co.*, 28 Wis. 580; *Kendall v. City of Albia*, 73 Iowa, 241; 34 N. W. Rep. 883.

¹ *Quigley v. Central Pacific R. Co.*, 11 Nev. 350, *Illinois Central R. Co. v. Sutton*, 53 Ill. 397; *Johnson v. Wells*, 6 Nev. 224; *Indianapolis, &c. R. Co. v. Stables*, 62 Ill. 313. In the case of *Bovee v. Danville*, 53 Vt. 190, in which the injury caused the woman to give premature birth to twins, it was held that any "injured feelings following the miscarriage, but not a part of the pain naturally attending it, are too remote to be considered as an element of damage. The court observed that "if, like Rachel, she wept for her children, and would not be comforted, a question of continuing damage is presented too delicate to be weighed by any scales which the law has yet invented." Mental anguish arising from the nature and character of the assault is a proper element of compensatory damages, and the outrage and indignity which have accom-

panied an injury are to be estimated as well as its physical effects, even in cases where exemplary damages do not lie. *McKinley v. Chicago, &c. R. Co.*, 44 Iowa, 314. In an action by a passenger against a carrier for personal injuries, plaintiff's evidence tended to show that threats of personal violence made by the conductor induced him to jump from the train. The court held that an instruction that plaintiff could recover damages for the threats whether any actual physical injury resulted therefrom or not, and that plaintiff could recover for mental anguish alone is erroneous and ground for reversal. *Spohn v. Missouri Pac. R. Co. (Mo.)*, 22 S. W. Rep. 690.

² Wood's Mayne on Damages, p. 74. The mental suffering engendered by the humiliation and insult occasioned where a passenger is unlawfully expelled in the presence of his fellow-passengers, is a proper element of damage. *Smith v. Pittsburgh, &c. R. Co.*, 23 Ohio St. 10; *post*, § 364. But this is clearly a different class of cases.

³ *Canning v. Williamstown*, 1 Cush. (Mass.) 452; *Joch v. Dankwardt*, 85 Ill. 333; *Lynch v. Knight*, 9 H. L. Cases, 577, 598; *Johnson v. Wells, Fargo, & Co.*, 6 Nev. 225; *Freese v. Tripp*, 70 Ill. 503; *Meidell v. Anthis*, 71 Ill. 241; *Blake v. Midland Ry. Co.*, 10 Eng. L. & Eq. 442. Since the author wrote the language above

the courts of several States with approbation. In an action, therefore, for the death of a child or other relative the mental anguish of the parent is not an element of damage.¹

The age and occupation of the injured person,² the value of his services, that is, the wages which he has earned in the past, whether he has been employed at a fixed salary,³ or as a professional man,

quoted there have been a number of cases holding that where, by the negligence of a telegraph company in transmitting or delivering a message, the sender or receiver is made to undergo mental suffering, as where a father is kept from the bedside of his dying son, compensatory damages can be recovered for such suffering, although it is unaccompanied with any physical or pecuniary injury whatever. *Sorelle v. W. U. Telegraph Co.*, 55 Tex. 310; *Stuart v. W. U. Telegraph Co.*, 66 Tex. 580; *Wilson v. Gulf, &c. R. Co.*, 69 Tex. 739; *W. U. Telegraph Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772; *Wadsworth v. W. U. Telegraph Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864; *Reese v. W. U. Telegraph Co.*, 123 Ind. 294; *Beasley v. W. U. Telegraph Co.*, 39 Fed. Rep. 181; *Chapman v. W. U. Telegraph Co.* (Ky. 1890), 13 S. W. Rep. 880; *Thompson on Electricity*, §§ 379 *et seq.*; article "*Telegraphs*," in Am. & Eng. Ency. Law, where the authorities are all collected. But such cases do not, it is believed, state the true doctrine. The error in the views stated by them is well exhibited in the very able opinion, of COOPER, J., in *W. U. Telegraph Co. v. Rogers*, 68 Miss. 748. And in the case of *Chapman v. W. U. Telegraph Co.*, 88 Ga. 763, LUMPKIN, J., in a very able opinion, condemns the doctrine set up in the cases referred to. The dissenting opinion of LURTON, C. J., in *Wadsworth v. W. U. Telegraph Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864, is also a strong exposition of the true doctrine. See also *Gulf, &c. R. Co. v. Levy*, 59 Tex. 568, where the court quotes with approval the rule stated in the text from Wood's *Mayne on Damages*, p. 74, and goes on to say: "We are referred to the case of *Sorelle v. W. U. Tel. Co.*, 55 Tex. 310, as an authority for the proposition that an action for mental suffering alone may be maintained. The opinion in that case does not seem to con-

tain the proposition necessary to sustain this action; but we are of the opinion that it cannot be sustained upon the principle, nor upon the authority of adjudicated cases."

¹ *Webb v. Denver, &c. R. Co.* (Utah, 1890), 24 Pac. Rep. 616; 44 Am. & Eng. R. Cas. 683; *Blake v. Midland Ry. Co.*, 18 Q. B. 83; 83 E. C. L. 93; *Howard Co. v. Legg*, 93 Ind. 532; *Mobile, &c. R. Co. v. Watley*, 69 Miss. 145; *Munro v. Pac. Coast, &c. Co.*, 84 Cal. 515; 18 Am. St. Rep. 248; *post*, Chapter XXVI.

² *Whalen v. St. Louis, &c. R. Co.*, 60 Mo. 323.

³ *Simonson v. Chicago, &c. R. Co.*, 49 Iowa, 87; *McIntyre v. N. Y. Central R. Co.*, 37 N. Y. 287; *Grant v. Brooklyn*, 41 Barb. (N. Y.) 381; *Kline v. Kansas, &c. R. Co.*, 50 Iowa, 656. Mere speculative profits are not to be considered; damages in cases of personal injury may be ascertained by the reduction of plaintiff's earning powers, mental or physical, and therefore reference should be had to his business at the time of the accident. *Penn. R. Co. v. Dale*, 76 Penn. St. 47. In Arkansas, it was held that a passenger who is injured by the negligent running of a train, or on account of an insufficient platform at which he is landed, is entitled, as damages, to compensation for the bodily injury sustained, the pain suffered, the effect of the injury on his health, according to its degrees and probable duration, the expenses of his sickness resulting from the injury, and of attempting to effect a cure, and the pecuniary loss sustained by reason of inability to attend to his business or profession. *St. Louis, &c. R. Co. v. Cantrell*, 37 Ark. 519; *Pittsburgh, &c. R. Co. v. Andrews*, 39 Md. 329; *Mackay v. Missouri Pacific R. Co.*, 18 Fed. Rep. 236. In a Missouri case the trial court, in an action for personal injuries, instructed the jury that if they

are proper to be considered.¹ He is entitled to recover for the disabling effect of the injury upon his capacity to earn, not only up to

should find for plaintiff, they should allow, "first, the expenses incurred by the plaintiff in attempting to cure himself of his injuries; second, his loss of time; third, his bodily pain and suffering and mental anguish," etc., etc. It was held that this instruction, while not as definite and precise as it might have been, was not open to the objection that it assumed that plaintiff had incurred expense, lost time, and endured bodily pain, etc., and the judgment should not be reversed for the mere want of precision. *Klutts v. St. Louis, &c. R. Co.*, 75 Mo. 642. In a Georgia case the suit being by an infant child for damages from wounds and bruises that were cured in a few months, and from the loss of the sense of hearing, alleged to have been a consequence of the injury, a charge on the measure of damages in the terms following was substantially correct: "There is no known rule of law by which witnesses can give you the amount in dollars and cents as the amount of injury, but this is left to the enlightened conscience of an impartial jury. This does not mean that juries can arbitrarily enrich one party at the expense of the other, nor that they should act unreasonably through mere caprice. But it authorizes you to give reasonable damages when the proof shows that the law authorizes it. But the jury should exercise common-sense and love of justice, and, from a desire to do right, fix an amount that will fairly compensate for the injury received." *Davis v. Central R. Co.*, 60 Ga. 329.

An aggravated condition of hernia caused by the cars running off the track, whereby the plaintiff was shocked, and thus damaged, was held a proper element of damage. *Houston, &c. R. Co. v. Shafer*, 54 Tex. 641. Where the question was whether the child of deaf and dumb parents was deprived of the sense of hearing by an injury received at the hands of the defendant, when it was under two months of age, it was devolved on the plaintiff to show that the child was not deaf before the injury, or was not born deaf. A charge to the jury that "if the

evidence be equally balanced for plaintiff and defendant on any contested point, they should find that part of the case in favor of the defendant," was not erroneous in view of the special facts. *Davis v. Central R. Co.*, 60 Ga. 329. In an action against a railway company for personal injury to a passenger, the jury in assessing the damages may take into their consideration, besides the pain and suffering of the plaintiff, and the expense incurred by him for medical and other necessary attendance, the loss he has sustained through his inability to continue a lucrative professional practice. *Phillips v. London, &c. Ry. Co.*, 5 C. P. Div. 280. A passenger who has been carried past her station, through the negligence of the company, but without any circumstances of aggravation, and without receiving any personal injury, may recover for the inconvenience, loss of time, labor, and expense of travelling back, but not for anxiety and suspense of mind suffered in consequence of the delay, nor the effects upon her health, nor the danger to which she was exposed in consequence of the train's being stopped at her station an insufficient length of time for her to get off. *Trigg v. St. Louis, &c. R. Co.*, 74 Mo. 147; 41 Am. Rep. 305.

¹ *Phillips v. Southwestern Ry. Co.*, 5 Q. B. Div. 78; *New Jersey Express Co. v. Nichols*, 34 N. J. L. 434; *City of Joliet v. Conway*, 119 Ill. 489; *Wade v. Leroy*, 20 How. (U. S.) 34; *Luck v. Ripon*, 52 Wis. 196. In *Nash v. Sharpe*, 19 Hun (N. Y.), 365, *PRATT, J.*, says: "It seems to be settled that in an action for loss of services, evidence of the nature and extent of the party's business, or how much he was earning from his business, or realizing from fixed wages, is proper upon the question of damages." *Masterton v. Mount Vernon*, 58 N. Y. 391; *McIntyre v. N. Y. Central R. Co.*, 37 N. Y. 287; *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260. In *Holmes v. Halde*, 74 Me. 28, 43 Am. Rep. 567, in an action to recover for personal injuries sustained by the defendant's negligence, where the plaintiff claimed damages for loss of business as a physi-

the time of the trial, but for all probable future disability in that respect.¹ If the injury is of such a character as of itself establishes the incapacity of the plaintiff to labor, — as, if it involves the loss of an arm, leg, or amounts to a permanent physical disability, — no evidence of the effect of the injury upon the earning capacity of the plaintiff is necessary.² But if the injury is not necessarily permanent, its probable effect upon the person injured must be shown; as possible consequences are too uncertain and speculative to constitute an element of damage.³

cian, it is not error to instruct the jury that the plaintiff is not prohibited from recovering damages for loss of business as a physician, although he has no such degree from a public medical institution as would entitle him to maintain an action for professional services. *LIBBY, J.*, said: "If by the injuries received the plaintiff was deprived of his capacity to perform his ordinary labor, or attend to his ordinary business, the loss he sustained thereby is an element of damages. The true test is what his services might be worth to him in his ordinary employment or business. It is not what sum he might legally recover for such services, but what he might fairly be expected to receive therefor. What he had previously been receiving for his services in his business is proper evidence on this point. A clergyman who has no fixed salary, but is dependent entirely upon voluntary contributions for his compensation for his services, as in some of our churches, may have an income, and if by an injury he is deprived of his capacity to perform his duties, might lose that income, and suffer as much loss as if he was receiving a salary fixed by contract; and still he could not enforce the payment of anything from his church or society. The plaintiff was practising his profession as a physician. If he had received no medical degree or license, still he was not pursuing a business in violation of law. The law would afford him no remedy for the collection of his charges for his services, but if his patients voluntarily paid him therefor, so that he was receiving an income of a certain amount for his services, that was the measure of the value of his capacity to render them, and might be fairly considered as evidence tending to show that he would

receive similar compensation in the future. This question was fully considered in England in the recent case, *Phillips v. London, &c. Ry. Co.*, 42 L. T. Rep. N. S. 6; 5 C. P. Div. 280. The plaintiff was a physician, and brought his action for a personal injury by which he was incapacitated from attending to his business. At the trial he proved that before the injury he had been receiving large special fees in the nature of gratuities from wealthy patients, which with his regular charges gave him an income of about five thousand pounds per year. The jury rendered a verdict for the plaintiff for sixteen thousand pounds. The case was taken to the court of appeal, and one of the questions was whether the jury was properly permitted to consider the special fees in estimating the value of the plaintiff's business, and the court held that it was a proper matter for their consideration." But it may be shown that the practice of a professional man is unlawful. *Jacques v. Bridgeport Horse R. Co.*, 41 Conn. 61.

¹ *Houston, &c. R. Co. v. Boehm*, 57 Tex. 152; *George v. Haverhill*, 110 Mass. 506; *Morris v. Chicago, &c. R. Co.*, 45 Iowa, 29; *New Jersey Exchange Co. v. Nichols*, 33 N. J. L. 435; *McLaughlin v. Corry*, 77 Penn. St. 109; *Hall v. Fond du Lac*, 42 Wis. 274.

² *Texas, &c. R. Co. v. O'Donnel*, 58 Tex. 27. See also *Wade v. Leroy*, 20 How. (U. S.) 34.

³ *Pennsylvania R. Co. v. Dale*, 76 Penn. St. 47. In *Jewell v. Union Passenger R. Co.*, Penn. Sup. Ct., 1883, 40 Leg. Int. 36, it was held in an action of damages for personal injury by negligence, that no damages will be allowed for any speculative or merely possible consequence of the wound in the absence of evidence that

Neither the poverty nor the wealth of the plaintiff can be shown to affect the damages, nor the number of persons who are dependent upon him for support,¹ except in cases where the circumstances are such as entitle the plaintiff to exemplary damages. In some of the cases it is held that it is not competent to show that the plaintiff's habits of intemperance are such as to affect his earning capacity.² But the soundness of this rule is doubtful, and upon principle there is no reason why evidence of that character which directly bears upon the actual loss to the plaintiff from the injury should not be permitted to be shown. In those cases where the injury is the result of gross negligence, or the wilful misconduct of the defendant's agents, the plaintiff, in addition to his actual damages, is entitled to such exemplary damages as the jury see fit to give, to prevent a recurrence of such injuries.³

the result will become more serious; as in case of an injury to one eye, and the barely possible result of inflammation extending to the other. The court said: "The cornea of the plaintiff's eye was cut in three places, in the lower, outer, and quarter, below the line of vision, and the iris became attached to the lower branches of the corneal injury. The power of the eye is permanently weakened, but its condition has remained unchanged for the last twenty months, while subjected to the severest tests, and during this time the plaintiff has been able to work from eleven o'clock P. M., till seven o'clock, A. M. As the measure of damage in this case is compensation only, the verdict transcends the proper limits, unless we believe that a more serious impairment or an entire loss of vision will follow as a direct consequence of the plaintiff's injury. The adherence of the iris may cause inflammation, which will affect the interior of the eye, and may aggravate an inflammation produced by any cause, and the loss of its sight follow. The other eye, to some extent, is exposed to the same risk, because of the danger of sympathetic inflammation. If an allowance should be made for such results in the assessment of damages, the verdict is not too large. They are proper elements of damage if they are fairly probable, and not merely possible. Upon the trial there was very little testimony directed to this point, and none that in

our judgment furnishes a just ground for a belief that the plaintiff's injury will become more serious than it now is. Demonstration on such a subject is not to be expected, but something more than a mere speculation as to possibilities is required. If the plaintiff can furnish satisfactory evidence on this point he will have an opportunity of doing so if he elects to try the case again."

¹ *W. U. Telegraph Co. v. Henderson*, 89 Ala. 510; *Ballou v. Farnam*, 11 Allen (Mass.), 73; *Kansas, &c. R. Co. v. Painter*, 9 Kan. 620; *Malone v. Hamley*, 46 Cal. 409; *Baltimore, &c. R. Co. v. Shipley*, 31 Md. 368; *Pittsburgh, &c. R. Co. v. Powers*, 74 Ill. 341; *Penn. R. Co. v. Books*, 57 Penn. St. 339.

² *Baltimore, &c. R. Co. v. Boteler*, 38 Md. 568.

³ *Philadelphia, &c. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Hopkins v. Atlantic, &c. R. Co.*, 36 N. H. 9; *Belknap v. Boston, &c. R. Co.*, 49 N. H. 358; *Lyon v. Hancock*, 35 Cal. 372; *Maysville, &c. R. Co. v. Herrick*, 13 Bush (Ky.), 122; *Western Union Tel. Co. v. Eyser*, 91 U. S. 495; *Milwaukee, &c. R. Co. v. Arms*, 91 U. S. 489; *Kansas Pacific R. Co. v. Otter*, 19 Kan. 83; *McKinley v. Chicago, &c. R. Co.*, 44 Iowa, 314; *Malecek v. Tower Grove R. Co.*, 57 Mo. 17. In *Kansas, &c. R. Co.*, 18 Kan. 523, of a verdict for \$820, the jury specifically returned that \$800 of

It was at one time regarded as improper to hold the principal liable for the wilful or malicious acts of his agents, and consequently

it was given as exemplary damages. The court sustained the verdict. See also *Goddard v. Grand Trunk R. Co.*, 57 Me. 203; *Footte v. Nichols*, 28 Ill. 486; *Devine v. Rand*, 38 Vt. 621; *Hanson v. European, &c. R. Co.*, 62 Me. 84; *Beale v. Railroad Co.*, 1 Dill. (U. S.) 568; *Edleman v. St. Louis Transfer Co.*, 3 Mo. App. 503; *Perkins v. Missouri, &c. R. Co.*, 55 Mo. 201; *Hanck v. Ridgway*, 33 Ill. 473; *Kennedy v. North Missouri R. Co.*, 36 Mo. 351; *Penn. R. Co. v. Zebe*, 33 Penn. St. 318; *Baltimore, &c. Turnpike Co. v. Boone*, 45 Md. 344; *Philadelphia, &c. R. Co. v. Larkin*, 47 Md. 155; *New Orleans, &c. R. Co. v. Hurst*, 36 Miss. 660; *Maysville, R. Co. v. Herrick*, 13 Bush (Ky.), 122; *Pleasants v. North Beach R. Co.*, 34 Cal. 594; *Union Pacific R. Co. v. Hause*, 1 Wyo. 27; *Atkinson v. Erie R. Co.*, 33 N. J. L. 354; *Kentucky, &c. R. Co. v. Dill*, 4 Bush (Ky.), 593. Corporations, like natural persons, are liable in exemplary damages when the facts of the case are of a character to warrant them. *Malecek v. Tower Grove, &c. R. Co.*, 57 Mo. 17. Where the testimony showed that the train upon which the deceased was riding as a passenger was thrown from the track, and that thereby the deceased received the injuries from which he died, and failed to show any unusual speed or want of care in the management of the train, or by any direct evidence the cause of the train's being thrown from the track, and disclosed as the only evidence of negligence on the part of the company the fact that some of the ties at and near the place of the accident were rotten, and it appeared that the company had a suitable and competent person in charge of the track at that place as section-boss, and that he was from time to time, and as fast as he deemed necessary for the safety of the track, replacing the old and rotten ties with new and sound ones,—it was held that the case was shown for exemplary damages. *Kansas Pacific R. Co. v. Cutter*, 19 Kan. 83. In a New York case the plaintiff's injury was caused by a train running into a river through the open

draw of a bridge, a few minutes after six o'clock in the morning. The bridge-tender, it was shown, could neither read nor write, but it was not made to appear that the accident was in any degree attributable to that fact. Evidence tending to show inattention on the part of the engineer was also given. The court charged the jury: "If you find from the evidence that the conduct of the engineer, or the conduct of the railroad company in the employment of a bridge-keeper who could neither read nor write, amounted to such a reckless indifference to human life as to constitute wilful and malicious misconduct, then you may be justified in giving exemplary damages. It was held error. *Brooks v. New York, &c. R. Co.*, 30 Hun (N. Y.), 47. A passenger in a railway-car who has been injured in a collision caused by the negligence of the employes of the company is not, as a general rule, entitled to an action against the company to recover damages beyond the limit of compensation for the injury actually sustained. Exemplary damages should not be awarded for such injury unless it is the result of wilful misconduct of the employes of the company, or of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. *Milwaukee, &c. R. Co. v. Arms*, 91 U. S. 489; *Western Union Tel. Co. v. Eyser*, 91 U. S. 495. The absence of slight care in the management of a train, or in keeping a railroad in repair, is gross negligence; and to enable a passenger to recover punitive damages for a personal injury, it is not necessary to show the absence of all care, or reckless indifference to the safety of passengers, or intentional misconduct on the part of the agents and officers of the company. Punitive damages are recoverable if the proof shows that the company failed to use such diligence in keeping its bridge in repair as careless and inattentive persons usually exercise in the preservation of the same or of business of like character. To authorize the recovery of punitive damages it is necessary to show a state of case—wilful neglect—*quasi criminal* in its nature.

exemplary damages were not recoverable against a corporation for the acts of its servants, unless it was shown that it authorized or had ratified the act.¹ But, since it is now almost universally held that the master is liable for the wilful and even malicious acts of his servants in the line of his duty, the rule which is now generally held in the better class of cases, that exemplary damages may be given against a corporation for injuries inflicted by its servants wilfully or maliciously, and whether authorized or ratified by it or not, seems to us to be consistent and just,² especially when the action is for personal injuries received by a passenger to whom the company owes a contract duty; and in some of the States such damages are provided for by statute.³ But where the action is based on the *negligence* of the company, exemplary damages are not recoverable, since they can never be allowed except in case of a wilful injury, and it is grossly incorrect to say that a negligence may be wilful.⁴ The fact that the plaintiff has an accident insurance policy should have no effect upon the damages;⁵

Maysville, &c. R. Co. v. Herrick, 13 Bush (Ky.), 122.

¹ Hays v. Houston, &c. R. Co., 46 Tex. 272; Hogan v. Providence, &c. R. Co., 3 R. I. 88; Ackerson v. Erie R. Co., 33 N. J. L. 254; Townsend v. N. Y. Central R. Co., 56 N. Y. 295; Great Western R. Co. v. Miller, 19 Mich. 305; Hill v. New Orleans, &c. R. Co., 11 La. An. 292; Milwaukee, &c. R. Co. v. Finney, 10 Wis. 388; Wade v. Thayer, 40 Cal. 578; Edelmann v. St. Louis Transfer Co., 3 Mo. App. 503.

² Matthews v. Warner, 29 Gratt. (Va.) 570; 26 Am. Rep. 396; Parsons v. Missouri Pac. R. Co., 94 Mo. 286; Smith v. Wabash, &c. R. Co., 92 Mo. 360; Goddard v. Grand Trunk R. Co., 57 Me. 202; Hopkins v. Atlantic, &c. R. Co., 36 N. H. 9; Haley v. Mobile, &c. R. Co., 7 Baxter (Tenn.), 239; New Orleans, &c. R. Co. v. Bailey, 40 Miss. 395; Gasway v. Atlantic, &c. R. Co., 58 Ga. 216; Pittsburgh, &c. R. Co. v. Slusser, 19 Ohio St. 257; Quigley v. Central Pacific R. Co., 11 Nev. 350; Baltimore, &c. T. Co. v. Borne, 45 Md. 344; Philadelphia, &c. R. Co. v. Larkin, 47 Md. 155; Milwaukee, &c. R. Co. v. Arms, 91 U. S. 489; Kansas, &c. R. Co. v. Kessler, 18 Kan. 523; Chicago, &c. R. Co. v. Bryan, 90 Ill. 126; Evans v. St. Louis, &c. R. Co., 11 Mo.

App. 463. In some States the right to such damages is made to depend upon the express or implied ratification of the act by the company. Graham v. Pacific R. Co., 66 Mo. 536; Hays v. Houston, &c. R. Co., 46 Tex. 272.

³ Houston, &c. R. Co. v. Cowser, 57 Tex. 293; Smith v. Wabash, &c. R. Co., 92 Mo. 360; Louisville, &c. R. Co. v. Brooks, 83 Ky. 137.

⁴ See 16 Am. & Eng. Ency. Law, p. 477. Where an employé of a railway company in enforcing a valid rule of the company, in a case to which he in good faith believes it to apply, without wantonness, indignity, or insult, ejects a passenger from a train, exemplary damages are not recoverable therefor. Fitzgerald v. Chicago, &c. R. Co., 50 Iowa, 79.

⁵ Kellogg v. New York Central R. Co., 79 N. Y. 72; North Penn. R. Co. v. Kirk, 90 Penn. St. 20; Harding v. Townsend, 43 Vt. 541; Clark v. Inhabitants, &c., 2 B. & C. 254; 12 E. C. L. 118; Dally v. India, &c. L. Assur. Co., 15 C. B. 365; 88 E. C. L. 364; Carroll v. Missouri Pac. R. Co., 88 Mo. 239; 26 Am. & Eng. R. Cas. 268; Baltimore, &c. R. Co. v. Wightman, 29 Gratt. (Va.) 431; Bradburn v. Great Western Ry. Co., L. R. 10 Exchq. 1; Harding v. Townsend, 43 Vt. 536; Pittsburgh, &c. R. Co. v. Thompson,

nor the circumstance that he has a large income independent of his earnings.¹

The precise measure of damages to be recovered is always a question for the jury to determine upon the evidence and the instructions of the court. And their verdict will never be set aside as excessive, except where the amount allowed is so exorbitant, and so disproportionate to the injury as clearly to evince that it was the result of passion or prejudice.²

In an action by a parent for an injury to a child, his recovery is limited to the loss of service, present and prospective, during minority, and the expense of medical attendance and nursing, but nothing is allowed for the pain and suffering of the child, physical or mental.³ An action by a parent for an injury to his minor child does not preclude a recovery by the child also. But in an action by the child when his parents are living, he can recover nothing for loss of time during minority, but only for the pain and suffering of body and mind, and prospective damages where the injury is likely to prove permanent.⁴ A statute giving an action to the father of a minor child injured or killed by the negligence of another, providing that in

56 Ill. 138. See also 19 Am. & Eng. Ency. Law, p. 944-945, *n.* *Contra*, Hicks v. Newport, &c. R. Co., 116 E. C. L. 401, *n.*, where Lord CAMPBELL instructed the jury that the amount of insurance on the life of deceased should be deducted.

Nor has the insurance company which has been obliged to pay a policy any right of action against the company causing the death of the policy holder. *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754; *Randall v. Cochran*, 1 Ves. Sr. 198; *Connecticut Life Ins. Co. v. New Haven, &c. R. Co.*, 25 Conn. 265; 65 Am. Dec. 571.

¹ *Phillips v. London, &c. Ry. Co.*, 5 C. P. Div. 280.

² *Phillips v. Southwestern Ry. Co.*, 4 Q. B. Div. 406; *Ransom v. N. Y. & Erie R. Co.*, 15 N. Y. 415; *Chicago, &c. R. Co. v. Hazyards*, 26 Ill. 373; *Curtis v. Rochester, &c. R. Co.*, 18 N. Y. 534; *Holyoke v. Gd. Trunk R. Co.*, 48 N. H. 541; *Hopkins v. Atlantic, &c. R. Co.*, 36 N. H. 9; *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49; *Malone v. Hawley*, 46 Cal. 409; *Laing v. Colder*, 8 Penn. St. 479; *Pittsburgh, &c. R. Co. v. Donahue*, 70 Penn. St. 119; *Penn. R. Co. v. Graham*,

63 Penn. St. 290; *Penn. R. Co. v. Books*, 57 Penn. St. 337; *Ballou v. Farnam*, 11 Allen (Mass.), 73; *Peoria Bridge Assn. v. Loomis*, 20 Ill. 235; *Chicago, &c. R. Co. v. Flagg*, 43 Ill. 364; *Chicago, &c. R. Co. v. McKean*, 40 Ill. 218; *Cohen v. Eureka, &c. R. Co.*, 14 Nev. 376; *Pierce v. Millay*, 44 Ill. 189; *Hogan v. Providence, &c. R. Co.*, 3 R. I. 88; *Ohio, &c. R. Co. v. Dickerson*, 59 Ind. 317; *Klein v. Jewett*, 26 N. J. Eq. 474; *McMahon v. Northern Central R. Co.*, 39 Md. 438; *Pittsburgh, &c. R. Co. v. Andrews*, 39 Md. 329; *Bannon v. Baltimore, &c. R. Co.*, 24 Md. 108; *Quigley v. Central Pacific R. Co.*, 11 Nev. 350; *Russ v. Steamboat*, 14 Iowa, 363; *Morris v. Chicago, &c. R. Co.*, 45 Iowa, 29; *Chappin v. New Orleans, &c. R. Co.*, 17 La. An. 19; *Smith v. Pittsburgh, &c. R. Co.*, 23 Ohio St. 10.

³ *Whilford v. Panama R. Co.*, 23 N. Y. 465; *Cleveland, &c. R. Co. v. Rowan*, 66 Penn. St. 393; *Donaldson v. Mississippi R. Co.*, 18 Iowa, 281. As to damages for injuries resulting in death, see *post*, Chapter XXVI.

⁴ *Wood's Master and Servant*, 449.

such action "such damages may be given as under all the circumstances of the case may be just," is held to entitle him to recover only compensatory damages for the loss of service of the child, and the expense incurred in consequence of the injury for medical services, nursing, etc., and not for the pain and suffering of the child or for his disfigurement. In an Indiana case,¹ the court say: "On the question of damages in this class of cases the common-law rule must prevail. When the action is by the husband, or master, or parent, for their individual losses respectively, occasioned by the tortious acts towards the wife, infant child, or servant, the individual suffering of the immediate subject of a wrongful act cannot be taken into account in the assignment of damages.² In such cases there may be two actions for the same injury, — that of the father, and that of the child. When the action is brought by the parent, loss of service, medical attendance, expense of nursing, and the like, are matters to be considered by the jury; and in such cases compensation is the rule. The child recovers, not for the loss of time or service or medical attendance or expense of curing, but for the injury personal to himself, his pain and suffering, and the probable infirmities after he comes of age.³

For an injury done to the wife, a husband's recovery is limited to the loss of services and comfort, and expenses of medical attendance and nursing.⁴ If the husband and wife join in the suit, or where, by statute, the wife sues alone, then the wife's pain and anguish of mind forms an element of damage.⁵

¹ *Long v. Morrison*, 14 Ind. 600.

² *Ohio, &c. R. Co. v. Tendall*, 13 Ind. 386; *Quin v. Moore*, 15 N. Y. 432; *Oldfield v. New York, &c. R. Co.*, 14 N. Y. 318.

³ *Pennsylvania R. Co. v. Zebe*, 33 Penn. St. 328; *Pennsylvania R. Co. v. Kelly*, 31 Penn. St. 372; *Sherm. & Red. on Neg.*, § 608. *Durkee v. Central Pacific R. Co.*, 56 Cal. 388; 38 Am. Rep. 59.

⁴ *Cregin v. Cross Town R. Co.*, 75 N. Y. 192; *Oakland R. Co. v. Fielding*, 48 Penn. St. 320; *Penn. R. Co. v. Zebe*, 33 Penn. St. 318; *Penn. R. Co. v. Butter*, 57 Penn. St. 335; *Brooks v. Schwerin*, 54 N. Y. 343; *Smith v. St. Joseph*, 55 Mo. 456; *Fuller v. Naugatuck R. Co.*, 21 Conn. 557; *Barnes v. Martin*, 15 Wis. 240; *Tuttle v. Chicago, &c. R. Co.*, 42 Iowa, 518; *East Tenn., &c. R. Co. v. Cox*,

57 Ga. 252; *Covington St. R. Co. v. Packer*, 9 Bush (Ky.), 455; *Houston, &c. R. Co. v. Miller*, 49 Tex. 322; *Hopkins v. Atlantic, &c. R. Co.*, 36 N. H. 9; *State v. Baltimore, &c. R. Co.*, 24 Md. 84; *Gilligan v. New York, &c. R. Co.*, 1 E. D. S. (N. Y.) 453; *Traver v. Eighth Ave. R. Co.*, 6 Abb. Pr. (N. Y.) n. s. 46.

⁵ *Hopkins v. Atlantic, &c. R. Co.*, 36 N. Y. 9; *Brooks v. Schwerin*, 54 N. Y. 343; *Laughlin v. Eaton*, 54 Me. 156. When both husband and wife have been injured by the same accident, the husband may in the same action recover for injuries done to himself and for damages sustained by him in consequence of the injury to his wife. *Cincinnati, &c. R. Co. v. Chester*, 57 Ind. 297. Or he may maintain separate actions. *Newberry v. Connecticut, &c. R. Co.*, 25 Vt. 377.

SEC. 318. Injuries received on Sunday. — In Massachusetts,¹ and some of the other States, under statutes prohibiting labor and all secular employment, including travelling, on the Sabbath, it is held that no recovery can be had of a railway company for an injury received by a passenger upon its trains upon that day, or by an employé who is injured while engaged in running its cars. But this doctrine, even under the Massachusetts statute, is generally regarded as strained, unwarranted, and unjust. It is so generally a matter of public convenience and necessity that street-cars, and even steam-cars should be run upon the Sabbath that it is regarded as a work of

¹ *Day v. Highland St. R. Co.*, 136 Mass. 113 ; 44 Am. Rep. 447, holding that a horse-car run on Sunday for the purpose of accommodating the public generally and earning money from whoever may see fit to travel upon it, is in violation of the Lord's Day Act, although some of the passengers are lawfully travelling ; and the conductor is both laboring and travelling in violation of the Lord's Day Act, and is without remedy for a personal injury sustained in such occupation. The court said : "It is not within our province to determine the wisdom or expediency of the law, or how far there has been a change in public sentiment in relation to the proper manner of observing the Lord's Day. These considerations are for the Legislature. We can only take the law as it is written, and apply it according to its obvious meaning and the intention of the Legislature. We do not intend to decide that a horse-car may not be so run on Sunday as to come within the exception of the statute and be employed in a work of necessity or charity. We only decide that in this case there was no evidence which would warrant a jury in finding that this car was run from consideration of necessity or charity, and that the jury should have been so instructed. We cannot hold that the mere fact that some of the passengers on the car were lawfully travelling rendered the running of the car lawful. *Com. v. Sampson*, 97 Mass. 407 ; *Com. v. Josselyn*, 97 Mass. 411. The plaintiff was engaged in performing his ordinary duties as conductor of a horse-car, and in performing those duties he was doing labor or work. Though he was travelling, he was primarily laboring, and his travel-

ling was merely an incident of the kind of work in which he was engaged. The car being run in violation of law, he was both laboring and travelling on the Lord's Day in violation of law. The question then arises whether his violation of law contributed to cause his injury. The general principles applicable to the case are well settled in this commonwealth. The question has more frequently arisen in cases of travelling, doubtless for the reason that travelling is the more common form in which the statutes for the observance of the Lord's Day are violated, or for the reason that in travelling a person is more exposed to injury than in laboring. It has been uniformly held in numerous decisions, from *Bosworth v. Swansey*, 10 Met. (Mass.) 363, to *Davis v. Somerville*, 128 Mass. 594, 35 Am. Rep. 399, that a person travelling on the Lord's Day in violation of law cannot recover in an action against a city or town for injuries sustained from a defect in a highway. This is not because the liability of a city or town for a defect in a way is imposed by statute, or because a city or town stands in any different position from an individual or other corporation, but only because the act of travelling, which is the act prohibited, necessarily contributes to cause the injury. The act of travelling in violation of law on the Lord's Day, with no evidence of any other negligence, has been held to be necessarily contributory to the injury sustained by the plaintiff, in *Stanton v. Metropolitan R. R. Co.*, 14 Allen (Mass.), 485 ; *Smith v. Boston, &c. R. Co.*, 120 Mass. 490 ; 21 Am. Rep. 538 ; *Lyons v. Desotelle*, 124 Mass. 387 ; and *Bucher v. Fitchburg R. Co.*, 131 Mass. 156, 41 Am. Rep. 216."

necessity;¹ and no attempt to prevent it is made, even in Massachusetts. Public convenience and necessity are thus permitted to

¹ In *Com. v. Louisville, & C. R. Co.*, 80 Ky. 291, 44 Am. Rep. 475, 6 Am. & Eng. R. Cas. 216, it was held that running railway trains on Sunday is a work of necessity. The court said: "Railroad companies, as carriers of passengers, furnish at this day almost every accommodation to the traveller that is to be found in the hotels of the country. His meals, as well as sleeping apartments, are often furnished him; and to require the train when on its line of travel to delay its journey that the passenger may go to a hotel to enjoy the Sabbath, where the same labor is required to be performed for him as upon the train, or to require him to remain on the train and there live as he would at the hotel, would certainly not carry out the purpose of the law; and besides, the necessity of reaching his home or place of destination must necessarily exist in so many instances as to make it indispensable that the train should pursue its way. So of the trains transporting goods, merchandise, live-stock, fruits, vegetables, etc., that by reason of delay would work great injury to parties interested. A private carriage in which is the owner or his family, driven by one who is employed by the month or year to the church in which the owner worships, or to the house of his friend or relative on the Sabbath, is not in violation of the statute. So in reference to the use of street-railroads in towns and cities on the Sabbath day. Those who have not the means of providing their own horses or carriages travel upon street-cars to their place of worship, or to visit their friends and acquaintances; and such is the apparent necessity in all such cases that no inquiry will be directed as to the business or destination of the traveller, whether on the one car or the other, nor will an inquiry be directed as to the character of the freight being transported. Nor will the person desiring to hire the horse from the livery-stable be compelled to disclose the purpose in view in order to protect the keeper from the penalty of the law. Such employments are necessary, and not within the inhibition of the statute. The common-sense as well as the moral sentiment of

the country will suggest that the merchant who sells his goods, or the farmer who follows his plough, or the carpenter who labors upon the building, or the saloon-keeper who sells his liquors on Sunday, are each and all violating the law by which it is made penal to follow the ordinary avocations of life on Sunday. The ordinary usages and customs of the country teach us that to pursue such employments on the Sabbath is wrong. Every man can realize the distinction between pursuing such avocations and that of transporting the traveller to his home, or the pursuit of such employments as must result from the necessary practical wants of trade." See *State v. Balt. & Ohio R. Co.*, 15 W. Va. 362; 36 Am. Rep. 803. In *Smith v. New York, & C. R. Co.*, 47 N. J. L. 7, 18 Am. & Eng. R. Cas. 399, a statute prohibiting travelling on Sunday except for necessity or charity, permitted any railroad company to run one passenger train each way on Sunday for the accommodation of the citizens of the State. It was held that travel on such trains, although not for necessity or charity, is lawful.

Running an excursion steamboat on Sunday is a "worldly employment" such as is forbidden by the Pennsylvania statute. *Com. v. Rees*, 10 Penn. Co. Ct. Rep. 545. So is driving an omnibus for public travel. *Com. v. Jeandell*, 2 Grant's Cas. (Penn.) 506. It is also held in Pennsylvania that the running of street-cars on Sunday is not a "work of necessity." *Sparkhawk v. Union Pass. R. Co.*, 54 Penn. St. 401 (see the subject well discussed in the several opinions delivered in this case). But in Georgia the running of street-cars on Sunday is considered a necessity. *Augusta, & C. R. Co. v. Renz*, 55 Ga. 126. And in view of the part which street-cars now have in the life of city people, particularly the poorer classes, the correctness of the view of the Georgia court cannot be doubted. See this subject of Sunday and Sunday laws discussed at length in the article "*Sunday*" in the *Am. & Eng. Ency. of Law*, by H. D. Minor, Esq. See also Ringgold on Sunday Law; Harris on Id.

override the statute ; yet the courts, adopting a narrow construction, hold that a person who avails himself of this public convenience, whether from necessity or otherwise, does so at his peril, and assumes all the risks of the negligent conduct of such trains. In other words, it is held that a person by travelling upon a railway-car upon the Sabbath is guilty of contributory negligence, as, if he had not been travelling contrary to the statute, he would not have been injured.¹ But this doctrine is generally repudiated by the courts in those States where similar statutes exist. In New York² a person who was injured while travelling upon the Sabbath, by reason of defects in the streets, was held entitled to recover therefor from the municipal corporation whose duty it was to keep the streets in repair ; and in an earlier case³ the same rule was applied in favor of a passenger upon a

¹ *Wallace v. Merrimac River Nav. &c. Co.*, 134 Mass. 95 ; 45 Am. Rep. 301. In this case the court held that there can be no recovery from the owners of a steamboat for running down a yacht upon the Sabbath, unless it was wantonly or maliciously done by those in charge. It is somewhat difficult to understand how the wantonness or malice of the act can affect the civil liability of the parties so as to strip the act of the yacht-owners in running their yacht upon the Sabbath of its unlawful character, or render them less obnoxious to the charge of contributory negligence. See the same views in *Bucher v. Fitchburg R. Co.*, 131 Mass. 156 ; 6 Am. & Eng. R. Cas. 212 ; *McDonough v. Metropolitan R. Co.*, 137 Mass. 210 ; 21 Am. & Eng. R. Cas. 354. See also opinion of DUFFEE, J., in *Baldwin v. Barney*, 12 R. I. 392, in which he combats the Massachusetts doctrine.

² *Platz v. Cohoes*, 89 N. Y. 219 ; 41 Am. Rep. 286. In this case it was held that the fact that the plaintiff was travelling at the time of the accident on Sunday in violation of the statute was no defence to an action against the city for the injury. The statute forbidding unlawful travelling on Sunday prescribes a penalty for its violation, but it goes no further, and there is no principle upon which it can be held that the right to maintain an action in respect of special damage resulting from the omission of a defendant to perform a public duty is taken away because the person injured was

at the time disobeying a positive law. DANFORTH, J., went on to say. "The plaintiff's act in travelling was not contributory negligence. The traveller is not declared to be a trespasser upon the streets, nor could defendant close them up against her. Travel does not usually result in injury, and cannot be regarded as the immediate cause of the accident, and of such only the law takes notice. At common law plaintiff's act was not unlawful, and plaintiff was under its protection and might resort to it against a wrong-doer by whose act she was injured. See *Steele v. Burkhardt*, 104 Mass. 59 ; *Welch v. Weston*, 6 Gray (Mass.), 505 ; *Norris v. Litchfield*, 35 N. H. 271. See also *Schmidt v. Humphrey*, 48 Iowa, 652 ; *Sutton v. Wauwatosa*, 29 Wis. 21 (a case similar to the one at bar) ; *Dillon Mun. Corp.*, § 778 ; *Baily v. Mayor, &c.*, 3 Hill (N. Y.), 531. There are authorities in conflict with the case at bar. See *Johnson v. Irasburgh*, 47 Vt. 28 ; *Holcomb v. Danby*, 51 Vt. 428 ; *Bosworth v. Swansey*, 10 Met. (Mass.) 333 ; *Jones v. Andover*, 10 Allen (Mass.), 18 ; *Smith v. Bost. & Me. R. Co.*, 120 Mass. 490. But see, in harmony with the case at bar, *Merritt v. Earle*, 29 N. Y. 115 ; *Wood v. Erie R. Co.*, 72 N. Y. 196. Also *Cooley on Torts*, § 157, *Whart. Neg.*, § 331."

³ *Carroll v. Staten Island R. Co.*, 58 N. Y. 126 ; 17 Am. Rep. 221. See also *Wood v. Erie R. Co.*, 72 N. Y. 196 ; *Merritt v. Earle*, 29 N. Y. 115 (validity of Sunday contract).

railway train run upon the Sabbath, who was injured through the negligence of the servants in charge of it. The same doctrine has been held in the United States Supreme Court.¹ And in a some-

¹ Phila., &c. R. Co. v. Phila., &c. Steam Tow Boat Co., 23 How. (U. S.) 209. In *Opsahl v. Judd*, 30 Minn. 136, in an action for the death of a passenger on defendants' steamboat, through their negligence, it was held that the fact that the accident causing death took place on Sunday while the defendants were violating the law in carrying passengers was not a defence on the ground that the intestate was *particeps criminis*. To such an objection it is a sufficient answer that the defendants on that day occupied the relation of common carriers of passengers, and their general obligation to use such care and diligence as the law enjoins is not limited by the contract with the passengers, nor with the person who engaged the use of the boat and the services of the crew for that day, but is governed by considerations of public policy. That the undertaking was unlawful does not touch the question, 58 N. Y. 134. As remarked in that case, "any relaxation of the rule as to duty or liability naturally tends to bring about a corresponding relaxation of care and diligence on the part of the carrier." The suggestion that if the deceased had not joined the excursion he would have escaped, may perhaps serve to enforce a valuable lesson which finds a sanction in law and morals, but as between him and the defendants he was rightfully on the boat. His presence did not (in a proper sense) contribute to or cause the accident; and in such cases wrong-doers, though answerable to the State or parties injured by them for their own acts, are entitled to the protection of the laws against the wrongful acts or culpable negligence of others. *Carroll v. Staten Island R. Co.*, 58 N. Y. 136; 17 Am. Rep. 221. In *Philadelphia, &c. R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415, 6 Am. & Eng. R. Cas. 194, under the Maryland statute which forbids all persons to "work or to do any bodily labor on the Lord's day, commonly called Sunday," and provides that no person shall command or willingly suffer any of his servants to do any man-

ner of work or labor on that day — works of necessity and charity always excepted — and prescribes a small penalty for a breach of the statute, — in an action to recover damages for delay in transporting cattle which were delivered to the defendant railroad company, a common carrier by a connecting line, for transportation, it appeared that the defendant had arrangements with the connecting line for the immediate transportation of cattle received on Sunday. Upon demurrer to the complaint it was held that the Sunday statute had no application to the case; that according to the principles of the common law applicable to common carriers, the defendant having accepted the stock to be transported over its road in the usual course of transit, it at once became its duty to forward the same without unnecessary delay or detention; that its obligation was to carry according to its public profession, and the conveniences at its command. And if injury were sustained by reason of any neglect of this duty, or other wrongful act in the carrying and delivery of the cattle, the fact of their having been received to be carried or having been carried on Sunday could afford no excuse to the defendant, or exoneration from liability; that the carrying forward of the cattle by the defendant on Sunday was not illegal; it was fairly and justly a work of necessity, and therefore excepted from the operation of the statute. *Johnson v. Midland R. Co.*, 4 Exch. 367. That even upon the supposition that the plaintiffs were violating the law in having their cattle transported on a Sunday, the defendant could not avail itself of such infraction of the law by the plaintiffs, as a defence to an action for the consequences of a wrong or negligence of its own. See *Waters v. Richmond, &c. R. Co.*, 110 N. C. 338; 14 S. E. Rep. 802; s. c. 108 N. C. 394; 12 S. E. Rep. 950, a case involving similar principles; the railroad company, having failed to provide a car on Sunday for the shipment of stock as it had contracted to do, was held liable for damages.

what recent case this court has taken pains to express its unqualified disapproval of the doctrine set up by the Massachusetts cases. "Without entering into a discussion of the subject," it was said, "we are bound to say that we do not feel satisfied, that upon any general principles of law by which the courts that have adopted the common law system are governed, this is a true exposition of that law."¹ The Massachusetts doctrine has been repudiated in every court in which it has ever been invoked, except those of Maine,² and Vermont;³ and the doctrine may be considered as well established that the fact that the injury was received on Sunday, at a time when plaintiff was violating the Sunday law, can afford no defence to an action for a tort.⁴ And even in Massachusetts the legislature has taken the matter in hand and provided by special statute that such a defence shall not avail,⁵ so that this anomalous doctrine is now repudiated in the State of its creation.

If the contract of carriage was made on Sunday, it is void in most of the States, and the passenger can maintain no action on such contract.⁶ But, it will of course be remembered that actions against

¹ *Bucher v. Cheshire R. Co.*, 125 U. S. 555; 34 Am. & Eng. R. Cas. 389. The judgment of the State court was affirmed as it was a case in which the State law had to be followed, but the court went out of its way to express its disapproval.

² *Cratty v. City of Bangor*, 57 Me. 423; *Hinckley v. Penobscot*, 42 Me. 89; *Tillock v. Webb*, 56 Me. 100. See also *Sullivan v. Maine Central R. Co.*, 82 Me. 196; 41 Am. & Eng. R. Cas. 195, where the court held that riding for exercise was not a violation of the statute providing for Sunday observance.

³ *Holcomb v. Danby*, 51 Vt. 428; *Johnson v. Irasburgh*, 47 Vt. 28. See also *McClary v. Lowell*, 44 Vt. 116.

⁴ *Louisville, &c. R. Co. v. Frawley*, 110 Ind. 18; 28 Am. & Eng. R. Cas. 308; *Louisville, &c. R. Co. v. Graham*, 1 Ind. App. 46; 29 N. E. Rep. 170; *Illinois Cent. R. Co. v. Dick* (Ky. 1891), 15 S. W. Rep. 665; *Johnson v. Missouri Pac. R. Co.*, 18 Neb. 690; 23 Am. & Eng. R. Cas. 429; *Norris v. Litchfield*, 35 N. H. 271; 69 Am. Dec. 546; *Wentworth v. Jefferson*, 60 N. H. 158; *Delaware, &c. R. Co. v. Trautwein*, 52 N. J. L. 169; 41 Am. & Eng. R. Cas. 187; *Carroll v. Staten*

Island R. Co., 58 N. Y. 126; *Kerwhacker v. Cleveland, &c. R. Co.*, 3 Ohio St. 172; 62 Am. Dec. 246; *Mahoney v. Cook*, 26 Penn. St. 342; 67 Am. Dec. 419; *Knowlton v. Milwaukee, &c. R. Co.*, 59 Wis. 278; 16 Am. & Eng. R. Cas. 330. Laborers working at a switch on Sunday to prevent a serious stoppage of trains are engaged in a work of necessity, and cannot be indicted for a violation of the Sunday Statute. *Yonoski v. State*, 79 Ind. 393; 5 Am. & Eng. R. Cas. 40. See also *Louisville, &c. R. Co. v. Com.* (Ky. 1892) 17 S. W. Rep. 274.

⁵ The benefits of this remedial statute do not extend to cases in which the injury occurred prior to the passage of the statute. *Bucher v. Fitchburg R. Co.*, 131 Mass. 156; 41 Am. Rep. 216.

⁶ *Nibert v. Baghurst*, 47 N. J. Eq. 201; 20 Atl. Rep. 252; *Saginaw, &c. R. Co. v. Chappell*, 56 Mich. 190; 22 Am. & Eng. R. Cas. 16; *Morgan v. Bailey*, 59 Ga. 683; Am. & Eng. Ency. of Law, Art. "Sunday." See also *Ringgold's on Sunday Law*; *Harris on Id.*; *Walsh v. Chicago, &c. R. Co.*, 42 Wis. 23; *Brown v. Chicago, &c. R. Co.*, 54 Wis. 354; 3 Am. & Eng. R. Cas. 444.

carriers for a personal injury are *ex delicto*, founded on the carrier's breach of its public duty and not on the contract of carriage.

SEC. 318 *a*. **Sick or Intoxicated Passengers.** — The general rule has often been declared as to the duty of the company in regard to the expulsion of intoxicated or disabled passengers. Several cases involving a consideration of this duty have recently arisen, and the courts have always taken pains to declare, that even in the exercise of a lawful right the company owes a positive duty to those against whom it is enforced, and must exercise all the care which the circumstances demand, to prevent injury to the expelled person.¹ Thus, in a case before the Kansas Court,² the passenger was a victim of delirium tremens, and in the course of the journey acted in such a way as to annoy and frighten his fellow-passengers, so that a number of them left the car. On reaching a station, a town of four thousand inhabitants, the conductor removed him from the train and notified the overseer of the poor; but it appeared that he was allowed to lie exposed on the bare station platform for more than an hour, before the overseer took charge of him. The court held,

¹ In the case of *Connolly v. Crescent City R. Co.*, 41 La. An. 57; 37 Am. & Eng. R. Cas. 117, a passenger while riding on a street-car was stricken with apoplexy, and the driver supposing him to be drunk removed him from the car and left him lying on the edge of the sidewalk. He was perfectly helpless, and the day being cold and rainy the exposure caused his death. The court held that the company had a right to remove him, considering the inconvenience and annoyance his presence caused to other passengers. But this right did not authorize a removal such as was made; the passenger being helpless the company owed him a positive duty to place him where relief could be had. A verdict against the company was therefore sustained. The court said: "We conclude therefore that the conduct of the defendant's agent in turning out this helpless and speechless sick passenger into the street, and there leaving him, on an inclement day, without the slightest attempt, at the moment or afterwards, to have him taken care of, was a gross violation of its duty." See also as sustaining similar principles, *Louisville, &c. R. Co. v. Sullivan*, 81 Ky. 624; 16 Am. & Eng. R. Cas.

390; *Paddock v. Atchison, &c. R. Co.*, 37 Fed. Rep. 841 (removal of passenger with infectious disease); *Hall v. South Carolina R. Co.*, 28 S. C. 261; 34 Am. & Eng. R. Cas. 311; *Cincinnati, &c. R. Co. v. Cooper*, 120 Ind. 469. Compare *Lemont v. Washington, &c. R. Co.*, 1 Mackey (D. C.), 180.

Where a passenger who had gotten into the caboose of a freight train, supposing he had a right to ride there, was put off between two stations because it was contrary to a regulation of the company to carry passengers upon such trains, when he was sick, and after he had so informed the conductor, and offered to pay his fare, the court held that there was a gross violation of the company's duty, and sustained a large verdict rendered in plaintiff's favor. *Illinois Central R. Co. v. Sutton*, 53 Ill. 397. See also *Louisville, &c. R. Co. v. Crunk*, 119 Ind. 542; *St. Louis, &c. R. Co. v. Finley*, 79 Tex. 85; 15 S. W. Rep. 266; *Foss v. Boston, &c. R. Co.* (N. H.), 21 Atl. Rep. 222; *Sheridan v. Brooklyn, &c. R. Co.*, 36 N. Y. 39.

² *Atchison, &c. R. Co. v. Weber*, 33 Kan. 553; 21 Am. & Eng. R. Cas. 418; 52 Am. Rep. 543.

that the company had an undoubted right to expel him; it owed a duty to its other passengers to secure them from his offensive conduct. But its duty did not, said the court, "end with his removal from the train. He was unconscious and unable to take care of himself. The company could not leave him on the platform helpless, exposed, and without care or attention. It was its duty to exercise reasonable care and diligence to make temporary provision for his protection and comfort. As was said by the learned court who tried this cause: 'Of course the carrier is not required to keep hospitals or nurses for sick or insane passengers, but when a passenger is found by the carrier to be in such a helpless condition, it is the duty of the carrier to exercise the reasonable and necessary offices of humanity towards him until some suitable provision may be made.'"¹ The duty of a railway passenger carrier to a sick passenger is well illustrated in a recent case in Mississippi.² In that case the railway company received a sick passenger, the conductor and ticket-agent consenting that he should be carried after they had been informed of his serious illness and of the necessity of his having assistance when he should arrive at his destination. But when his destination was reached, the conductor forgot to arouse him and put him off, but allowed him to be carried thirty miles beyond, where he was put off at a small station at two o'clock in the morning and allowed to remain for forty hours, without care and attention, before he was returned to his destination on one of the company's trains. The exposure and rough treatment so increased his illness that he died soon afterwards. The court held that the company had been guilty of a gross violation of its duty as carrier, and was liable for the death of the passenger.³ And on principle

¹ The case was remanded for a new trial because the jury gave substantial damages, although the next of kin had failed to prove any damage. The court however laid down the law as above to be applied to the facts on the new trial. *Atchison, &c. R. Co. v. Weber*, 33 Kan. 555; 52 Am. Rep. 543.

² *Weightman v. Louisville, &c. R. Co.*, 70 Miss. 563; 12 So. Rep. 586.

³ *Weightman v. Louisville, &c. R. Co.*, 70 Miss. 563; 12 So. Rep. 586.

In another case, the train having stopped, the passenger walked to the platform to get off, but had no sooner reached there than the car gave a sudden jerk

which threw him to the ground, and he was run over and seriously injured. There was evidence to prove that he was intoxicated, and counsel for the company contended that he had no right on the train, and that the fact of his intoxication was such contributory negligence as would bar his recovery. But the trial court charged as to this question of intoxication that: "An intoxicated man has a right to ride upon the cars. The defendant is as liable for an injury to the intoxicated man as to the sober man. Intoxication, as we all know, — it is a matter of observation if not experience, — makes a man less capable for the protection of his own life and limb. It

there is no reason why the company should not be liable in a similar case, if the sickness of the passenger arose during the passage, and after his acceptance as a passenger, provided its officers or agents are informed of it. The contract of carriage having been entered into, the relation of passenger and carrier is established and continues to the end of the journey, and the passenger having become sick or injured in the course of the journey, the duties of the carrier towards him are measured by the necessities which his disabled state call for, and are not necessarily those which existed at the time of the formation of the contract.

tends to deprive a man of the ability to exercise that care. If you find that the plaintiff has failed to exercise the reasonable care for his own safety, whether from intoxication or not, he cannot recover. If you find that the plaintiff was intoxicated, that proof may go to render it more probable that he was guilty of that degree of negligence which will prevent his recovery. It would bear upon the probability or improbability of the plaintiff's having been guilty of negligence which contributed to the injury which he sustained." The Court of Appeals held that the instruction was a proper statement of the law. *Milliman v. N. Y. Central R. Co.*, 66 N. Y. 642. And it seems that this is unquestionably the correct view. Intoxication is a temporary infirmity brought on by the plaintiff's own voluntary act, and he cannot be allowed to set it up as infirmity which would release him from all obligation to use care, and place him in the same relation which an infant of tender years would occupy towards the carrier. But at the same time it cannot be regarded as negligence *per se*; it is only evidence of prob-

able negligence, to be considered in connection with all the other facts and circumstances of the case. And as will be seen, it is a condition of which the company is bound to take cognizance, and if with full knowledge of the passenger's condition it deliberately fails or refuses to exercise care to prevent injury to him, it must be held responsible for the consequences. See *post*, § 319 *a*; *Missouri Pacific R. Co. v. Evans*, 71 Tex. 361; 37 Am. & Eng. R. Cas. 144. A drunken passenger on a train was, owing solely to his condition, carried past his destination, and then, failing to comprehend his liability to pay further fare or to get off the train, was removed, in a lawful manner, from the train by the conductor and his assistants, and placed a short distance from the track. Later on he wandered upon the track and was killed by being run over by a train at a point where those in charge of the latter train could not see him in time to prevent the accident. It was held that the company was not liable for his death. *McClelland v. Louisville, &c. R. Co.*, 94 Ind. 276.

CHAPTER XVIII.

NEGLIGENCE.

SEC. 319. Negligence: the General Doctrine.

319 *a*. Contributory Negligence:

320. Injuries to Trespassers on Track, etc.: Children.

321. Children injured by dangerous Agencies, left exposed in Public Places.

322. Imputable Negligence: Parent and Child.

SEC. 322 *a*. Imputable Negligence. Case of Carrier and Passenger.

322 *b*. Comparative Negligence.

323. Injuries at Highway-crossings.

324. Frightening Teams.

325. Liability for Injuries where one Company runs on Road of another.

325 *a*. Presumption of Negligence: Burden of Proof.

325 *b*. Evidence.

SEC. 319. **Negligence, What is: Contributory Negligence, etc.**—Negligence may be defined as a want of due care; and the care required in a given case depends upon the consequences likely to ensue if such care is not observed. It is sometimes, indeed generally, said that the standard of care to be observed is such as a prudent man, in view of the circumstances, would observe;¹ and this rule affords the best test for determining whether negligence exists in a given case or not. The constantly recurring question is, what ought to have been done or omitted under the circumstances, and did the defendant do what he ought not to have done, or omit to do that which he ought to have done? And the answer to these inquiries, it would seem, will afford a sufficient test of liability in a given case.² But the difficulty is in determining by what standard the questions are to be solved; for if we leave the jury to answer these inquiries

¹ DILLON, J., in *Stout v. Sioux City, &c. R. Co.*, 2 Dill. (U. S.) 294. See *Baltimore, &c. R. Co. v. Jones*, 95 U. S. 439, where Mr. Justice SWAYNE observes; "Negligence is a failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the circumstances would not have done. The essence of the fault may

lie in omission or commission." This, however is rather a definition of a want of ordinary care than of technical negligence.

² *Philadelphia, &c. R. Co. v. Stinger*, 78 Penn. St. 219. In this case the court say that negligence is the want of due care according to the circumstances. *Marcott v. Marquette, &c. R. Co.*, 47 Mich. 1; *Jamison v. San Jose, &c. R. Co.*, 55 Cal. 593.

according to their own notions of the care which should have been observed, it is obvious that in many cases great injustice would be done, because their ideas might be such as to require either a too small or a too high degree of care, and the question of liability would depend wholly upon their peculiar notions in this respect. Therefore, while the rule that a person should exercise such care as a prudent man in view of the circumstances would observe, does not afford an infallible test in all cases, yet it does seem to be the nearest approach to accuracy which can be given; because without it there is no other standard than the peculiar notions of the triers themselves. Mr. Wharton, in his excellent treatise upon Negligence, has attempted to formulate a more accurate definition of the term; but with all due respect to his learning and ability, it seems to us that the adoption of his definition would result in serious confusion, and disastrously to the interests of parties in cases involving questions of negligence. He says:¹ "Negligence, in its civil relations, is such an inadvertent imperfection by a responsible human agent, in the discharge of a legal duty, as produces, in an ordinary and natural sequence, a damage to another." But the difficulty with his definition is, that it is beyond the comprehension of most jurors, and affords no standard for determining in a given case whether or not this "inadvertent imperfection" exists. And herein lies the difficulty with many of the definitions. Upon the whole we are inclined to prefer the definition given by ALDERSON, B.,² that "negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would not do," or, as is said by one of our own eminent jurists,³ "an omission to do something which a reasonable, prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent or reasonable man would not do, under all the circumstances surrounding the particular transaction," as stating the rule most generally applied. The definition given in a recent work is a very clear one: "Negligence, constituting a cause of civil action, is such an omission

¹ Wharton on Negligence, § 3.

² In *Blyth v. Birmingham Water Works Co.*, 11 Exchq. 784. The objection to this definition is that it is too comprehensive. The explanatory clause suggested by Mr. Pollock should be added: "Provided, of course, that the party whose conduct is in question is already in a situa-

tion that brings him under the duty of taking care." Pollock on Torts, 355. See a criticism of this definition as being "entirely too wide for a definition of negligence from the standpoint of legal liability," in Beven on Neg., p. 1.

³ DILLON, J., in *Stout v. Sioux City, &c. R. Co.*, 2 Dill. (U. S.) 294.

by a responsible person, to use that degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury, as, in a natural and continuous sequence, causes unintended damage to the latter."¹ Whichever of these definitions we adopt, it is evident that there is no absolute rule as to negligence which will cover all cases, but that each case stands upon its own peculiar circumstances.²

It will be understood, of course, that actionable negligence involves the breach of a legal duty, and is actionable only when it results in injury to others;³ that is, that it must appear, in order to sustain an action for negligence in a given case, not only that the defendant was negligent, but also that the injury complained of was the result of such negligence,⁴ and was not brought about by inevitable causes, or the fault of the plaintiff.⁵

Negligence may be either a pure tort, a breach of contract in the nature of a tort (*e. g.* breach of a contract to carry safely), or a pure breach of contract. But it is only in its character as a tortious

¹ 1 Shear. & Red. on Neg., § 3. This definition is generally considered unexceptionable in all respects. Beven on Neg., p. 9; 16 Am. & Eng. Ency. Law, p. 391, *n.* Probably the most accurate definition is that given by Mr. Russell in the article on Negligence, 16 Am. & Eng. Ency. Law, p. 389. He defines it thus: "Actionable negligence is the inadvertent failure of a legally responsible person to use ordinary care under the circumstances, in observing or performing a non-contractual duty, implied by law, which failure is the proximate cause of injury to a person to whom the duty is due." It is of small practical value, however, to multiply definitions of negligence. Upon the essential elements which make up the wrong the authorities substantially agree, and beyond this little is required, as there are few juries whose capacity enables them to comprehend the ultimate refinements sometimes insisted upon. Reference may be made, however, to 16 Am. & Eng. Ency. Law, pp. 389-391, *n.*, where the principal definitions are collected with criticisms upon each. See also Beven on Neg., pp. 1-10. Negligence is defined by Mr. Justice BRETT in *Haven v. Pender*, 11 Q. B. Div. 503, 507; by Mr. Justice SWAYNE in *Baltimore, &c. R. Co. v. Jones*, 95 U. S.

439; by Mr. Bishop, in *Bishop on Non-Contract Law*, § 436; by Dr. Wharton, *Wharton on Neg.*, § 3 (*Salmon v. Railroad*, 38 N. J. L. 11); by Mr. Pollock, *Pollock on Torts*, p. 352; by Mr. Austin, in *Lectures on Jurisprudence*, p. 20.

² *Finlayson v. Chicago, &c. R. Co.*, 1 Dill. (U. S.) 579; *Philadelphia, &c. R. Co. v. Spearen*, 47 Penn. St. 305; *Norfolk, &c. R. Co. v. Ormsby*, 27 Gratt. (Va.) 321; *New York, &c. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.

³ *Cosgrove v. N. Y. Central R. Co.*, 13 Hun (N. Y.), 329.

⁴ *Johnson v. Hudson River R. Co.*, 20 N. Y. 73; *Chicago, &c. R. Co. v. Rend*, 6 Brad. (Ill. App.) 243; *Barringer v. N. Y. Central R. Co.*, 18 Hun (N. Y.), 398; *Cosgrove v. N. Y. Central R. Co.*, 13 Hun (N. Y.), 329.

⁵ *Wildes v. Hudson River R. Co.*, 24 N. Y. 430, 40 N. Y. 51. There is no liability where the injury was the result of an inevitable accident or act of God. See *Salisbury v. Herschenroder*, 106 Mass. 458; 8 Am. Rep. 354; *Baltimore, &c. R. Co. v. School District*, 96 Penn. St. 65; 2 Am. & Eng. R. Cas. 16; *Ellett v. St. Louis, &c. R. Co.*, 76 Mo. 518; 12 Am. & Eng. R. Cas. 183; *Cooley on Torts*, p. 80; *Patterson's Ry. Acc. Law*, 35.

injury that it is important here.¹ Separating it into its elements, it appears, therefore, that actionable negligence consists of:—

1. A legal duty, not dependent wholly upon contract, to use ordinary care under the circumstances in which the parties are placed.

2. A breach of this duty, not wilful.

3. Injury to the party to whom the duty is due, of which the breach of duty was the proximate cause.²

The prime essential of negligence being a failure to exercise ordinary care in the discharge of the duty involved, the principal question in all actions for negligent injury is whether or not the defendant in fact failed to exercise such care. This is a question of fact, and must vary with the circumstances in which the parties are situated and the relations which they sustain towards each other. No definite rule therefore can be stated.³ The test is whether defendant exercised such care as a man of ordinary prudence would have used under similar circumstances. If he has either done, or omitted to do, something which an ordinarily careful and prudent person in the same relation and under the conditions and circumstances would not have done, or omitted to do, he has failed to use ordinary care, and must therefore be held to be guilty of negligence and liable for the damage which may have resulted from his action.⁴ All the attendant circum-

¹ Negligence as a pure breach of contract belongs properly to the domain of contract law, but even there it has a very limited scope since most breaches of contracts are wilful. See Bishop on Non-Contract Law, § 76; Pollock on Torts, 432; *Courtenay v. Earle*, 10 C. B. 73.

² See 16 Am. & Eng. Ency. of Law, p. 389; Beven on Neg., 9.

In 1 Shear. & Red. on Neg. (4th ed.), § 5, a very clear analysis is made: "Negligence," these authors say, "consists in:

"1. A legal duty to use care.

"2. A breach of that duty.

"3. The absence of distinct intention to produce the precise damage, if any, which actually follows.

"With this negligence in order to sustain a civil action there must concur:

"1. Damage to the plaintiff.

"2. A natural and continuous sequence uninterruptedly connecting the breach of duty with the damage, as cause and effect." See also Dr. Wharton's analysis, Whart. on Neg., § 3.

³ Ordinary care is that degree of care

which a person of ordinary prudence is presumed to use, under the peculiar circumstances, to avoid injury, and should be in proportion to the danger to be avoided and the fatal consequences involved in his neglect. *Toledo, &c. R. Co. v. Goddard*, 25 Ind. 185. See *Brown v. Congress, &c. R. Co.*, 49 Mich. 153; 8 Am. & Eng. R. Cas. 383; *Fowler v. Baltimore, &c. R. Co.*, 18 W. Va. 579; 8 Am. & Eng. R. Cas. 480; *Norfolk, &c. R. Co. v. Ormsby*, 27 Gratt. (Va.) 455; Pollock on Torts, 36; Bishop on Non-Contract Law, § 436-437; 16 Am. & Eng. Ency. Law, pp. 400 *et seq.*

⁴ *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *Matson v. Manpin, &c. Co.*, 75 Ala. 312; *Richmond, &c. R. Co. v. Howard*, 79 Ga. 44; *Toledo, &c. R. Co. v. Goddard*, 25 Ind. 185; *Chicago, &c. R. Co. v. Hedges*, 105 Ind. 398; *Funston v. Chicago, &c. R. Co.*, 61 Iowa, 452; 14 Am. & Eng. R. Cas. 640; *Needham v. Louisville, &c. R. Co.*, 85 Ky. 423; *Briggs v. Union St. R. Co.*, 148 Mass. 72; 37 Am. & Eng. R. Cas. 204; *Jager v. Adams*,

stances, the time and place of the occurrence, must be considered together; a person cannot be charged with a failure to exercise ordinary care because in a situation of danger or emergency, necessitating instant action, he did not take all the precautions which from a careful and deliberate retrospective view of the situation it appears might have been taken. The inquiry is what would a man of ordinary prudence and care have done in the same situation of emergency when suddenly presented to him?³ It follows, therefore, that the question as to what constituted ordinary care under the circumstances is one of fact and for the jury to determine. It is one of those questions which calls especially for the exercise of a jury's functions, and cannot become a question for the court unless the facts are all admitted *and* there is but one inference that can be fairly and reasonably drawn from them.⁴

123 Mass. 26; *Durant v. Palmer*, 29 N. J. L. 546; *Key v. Philadelphia, &c. R. Co.*, 65 Penn. St. 269; *Gulf, &c. R. Co. v. Smith*, 69 Tex. 406; *Fowler v. Baltimore, &c. R. Co.*, 18 W. Va. 579; 8 Am. & Eng. R. Cas. 480; *Graville v. Minneapolis, &c. R. Co.*, 10 Fed. Rep. 711; *Harris v. Union Pac. R. Co.*, 13 Fed. Rep. 591; *Baltimore, &c. R. Co. v. Jones*, 95 U. S. 442; 4 Am. & Eng. Ency. Law, p. 22; 16 id. 403; *Pollock on Torts*, 36. See also *Wabash, &c. R. Co. v. Locke*, 112 Ind. 404, known as the "Tall brakeman case."

In the case of *Louisville, &c. R. Co. v. McCoy*, 81 Ky. 403, 15 Am. & Eng. R. Cas. 277, the court states the test that ordinary care by the employes of a railroad company is that degree of care which a majority of men, of prudent and careful habits, would exercise under like circumstances to avoid injury to their own persons from the same risks which others undergo in obedience to orders or by reason of their hazardous business. It is going too far to require that care which any of such persons would take of "his family," if placed under the same circumstances. In *Louisville, &c. R. Co. v. Gower*, 85 Tenn. 465, the judge in stating the test went on to explain to the jury that ordinary care meant "just such care as one of you similarly employed would have exercised under the circumstances." This was held to be an erroneous statement of the rule. See also *Austin, &c. R. Co. v.*

Beatty, 73 Tex. 592; *Westbrook v. Mobile, &c. R. Co.*, 66 Miss. 560.

³ *Karr v. Parks*, 40 Cal. 188; *Moore v. Central R. Co.*, 47 Iowa, 688; *Fraudsens v. Chicago, &c. R. Co.*, 36 Iowa, 372.

⁴ *Grand Trunk R. Co. v. Ives*, 144 U. S. 403; *East Tennessee, &c. R. Co. v. Bayliss*, 74 Ala. 150; 19 Am. & Eng. R. Cas. 480; *Sloan v. Central Iowa R. Co.*, 62 Iowa, 728; 11 Am. & Eng. R. Cas. 145; *Pennsylvania Co. v. Frana*, 112 Ill. 398; *White v. Missouri Pac. R. Co.*, 31 Kan. 280; 13 Am. & Eng. R. Cas. 473; *Connolly v. City of Waltham (Mass.)*, 31 N. E. Rep. 302; *Lasky v. Canadian Pac. R. Co.*, 83 Me. 461; 22 Atl. Rep. 367; *Kennedy v. Hannibal, &c. R. Co.*, 80 Mo. 573; *Griffin v. Auburn*, 58 N. H. 121; *Texas, &c. R. Co. v. Levi*, 59 Tex. 674; 13 Am. & Eng. Cas. 464; *Atkinson v. Goodrich Transportation Co.*, 60 Wis. 141. Although the facts may be undisputed, it is for the jury and not the court to determine whether proper care was used and defendant was guilty of negligence, unless the inference to be drawn from the admitted facts are too plain to admit of any doubt in a reasonable mind. *Ohio, &c. R. Co. v. Collarn*, 73 Ind. 261; 5 Am. & Eng. R. Cas. 554; *Hathaway v. East Tennessee R. Co.*, 29 Fed. Rep. 489; *Vinton v. Schwab*, 32 Vt. 612. See also *Knight v. Albemarle, &c. R. Co.*, 110 N. C. 58; 14 S. E. Rep. 650 (held a question for the court); *Woolwine v. Chesapeake, &c. R. Co.*, 36 W. Va.

The definition of ordinary care follows from the test above described. It is to be observed that there is no standard by which we can measure care, and then label it as gross, ordinary, or slight, and there is therefore no reason in the doctrine of degrees of negligence. The kind of care necessary to be exercised may vary with the relation of the parties, — care which would constitute the measure of a carrier's duty to a trespasser would by no means suffice in the discharge of his duty to his passenger. But still, in every case, the care which is owing is ordinary care, that is, that care which an ordinarily prudent man would have exercised under the circumstances and *in the same relation*.¹ The doctrine of degrees of negligence has been repudiated in all the higher courts of the country with one exception; it is wrong in principle and vicious in practice and leads only to confusion and mistake.² As observed by a leading writer, it is a solecism to speak of "ordinary" negligence, since if the negligence were ordinary, — *i. e.* in accordance with the usual course of practice among all men of average prudence, — it would not be negligence at all.³

But it is not enough merely to prove a want of ordinary care on the part of the defendant. It is a fundamental principle that the law regards only the proximate cause of an injury; it is one of its favorite maxims that *in jure, causa proxima non remota spectatur*.⁴ Out of the application of this maxim grows the liability or non-liability of a defendant charged with the infliction of an injury by his wrongful

stances." 329; 15 S. E. Rep. 81; Chaffee v. Old Colony R. Co. (R. I.), 24 Atl. Rep. 141.

¹ Bishop on Non-Contract Law, § 439; 16 Am. & Eng. Ency. Law, 398, 399; Legg v. Midland Ry. Co., 1 H. & N. 781; Wharton on Neg., § 25; Norfolk, &c. R. Co. v. Budge, 84 Va. 63; Philadelphia, &c. R. Co. v. Boyer, 97 Penn. St. 101; 2 Am. & Eng. R. Cas. 172; Smith's Law of Neg., *14; Shear. & Red. on Neg., § 45.

² Steamboat New World v. King, 16 How. (U. S.) 469; Perkins v. N. Y. Central R. Co., 24 N. Y. 196; McAdoo v. Richmond, &c. R. Co., 105 N. C. 140; Lane v. Boston, &c. R. Co., 112 Mass. 455. "Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence,' but after all it only means the absence of the care that was requisite under the circum-

stances." Mr. Justice DAVIS in Milwaukee, &c. R. Co. v. Arms, 91 U. S. 494. And the same term has been very aptly spoken of by Lord CRANWORTH as nothing more than negligence "with a vituperative epithet attached." Wilson v. Brett, 11 M. & W. 113. See also Beal v. South Devon R. Co., 3 H. & C. 327; McPheeters v. Hannibal, &c. R. Co., 45 Mo. 22; Mariner v. Smith, 5 Heisk. (Tenn.) 208.

³ 1 Shear. & Red. on Neg. (4th ed.), § 48.

⁴ Broom's Legal Maxims (8th ed.), p. 165; Bishop on Non-Contract Law, § 40 *et seq.*; Ætna L. Ins. Co. v. Boone, 95 U. S. 130; McGrew v. Stone, 53 Penn. St. 436; Pollock on Torts, 26; Shear. & Red. on Neg. (4th ed.), §§ 25-40; Campbell on Neg., § 118; Cooley on Torts (2d ed.), 68, 69, 71.

act; for unless the complainant can establish a proximate causal connection between the injury complained of and the alleged negligence of the defendant, his cause must fail.¹ A proximate cause has been very accurately defined as that cause which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred.² In pursuance of a casual observation in the opinion of Mr. Justice STRONG in a case before the Supreme Court, of the United States, to the effect that "it has been often held that in order to warrant a finding that negligence, or an act not amounting to a wilful wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it was such as might or ought to have been foreseen in the light of the attending circumstances;"³ there are a large number of cases which apply, as a test of the proximity of causation, the fact whether the injury might have reasonably been anticipated as a consequence of the act complained of.⁴ But these cases applying such a test confound the element of proximate cause with that of a want of ordinary care. If the injury could reasonably have been anticipated as a consequence of the wrongful act, then the defendant was guilty of a want of ordinary

¹ *Clifford v. Denver, &c. R. Co.*, 9 Col. 333; *Harlem v. St. Louis, &c. R. Co.*, 65 Mo. 22; *Schaeffer v. Washington City R. Co.*, 105 U. S. 249; 8 Am. & Eng. R. Cas. 59; *Washington v. Baltimore, &c. R. Co.* 17 W. Va. 190; 10 Am. & Eng. R. Cas. 749; *Oil City Gas Co. v. Robinson*, 99 Penn. St. 1; *Terre Haute, &c. R. Co. v. Buck*, 96 Ind. 346; 49 Am. Rep. 168; 18 Am. & Eng. R. Cas. 234.

² 1 Shear. & Red. on Neg. (4th ed.), § 26; 16 Am. & Eng. Ency. Law, p. 436. See also *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44; *Milwaukee, &c. R. Co. v. Kellogg*, 94 U. S. 469; *Wharton on Neg.*, § 97; *Pollock on Torts*, 36, 37; *Beven on Neg.*, pp. 80, 81, 90. "Nor yet is it possible," says Mr. Bishop, "that there should be any such enunciation of this doctrine as will furnish alone the practical guide needed for every sort of case. But with proximate accuracy we may define the immediate cause which is adequate to charge the party putting it forth, to be any wrong sufficient in magnitude for the law to take cognizance of it, where-

from, operating either alone or in conjunction with anything else, the injury comes as a first, final, or intermediate consequence, and the inadequate, remote cause, which is not sufficient to charge the party, we may define to be one which has so far expended itself that its influence in producing the injury is too minute for the law's notice, or a cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof." *Bishop on Non-Contract Law*, § 41.

³ *Milwaukee, &c. R. Co. v. Kellogg*, 94 U. S. 469, 475.

⁴ *Hoag v. Lake Shore, &c. R. Co.*, 85 Penn. St. 293, 298; 27 Am. Rep. 653 (fire spreading from one building to another); *Pennsylvania R. Co. v. Hope*, 80 Penn. St. 373; 21 Am. Rep. 100; *Phillips v. Dickerson*, 85 Ill. 11; 28 Am. Rep. 607, 609; *Greenland v. Chaplin*, 5 Exch. 248; *Clark v. Chambers*, 3 Q. B. Div. 327. See the numerous cases collected in 16 Am. & Eng. Ency. Law, pp. 436-437, n. 4.

care in failing to provide against it; but manifestly this has nothing to do with the causal connection between the act and the injury.¹ Consequences which follow a certain act in an unbroken sequence and without any intervening efficient cause are natural and are the proximate consequences of such act, and for them the original cause is responsible whether they could or ought to have been foreseen or not.²

But the chain of causation is broken if, between the injury and the alleged wrongful act, there intervened a new and efficient cause.³ Such an intervening cause is not merely a condition, whether the product of the defendant's act, or of other circumstances;⁴ it is "a new and independent force which breaks the causal connection between the original wrong and the injury, and itself becomes the direct and immediate — the proximate — cause."⁵ This intervening, efficient cause may be either culpable or not culpable, accidental or intentional, animate or inanimate. The test is, was it a new and independent force acting in and of itself in causing the injury and

¹ 16 Am. & Eng. Ency. Law, p. 438-439; Pollock on Torts, 36, 37; Alabama, &c. R. Co. v. Chapman, 80 Ala. 615; 31 Am. & Eng. R. Cas. 394; Ehr Gott v. Mayor, &c., 96 N. Y. 264; 48 Am. Rep. 622. "When it has been once determined that there is evidence of negligence the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." Smith v. London, &c. Ry. Co., L. R. 6 C. P. 14; 5 C. P. 98; Beven on Neg., pp. 80, 81. The distinction between the two tests is very clearly stated by Mr. Smith in his work on Negligence, p. *16. "The word 'proximately' is to be distinguished from the word 'culpably.' An act to be culpable, that is, to be a breach of legal duty, must, as we have seen, be such as a reasonably careful man would foresee would be productive of injury, and the person is not liable for an injury which he could not foresee; but a breach of duty to be proximately producing injury must be such that whether defendant could foresee the injury to be probable or not, the breach of duty is in fact the actual cause of the injury." Smith on Law of Neg., *16. See also Chicago, &c. R. Co. v. Starr, 42 Ill. 174; 89 Am. Dec. 422; Gould v. Slater Woolen Co., 147 Mass. 315.

² Brown v. Chicago, &c. R. Co., 54 Wis. 342; Smith v. London, &c. Ry. Co., L. R. 6 C. P. 14; 5 C. P. 98; Louisville, &c. R. Co. v. Nitsche, 126 Ind. 229; 45 Am. & Eng. R. Cas. 532; Alabama, &c. R. Co. v. Chapman, 80 Ala. 615; 31 Am. & Eng. R. Cas. 394; Lowery v. Manhattan R. Co., 99 N. Y. 158; 23 Am. & Eng. R. Cas. 276; Liming v. Ill. Central R. Co., 81 Iowa, 246; 47 N. W. Rep. 67; Milwaukee, &c. R. Co. v. Kellogg, 94 U. S. 469; Hill v. Winsor, 118 Mass. 251; Louisville, &c. R. Co. v. Krinning, 87 Ind. 351; 16 Am. & Eng. Ency. Law, p. 439; Bishop on Non-Contract Law, § 457.

³ Louisville, &c. R. Co. v. Kelsey, 89 Ala. 287; 7 So. Rep. 648; Read v. Nichols, 118 N. Y. 224; Fairbanks v. Kerr, 70 Penn. 86; 10 Am. Rep. 664; Shear. & Red. on Neg. (4th ed), § 37.

⁴ Wharton on Neg., §§ 85, 86; Atchison v. King, 9 Kan. 550.

⁵ Bishop on Non-Contract Law, §§ 42, 836; Pennsylvania Co. v. Whitlock, 99 Ind. 16; 50 Am. Rep. 71; Scheffer v. Washington City R. Co., 105 U. S. 249; 8 Am. & Eng. R. Cas. 59 (suicide case); Beall v. Athens, 81 Mich. 536.

superseding the original wrong complained of so as to make it remote in the chain of causation, although it may still have remotely contributed to the injury as an occasion or condition thereof.¹

The defendant's wrongful act may be one of several causes, each of which acting with the others was a proximate cause of the injury. In such cases it is no defence that defendant's wrong was merely one of the several concurrent causes, and this whether such concurrent causes are culpable and responsible or not. The injured party may hold any or all of the responsible authors liable, and is not bound to separate and distinguish the exact effects produced by each.² Prominent illustrations of this principle are seen where an injury is occasioned by the collision of trains owned and operated by different companies, both of which are in fault,³ and where the injury inflicted combines with a disease already existing, or a predisposition to disease, and causes an injury which neither cause alone would have produced. In such cases the negligent injurer is liable for all the consequences following his wrongful act, though they are increased by the disposition to disease.⁴

Illustrations of all these propositions might be multiplied; the books are full of them.⁵ But the great difficulty in the law of negli-

¹ 16 Am. & Eng. Ency. Law, p. 445; *Milwaukee, &c. R. Co. v. Kellogg*, 94 U. S. 469; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44; *Lewis v. Flint, &c. R. Co.*, 54 Mich. 55; 18 Am. & Eng. R. Cas. 263; *Seale v. Gulf City R. Co.*, 65 Tex. 274; 57 Am. Rep. 602; *Washington v. Baltimore, &c. R. Co.*, 17 W. Va. 190; 10 Am. & Eng. R. Cas. 749.

² 2 Thomp. on Neg., p. 1084, § 3; *Cartenille v. Cook*, 129 Ill. 152; 16 Am. St. Rep. 248-250, n. (in this note the authorities are all collected); *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700; 11 Am. & Eng. R. Cas. 254; *Slater v. Mersereau*, 66 N. Y. 138; *Wabash, &c. R. Co. v. Shacklet*, 105 Ill. 364; 44 Am. Rep. 791; 12 Am. & Eng. R. Cas. 166; *North, &c. R. Co. v. Mahoney*, 57 Penn. St. 187; *Cleveland, &c. R. Co. v. Terry*, 8 Ohio St. 570; *Pittsburgh, &c. R. Co. v. Spencer*, 98 Ind. 186; 21 Am. & Eng. R. Cas. 478; *Coolèy on Torts* (2d ed.), [133] 153. Where the negligence of a third person concurred with that of defendant to produce the injury so that without either it could not have occurred, defendant's

negligence is a proximate cause. *Johnson v. Northwestern Teleph. Co.* (Minn.), 51 N. W. Rep. 225.

³ *Colegrove v. New York, &c. R. Co.*, 20 N. Y. 492; *Cuddy v. Horn*, 46 Mich. 596; 41 Am. Rep. 178; *Cooper v. Eastern Transp. Co.*, 75 N. Y. 116. See these cases examined more at length further on.

⁴ *Baltimore, &c. R. Co. v. Kemp*, 61 Md. 74; 48 Am. Rep. 134; 18 Am. & Eng. R. Cas. 220; *McNamara v. Clintonville*, 62 Wis. 207; 51 Am. Rep. 722. See also *post*, pp. 1440-1443.

⁵ In the case of *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, it appeared that fire fell from a locomotive on defendant's road upon a horse attached to a wagon in the street below, and upon the hand of the driver. The horse became frightened and ran away, the driver attempted to drive him against the curbstone to arrest his progress, and in doing so the wagon passed over the curbstone, threw the driver out, and plaintiff, who was on the sidewalk, was run over and injured. In an action against the railroad company to recover damages for alleged negligence causing the

gence lies not in securing accurate and correct definitions, nor in determining the principles which underlie the case, but in the application of these to the various and widely differing cases which arise.¹ The courts generally hold that the question as to whether or not defendant's act was a proximate cause of the injury is a question for the jury,² and the refinements of legal learning are not generally considered by the twelve men who find the verdict. No ultimate and absolute test has yet been or ever can be formulated. It is by analysis and by recorded experience, rather than by definition, that the distinction between proximate and remote causes is to be properly made.

If the wrong and the legal damage are not known by common experience to be *usually* in sequence, and the damage does not according to the ordinary course of events follow from the wrong, they are not sufficiently conjoined, or concatenated as cause and effect, to support an action.³ If the damages would not have followed the wrong if other independent circumstances had not intervened, for which the defendant is not responsible, the damage cannot be said to be the proximate result of the wrong, or so connected therewith as to uphold a recovery therefor.⁴ But a wrong-doer is responsible for all the consequences that ensue in the ordinary and natural course of events, although those events are brought about by the intervening agency of others, provided the intervening agency was set in motion by the primary wrong-doer, or the acts causing the damage were the

injury, the court charged, in substance, that if the jury believed the coal fell through negligence on the part of the defendant, causing the horse to become unmanageable and to run against the plaintiff, inflicting the injury, defendant was liable; and refused to charge that if the accident occurred through the driver's error of judgment in endeavoring to obtain control of the horse, plaintiff could not recover. It was held that this was no error; that so long as the injury was chargeable to the original wrongful act of the defendant, it was liable; that the action of the driver in view of the exigency of the occasion, whether prudent or otherwise, might be considered as a continuation of the original act, and so that act was the proximate, not the remote, cause of the injury; also, that the injury was a natural and probable consequence of defendant's negligence. *Ryan v. N. Y. Central R. Co.*, 35 N. Y. 210;

Pennsylvania R. Co. v. Kerr, 62 Penn. St. 353, *distinguished*. See also *Board of Com'rs v. Sisson*, 2 Ind. App. 311; 28 N. E. Rep. 374.

¹ In this connection see the very admirable treatise of Mr. W. H. Russell in volume 16 of the *Am. & Eng. Ency. Law*, pp. 428 *et seq.*, where the doctrine of causation is examined.

² *West Mahoney v. Watson*, 112 Penn. St. 574; 116 Penn. St. 344; *Dunn v. Cass. Ave. R. Co.*, 21 Mo. App. 188; *Milwaukee, &c. R. Co. v. Kellogg*, 94 U. S. 469; *Webb v. Rome, &c. R. Co.*, 49 N. Y. 420; *Henry v. Southern Pac. R. Co.*, 50 Cal. 176; *Chicago, &c. R. Co. v. Pennell*, 110 Ill. 435; *Hoyt v. Jeffers*, 30 Mich. 181; *Smith v. London, &c. Ry. Co.*, L. R. 5 C. P. 98.

³ Lord CAMPBELL in *Gerhard v. Bates*, 2 El. & Bl. 490.

⁴ *Hoey v. Felton*, 11 C. B. N. s. 146.

necessary or legal and natural consequences of the original wrongful act.¹ Mere conditions or occasions that intervene between the original act and the injury cannot be considered the proximate cause, although they may be nearest in point of time.² Nor can they be considered as intervening efficient causes, breaking the causal connection between the injury and the original act. The most apt illustration of this rule relating to the concatenation of cause and effect is to be found in what is known as the Squib Case.³ In that case the defendant threw a lighted squib into the market-house, in a market-place, during a fair, and the squib fell upon a gingerbread-stall; the stall-keeper, to protect himself and wares, threw it across the market-house, where it fell upon another stall, and was again thrown off, and exploded near the plaintiff's eye and blinded him; it was held that the original thrower was responsible in damages for the injuries sustained by the plaintiff through the intervening agency of the others. "All the injury," said DE GREY, C. J., "was done by the first act of the defendant. That and all the intervening acts of throwing must be considered as one single act. It is the same as if a cracker had been flung which had bounded and rebounded again and again before it had struck out the plaintiff's eye." In an early American case,⁴ the defendant, having had a quarrel with a boy in the street, took up a pickaxe and pursued him, and

¹ Addison on Torts (Wood's ed.), 13. It matters not how many conditions or causes intervene, if the defendant's act is still the efficient cause he remains liable. *MacMahon v. Davidson*, 12 Minn. 357; *Nagel v. Missouri, &c. R. Co.*, 75 Mo. 653; *Whart. on Neg.*, § 154.

² *Washington v. Baltimore, &c. R. Co.*, 17 W. Va. 190; 10 Am. & Eng. R. Cas. 749; *Hofnagle v. New York, &c. R. Co.*, 55 N. Y. 608; *Cuff v. Newark, &c. R. Co.*, 35 N. J. L. 32; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16; 50 Am. Rep. 71. "One of the most valuable *criteria* furnished us by the authorities," observes Mr. Justice MILLER, "is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote." *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44. See also *Lewis v. Flint, &c. R. Co.*, 54 Mich. 55;

18 Am. & Eng. R. Cas. 253; *Scheffer v. Washington City R. Co.*, 105 U. S. 249; 8 Am. & Eng. R. Cas. 259; *Bishop on Non-Contract Law*, §§ 41-48.

³ *Scott v. Shepherd*, 3 Wils. 403; 1 Wm. Blackstone, 892; 1 Smith's L. Cas. 417. See *Cooley on Torts*, p. 71.

⁴ *Vandenburgh v. Truax*, 4 Den. (N. Y.) 464. Defendant sold gunpowder to a child, but the child gave all the powder to its parents, who afterwards allowed the child to take some of it, by the accidental explosion of which he was injured. In an action against defendant it was held that he was not liable, even admitting his negligence, since the act of the parents in negligently allowing the child to have the powder was such an intervening efficient cause as to break the causal connection between defendant's wrongful act and the ultimate injury. *Carter v. Towne*, 98 Mass. 567; 96 Am. Dec. 682. See also *Cuff v. Newark, &c. R. Co.*, 35 N. J. L. 32; *Lange v. Wagner*, 52 Md. 310; 38 Am. Rep. 380.

the latter ran for safety into a wine-shop and upset a cask of wine. The pursuer of the boy was held responsible for the loss of the wine. So if while a person is riding a horse, another person whips it, in consequence of which it runs away and runs over some other person, or damages his property, he who whipped the horse is responsible for the injury, and not the person who rode the horse.¹ These rules are time-honored and indisputable, and are universally applied, except in cases where the courts cut adrift from principles. In the case of personal injuries received by passengers through the negligence of a railway company, they are especially applicable, and necessary to secure to the injured party his just rights. If a passenger is, through the negligence of a carrier, left at the wrong station late at night, whereby he is compelled to walk a long distance to reach his place of destination, and during his attempt to reach his place of destination contracts a severe cold, or is lamed by the exertion, it is unreasonable to say that there is no such immediate connection between the wrong and the injury as to entitle the passenger to recover therefor; and the tendency of the courts, both English and American, is to hold that such injuries are sufficiently connected with the wrong to be the subject of damages.²

Where the negligence of the defendant causes an injury, the effects of which are subsequently aggravated by a predisposition to disease already existing in the injured party, the defendant's wrongful act is considered the proximate cause of all the consequences attending the injury, and the disease of the party injured constitutes no defence, it being not a cause but a mere condition or incident of the injury; nor can it even be considered in mitigation of damages.³ Thus, in a case in Maryland,⁴ in an action brought by a husband and wife to recover damages for personal injuries to the

¹ *Gibbons v. Pepper*, 2 Ld. Raym. 38.

² *Brown v. Chicago, &c. R. Co.*, 54 Wis. 342; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 619; 48 Am. Rep. 134; *Drake v. Reilly*, 93 Penn. St. 492; *McMahon v. Field*, 45 L. T. N. s. 381; 7 Q. B. Div. 591.

³ *Louisville, &c. R. Co. v. Snyder*, 117 Ind. 435; 37 Am. & Eng. R. Cas. 137; *McNamara v. Clintonville*, 62 Wis. 207; 51 Am. Rep. 722; *Baltimore, &c. R. Co. v. Kemp*, 61 Md. 619; 48 Am. Rep. 134; *Com. v. Warner*, 4 McLean (U. S.), 464; *Com. v. Fox*, 7 Gray (Mass.), 585; *Kitter-*

ingham v. Sioux City, &c. R. Co., 62 Iowa, 285; 18 Am. & Eng. R. Cas. 14; *Heirn v. McCaughan*, 32 Miss. 17; *Mobile & Ohio R. Co. v. McArthur*, 43 Miss. 180; *Stewart v. Ripon*, 38 Wis. 584. The only case opposing this view is that of *Pullman Palace Car Co. v. Barker*, 4 Col. 344; 34 Am. Rep. 89, and it has been repudiated in every court in which it has been cited as authority. See *Brown v. Chicago, &c. R. Co.*, 51 Wis. 360.

⁴ *Baltimore, &c. R. Co. v. Kemp*, 61 Md. 619; 48 Am. Rep. 134; 18 Am. & Eng. R. Cas. 220.

wife, caused by the negligence of the defendants, the wife having testified that, shortly after the injury complained of, a cancer was developed at the place on her person where she was injured, and medical testimony having been offered on both sides of the question, whether the cancer was the result of the injury, — it was held that it was for the jury to determine as a matter of fact whether the cancer did result from the injury received; and in determining this question they were required to consider all the circumstances and coincidences of the case, in connection with the testimony of the professional witnesses; that if the jury believed from all the evidence before them that the cancer was the natural and proximate consequence of the blow inflicted by the negligent act of the defendant, it would properly form an element to be considered in awarding damages for the pain and injury suffered by the female plaintiff; and that the fact that she may have had a tendency or predisposition to cancer, could afford no proper ground of objection to her claim.¹

¹ See also *Bishop v. St. Paul, &c. R. Co.* (Minn.), 50 N. W. Rep. 927; *Louisville, &c. R. Co. v. Northington*, 91 Tenn. 56; 17 S. W. Rep. 880 (distinguishing *Jackson v. Railroad Co.*, 25 Am. & Eng. R. Cas. 327); *Milwaukee, &c. R. Co. v. Kellogg*, 94 U. S. 469; *Houston, &c. R. Co. v. Fredericks*, Tex. 1882; *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84; *McAllister v. State*, 17 Ala. 434. In the Maryland case last cited (61 Md. 319), ALVEY, C. J., said: "The question is, whether the production of cancer, as the result of any injury received by the negligence of the defendants, under the circumstances of this case, be too remote a consequence from such negligence, to form an element of damage to the plaintiff. If it be not, then clearly the court below committed no error in refusing the second prayer of the defendants. It is not simply because the relation of cause and effect may be somewhat involved in obscurity, and therefore difficult to trace, that the principle obtains, that only the natural and proximate results of a wrongful act are to be regarded. It is only where there may be a more direct and immediate sufficient cause of the effect complained of, that the more remote cause will not be charged with the effect. If a given result can be directly traced to a particular

cause, as the natural and proximate effect, why should not such effect be regarded by the law, even though such cause may not always, and under all conditions of things, produce like results? It is the common observation of all, that the effects of personal physical injuries depend much upon the peculiar conditions and tendencies of the persons injured; and what may produce but slight and comparatively uninjurious consequences in one case, may produce consequences of the most serious and distressing character in another. And this being so, a wrong-doer is not permitted to relieve himself from responsibility for the consequences of his act by showing that the injury would have been of less severity if it had been inflicted upon any one else of a large majority of the human family. Hence the general rule is, that in actions of tort like the present the wrong-doer is liable for all the direct injury resulting from his wrongful act; and that too although the extent or special nature of the resulting injury could not, with certainty, have been foreseen or contemplated as the probable result of the act done. If therefore the jury believed, from all the evidence before them, that the cancer in the breast of Mrs. Kemp was the natural and proximate consequence of the blow received on her breast, by the negli-

But where an existing disease is merely aggravated by the defendant's wrongful act, the recovery must be limited to compensation for the aggravation, and cannot include damages for the existence of the disease itself,¹ although the disease cannot be regarded as an intervening cause which will operate to make defendant's wrong remote in the chain of causation.²

gent act of the defendants, it would properly form an element to be considered in awarding damages for the pain and injury suffered by her. If by the blow received a severe contusion had been produced, resulting in an ordinary tumor or open ulcer, we suppose no question would have been raised as to the right of the plaintiff to show such results of the injury received, as indicating the extent of the injury and the degree of suffering endured. Why should a different rule be applied to this case? That the female plaintiff may have had a tendency or predisposition to cancer, can afford no proper ground of objection. She, in common with all other people of the community, had a right to travel or be carried in the cars of the defendants, and she had a right to enjoy that privilege without incurring the peril of receiving a wrongful injury that might result in inflaming and developing the dormant germs of a fatal disease. It is not for the defendants to say that because they did not, or could not in fact, anticipate such a result of their negligent act, they must therefore be exonerated from liability for such consequences as ensued. They must be taken to know, and to contemplate, all the natural and proximate consequences, not only that certainly would, but that probably might flow from their wrongful act. The defendants must be supposed to know that it was the right of all classes and conditions of people, whether diseased or otherwise, to be carried in their cars, and it must also be supposed that they knew that a personal injury inflicted upon any one with predisposition or tendency to cancer, might, and probably would, develop the disease. See case of *Stewart v. City of Ripon*, 38 Wis. 584. The defendants have cited and relied upon the case of *Hobbs v. London, &c. Ry. Co.*, L. R. 10 Q. B. 111; 11 Moak's Eng. Rep. 181, as maintaining a doctrine different from

that just stated by us. But in several respects that case is quite different from this. In the first place, that was an action upon contract, seeking a recovery for a breach thereof. There a passenger, who had been set down with his wife at a wrong station, sought to recover from the railway company damages for a cold which his wife had taken in consequence of the exposure in having to walk home in the rain. And it was held that the loss so occasioned was not so connected with the breach of contract as that the carrier breaking the contract would be liable. As said by the court, the catching cold by the plaintiff's wife was not the immediate and necessary effect of the breach of contract, or, was not such an effect as could fairly be said to have been in the contemplation of the parties. But we suppose, with Mr. Mayne, in his work on Damages, p. 73 (Wood's ed.), that that case would have been differently decided, if instead of putting the plaintiff down safely at the wrong place, the company had by their negligence caused any personal injury to him. Without therefore intimating that we should accept the decision as an authority in any case, we think it has no direct application to the case before us."

¹ *Louisville, &c. R. Co. v. Falvey*, 104 Ind. 409; 23 Am. & Eng. R. Cas. 522; *Louisville, &c. R. Co. v. Jones*, 108 Ind. 551; 28 Am. & Eng. R. Cas. 170; *Allison v. Chicago, &c. R. Co.*, 42 Iowa, 274; *Northern, &c. R. Co. v. State*, 29 Md. 420; 4 Am. & Eng. Ency. Law, p. 31.

² *McNamara v. Clintonville*, 62 Wis. 207; 51 Am. Rep. 722; *Heirn v. McCaughan*, 32 Miss. 17; *Williams v. Vanderbilt*, 28 N. Y. 217; *Terre Haute, &c. R. Co. v. Buck*, 96 Ind. 346; 18 Am. & Eng. R. Cas. 234. "The fact that the injured passenger was suffering from Bright's disease at the time he was injured, does not impair his right of recovery.

In Wisconsin,¹ a doctrine strictly in consonance with that expressed in the Maryland case is held. In the case last cited the plaintiffs, husband and wife, were passengers on the defendant's railroad. Through the negligence of the train-employés they were put off the train before they reached the station of their destination; in the dark, where they were unacquainted; and consequently they walked along the track, in the dark, a distance of three miles to the station to which the defendant had contracted to carry them. As a consequence of this walk the female plaintiff, being pregnant at the time, suffered a long illness and prostration, resulting in a miscarriage.² The defendant appealed, on the ground, amongst other things, that the negligence of its employés was not the proximate cause of the plaintiff's sickness and miscarriage. The court, however, held otherwise, saying: "The rules which limit damages in actions of tort, so far as any general rules can be established, are in many respects different from those in actions on contract. The general rule is that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act alone."³ These cases, and many more

The rule in such cases is this: 'Where a disease caused by the injury supervenes as well as where the disease exists at the time of the injury and is aggravated by it, the plaintiff is entitled to full compensatory damages.' " ELLIOTT, C. J., in *Louisville, &c. R. Co. v. Snyder*, 117 Ind. 475; 37 Am. & Eng. R. Cas. 138. *Citing Ohio, &c. R. Co. v. Hecht*, 115 Ind. 443; 34 Am. & Eng. R. Cas. 447; *Louisville, &c. R. Co. v. Wood*, 113 Ind. 544; *Indianapolis, &c. R. Co. v. Pitzer*, 109 Ind. 179; 25 Am. & Eng. R. Cas. 313; *Terre Haute, &c. R. Co. v. Buck*, 98 Ind. 346; *Ehrgott v. Mayor*, 96 N. Y. 264; 48 Am. Rep. 622; *Denver, &c. R. Co. v. Harris*, 122 U. S. 597; *Lake Shore, &c. R. Co. v. Rosenzweig*, 113 Penn. St. 519; 26 Am. & Eng. R. Cas. 489; *Houston, &c. R. Co. v. Leslie*, 57 Tex. 83; 2 Shear. & Red. on Neg. (4th ed.), § 742.

¹ *Brown v. Chicago, &c. R. Co.*, 54 Wis. 342; 41 Am. Rep. 41.

² See also *Fitzpatrick v. Great-Western Ry. Co.*, 12 U. C. Q. B. 645, where premature confinement resulting from an injury was held to constitute a ground of

action. If the negligence of the carrier place the passenger in a position of such apparent imminent danger as to cause fright, and the fright causes nervous convulsions and illness, the carrier's negligence may be regarded as the proximate cause of the injury. *Purcell v. St. Paul, &c. R. Co. (Minn.)*, 50 N. W. Rep. 1034. See also *Ewing v. Pittsburgh, &c. R. Co. (Penn.)*, 23 Atl. Rep. 340; 29 W. N. Cas. 248.

³ *Eten v. Luyster*, 60 N. Y. 252; *Hill v. Winsor*, 118 Mass. 251; *Lane v. Atlantic Works*, 111 Mass. 136; *Keenan v. Cavanaugh*, 44 Vt. 268; *Little v. Boston, &c. R. Co.*, 66 Me. 239; *Collard v. South-eastern Ry. Co.*, 7 H. & N. 79; *Hart v. Western R. Co.*, 13 Met. (Mass.), 99-104; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 277, 12 Am. Rep. 689; *Salsbury v. Herchenroder*, 106 Mass. 458; 8 Am. Rep. 354; *Perley v. Eastern R. Co.*, 98 Mass. 414; *Kellogg v. Chicago, &c. R. Co.*, 26 Wis. 223; 7 Am. Rep. 69; *Patten v. Railroad Co.* 32 Wis. 524, and 36 Wis. 413;

which might be cited, clearly establish the doctrine that one who commits a trespass or other wrong is liable for all the damages

Williams v. Vanderbilt, 28 N. Y. 247; *Ward v. Vanderbilt*, 34 How. Pr. (N. Y.) 144; *Bowas v. Pioneer Tow Line*, 2 Sawy. (U. S.) 21.

In *Stewart v. Ripon*, 38 Wis. 584, it was held that "the public streets and sidewalks of a city are for the use of the sick and infirm, and those with organic predisposition to disease, as well as for that of the healthy and robust; and the corporation is chargeable with knowledge that persons of the former classes constantly travel its highways, and that a bodily injury to such from a defective highway may be greatly aggravated by their diseased condition. If therefore the diseased condition of the plaintiff's arm would not have occurred but for his organic tendency to scrofula, still the defendant's negligence must be regarded as the proximate cause of the whole injury." In *Oliver v. La Valle*, 36 Wis. 592, the plaintiff, who was a married woman, and pregnant, was riding with her brother, and when crossing a defective bridge in a public highway the team broke through the bridge. The plaintiff jumped from the wagon and assisted her brother in an attempt to extricate the team. Failing in this, at the request of her brother, she ran some distance to obtain more assistance. The result of her fright and exertions was a miscarriage. She brought an action against the town, and the principal damages proved on the trial were the consequences of such miscarriage. It was held that such damages were the proximate result of the negligence of the town, and a verdict and judgment therefor were sustained. In *Efen. v. Luyster*, 60 N. Y. 253, the court held that where the defendants tore down and destroyed a building built by them, in which the plaintiff had a sum of money in a box, which was lost in the removal, the plaintiff was not bound to gather up the fragments of his scattered and broken chattels, but was at liberty to leave them where the defendants placed them, looking to them for their value; that the plaintiff was entitled to recover for all losses occasioned by the trespass, including the destruction of the

building, the loss of the money, and the value of the unexpired term; that although the money was kept in an unusual place, and the defendants may not have suspected its presence, yet that they were liable for its loss, which was the direct result of their acts. But in *Pullman Palace Car Co. v. Barker*, 4 Col. 344, 34 Am. Rep. 89, the defendant's palace car, in which plaintiff was sleeping, was burned, through the negligence of defendant's servants. The burning was so rapid that she had not time to properly clothe herself, and she left it in her stocking feet. In doing so she was compelled to stand for a short time on the platform of another car, and caught a severe cold which caused a cessation of her menses and resulted in a long period of illness. The court said (p. 347): "Conceding that the appellee was compelled on account of the smoke and flames to leave the car in the half-clad condition she did, the exposure to the cold was the direct and necessary result of the appellant's negligence. Her subsequent illness, however, was not the result of the exposure, but the result of the exposure in her then condition." This case was expressly disapproved in *Brown v. Chicago, &c. R. Co.*, 54 Wis. 342, — the court saying in reference to it, "This case is, we think, unsustained by authority, and is in direct conflict with the decisions of this court in the cases of *Stewart v. Ripon*, and *Oliver v. La Valle*, *supra*. This decision is, it seems to me, supported by the principles of neither law nor humanity. It in effect says, that if an individual unlawfully compels a sick and enfeebled person to expose himself to the cold and storm to escape worse consequences from his wrongful act, he cannot recover damages from the wrong-doer because it was his sick and enfeebled condition which rendered his exposure injurious. Certainly such a doctrine does not commend itself to those kinder feelings which are common to humanity, and I know of no other case which sustains its conclusions." In *Hobbs v. London, &c. Ry. Co.*, L. R. 10 Q. B. 111, the plaintiff, with his wife and two children, took tickets to H. on the defendant's railway. They were

which legitimately flow directly from such trespass or wrong, whether such damages might have been foreseen by the wrong-doer or not.”¹

In a New York case,² the defendant contracted to carry the plaintiff from New York to San Francisco, *via* Nicaragua; but in consequence of the wrecking of the connecting vessel on the Pacific coast he was detained several weeks on the Isthmus, where he contracted a local fever, which disabled him for a long time after his return to New York, and this injury was held to constitute a good ground of recovery. In a recent case in the Supreme Court,³ where an injury to a passenger upon a railway produced insanity, and while laboring under it, he committed suicide, the court held that, admitting the negligence of the railroad company, the injury resulting from it was not the proximate cause of the passenger's ultimate death.⁴

setdown at E. It being late at night, the plaintiff could not get a wagon nor accommodation at an inn. They had therefore to walk five or six miles on a rainy night, and his wife took cold, was laid up in bed for some time, and was unable to assist her husband. The jury found £8 for inconvenience in having to walk home, and £20 for the wife's illness and its consequences. The court held the £8 recoverable, but not the £20. The circumstances in Indianapolis, &c. R. Co. v. Birney, 71 Ill. 391, were very similar to those in the Hobbs case, except that in the latter the plaintiff “had the option to remain five or six hours and take the next train, or procure a horse or a horse and carriage;” and the opinion is based on the ground that his exposure was voluntary and unnecessary.

¹ McMahon v. Field, 7 Q. B. Div. 591; Lange v. Wagner, 52 Md. 310; 36 Am. Rep. 380. The case of Hobbs v. London, &c. Ry. Co., L. R. 10 Q. B. 111, is severely criticised in McMahon v. Field, 44 L. T. N. S. 175, and also in Wilson v. Newport Dock Co., L. R. 1 Ex. 177. Compare Pullman Palace Car Co. v. Barker, 4 Col. 344; 34 Am. Rep. 89. But this last case, as already observed, has been disapproved in every court in which it has been offered as authority.

² Williams v. Vanderbilt, 28 N. Y. 217.

³ Scheffer v. Washington, &c. R. Co., 105 U. S. 249. In Houston, &c. R. Co. v.

Leslie, 57 Tex. 83, it was held that a disease directly induced by the injury is an element of damage although such result is unusual.

⁴ MILLER, J., said: “The Circuit Court sustained the demurrer on the ground that the death of Scheffer was not due to the negligence of the railroad company in the judicial sense which made it liable under the statute. That the relation of such negligence was too remote as a cause of death to justify recovery, the proximate cause being the suicide of the decedent — his death by his own immediate act. In this opinion we concur. Two cases are cited by counsel, decided in this court, on the subject of the remote and proximate causes of acts where the liability of the party sued depends on whether the act is held to be the one or the other; and though relied on by plaintiffs in error, we think they both sustain the judgment of the Circuit Court. The first of these is that of Insurance Co. v. Tweed, 7 Wall. (U. S.) 44. In that case a policy of fire insurance contained the usual clause of exception from liability for any loss which might occur ‘by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane.’ An explosion took place in the Marshall warehouse, which threw down the walls of the Alabama warehouse, — the one insured, situated across the street

Several cases have arisen in which the immediate cause was one for which the carrier was not responsible, — *e. g.*, a storm or other act of God, — but it appeared that, but for the carrier's negligence in delaying the train, the injury would not have occurred, for, if the train had been on time, it would not have been in the track of the storm, or if the goods had been transported promptly, as they should have been, they would not have been subject to the agency which destroyed them. In such cases the better view is that the carrier's delay was not a cause, but a mere condition or occasion, of which the storm or other irresponsible agency took advantage, and there is properly no liability on the carrier's part, although if it had discharged its duty the injury would not have occurred.¹ The test

from the Marshall warehouse, — and by this means, and by the sparks from the Eagle Mill, also fired by the explosion, facilitated by the direction of the wind, the Alabama warehouse was burned. This court held that the explosion was the proximate cause of the loss of the Alabama warehouse, because the fire extended at once from the Marshall warehouse, where the explosion occurred. The court said that no new or intervening cause occurred between the explosion and the burning of the Alabama warehouse. That if a new force or power had intervened, sufficient of itself to stand as the cause of the misfortune, the other must be considered as too remote. This case went to the verge of the sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse; but it rested on the ground that no other proximate cause was found. In the case of *Milwaukee, &c. R. Co. v. Kellogg*, 94 U. S. 469, the sparks from a steam ferryboat of the company had set fire to an elevator, and the sparks from the elevator had set fire to Kellogg's sawmill and lumber-yard, which were from three to four hundred feet from the elevator. The court below was requested to charge the jury that the sparks from the steamboat, as a cause of the fire of the mill and lumber, were too remote. *Instead of this the court submitted to the jury to find 'whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which under the*

circumstances would not naturally follow from the burning of the elevator; and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected.' The Supreme Court affirmed this ruling, and in commenting on the difficulty in ascertaining in each case the line between the proximate and remote causes of a wrong for which a remedy is sought, says: 'It is admitted that the ruling is difficult. But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.' " To the same effect is the language of the court in *McDonald v. Snelling*, 14 Allen (Mass.), 294.

¹ *Denny v. N. Y. Central R. Co.*, 13 Gray (Mass.), 481; *McClary v. Sioux City, &c. R. Co.*, 3 Neb. 44; *Dubuque, &c. Assoc. v. Dubuque*, 30 Iowa, 176; *Memphis R. Co. v. Reeves*, 10 Wall. (U. S.) 176; *Daniels v. Ballantine*, 23 Ohio St. 532; *Morrison v. Davis*, 20 Penn. St. 171; 1 Shear. & Red. on Neg. (4th ed.), § 40. There are cases, however, which hold the other way, but it is believed they are opposed to principle. See *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500, and cases there cited; *Michaels v. New York, &c. R. Co.*, 30 N. Y. 564; *Denning v. Grand Trunk R. Co.*, 48 N. H. 455; 2 Am. Rep. 267; *Pruitt v. Hannibal, &c. R. Co.*, 62 Mo.

as to whether any act is a proximate cause is not that the injury would not have occurred without such act, but was the act the efficient moving cause, and were there no intervening causes?¹

SEC. 319 a. **Contributory Negligence.** — Negligence on the part of the plaintiff, commonly denominated contributory negligence, is, when it proximately contributes to the infliction of the injury, a bar to an action by him, because a person cannot be permitted to rush upon an apparent danger, and then, when he is injured, be allowed to saddle the other party with the pecuniary consequences of an injury which his own want of care has brought upon him.² But the

527. In this last case the company delayed forty-one days in transporting live-stock (hogs), and while they were waiting at the stock-yards, were killed by a snow-storm of unusual severity. In *Deming v. Merchants' Cotton, &c. Co.*, 90 Tenn. 306, it appeared that a train loaded with cotton was delayed in a compress yard, about half an hour later than the usual time for leaving. Just as it was about to pull out a breakage occurred in the coupling, and before it could be repaired the cotton took fire from the compress. It was held that the breakage of the coupling following the failure to depart on time, was the proximate cause of the loss, and that the compress company was therefore not liable.

¹ "In order to make the defendant liable, his negligence must be the *causa causans*, and not merely a *causa sine qua non*." KELLY, C. B. in *Lord Baliff's, &c. v. Trinity House*, 39 L. J. Exch. 163. See also *Sanders on Neg.*, p. 7, § 2; *Milwaukee, &c. R. Co. v. Kellogg*, 94 U. S. 475; *Wharton on Neg.*, § 3. Note the elements of the definition of proximate cause given *supra*, and in *Shear. & Red. on Neg.* (2d ed.), § 26. A train wrongfully obstructed a street crossing. Animals were thus prevented from crossing, and while they stood waiting on another track, a second train came along and injured them. It was held that the obstruction of the highway was not the proximate cause of the injury. *Brown v. Wabash, &c. R. Co.*, 20 Mo. App. 222.

² *Baltimore, &c. R. Co. v. Whitacre*, 35 Ohio St. 627; *Cleveland, &c. R. Co. v. Elliott*, 28 Ohio St. 340; *Cleveland, &c. R. Co. v. Terry*, 8 Ohio St. 570; *Hearne v. Southern Pacific R. Co.*, 50 Cal. 482; *Fleming v. Western Pacific R. Co.*, 49 Cal.

253; *Needham v. San Francisco, &c. R. Co.*, 37 Cal. 419; *Murphy v. Deane*, 101 Mass. 455; *Toledo, &c. R. Co. v. Goddard*, 25 Ind. 185; *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335; *Fowler v. Baltimore, &c. R. Co.*, 18 W. Va. 579; *Wabash, &c. R. Co. v. Thompson*, 10 Ill. App. 271; *Jeffrey v. Keokuk, &c. R. Co.*, 56 Iowa, 546; *Louisville, &c. R. Co. v. Burke*, 6 Coldw. (Tenn.) 45; *Nashville, &c. R. Co. v. Carol*, 6 Heisk. (Tenn.) 347; *Colegrove v. New York, &c. R. Co.*, 20 N. Y. 492; 6 *Duer* (N. Y.), 382; *Reeves v. Delaware, &c. R. Co.*, 30 Penn. St. 454; *Owen v. Hudson River R. Co.*, 35 N. Y. 516; 2 *Bosw. (N. Y.)* 374; *McKeon v. Citizens' R. Co.*, 43 Mo. 405. Under this rule, in case of the injury by a backing train of a person on a hand-car on the track, though the jury were instructed that if the injured party was guilty of negligence, which contributed to the accident, the defendant was not liable, yet it was error to add in connection that very slight negligence on the part of the injured party would not prevent a recovery. *Catawissa R. Co. v. Armstrong*, 49 Penn. St. 186. Upon a hearing as to damages after a demurrer to a declaration charging an injury by the negligence of the defendant, the defendant may show, for the purpose of reducing the damages to a nominal sum, that the plaintiff was guilty of negligence directly contributing to the injury. *Daily v. N. Y. & New Haven R. Co.*, 32 Conn. 356. It is error to charge the jury that if the plaintiff, by his own fault, has contributed to his injury, the defendant must then show that he was without fault himself, and that no man can be shown without fault, unless he has done all in his power to

contributory negligence of the injured party in order to constitute a defence must have contributed as a *proximate cause* of the injury; if it were a remote cause or a mere condition of injury, it is no bar to the plaintiff's action.¹ It is not a proximate cause when the

avoid the injury. *Pendleton Street R. Co. v. Stallman*, 22 Ohio St. 1. Upon the general proposition of the text see also *Memphis, &c. R. Co. v. Copeland*, 61 Ala. 376; *Government St. R. Co. v. Hanlon*, 53 Ala. 70; *Beers v. Housatonic R. Co.*, 19 Conn. 566; *Neal v. Gillett*, 23 Conn. 566; *Aurora Branch R. Co. v. Grimes*, 13 Ill. 585; *Evansville, &c. R. Co. v. Lander-milk*, 15 Ind. 120; *Evansville, &c. R. Co. v. Hiatt*, 17 Ind. 102; *Lang v. Halliday Creek R. Co.*, 42 Iowa, 677; *Wright v. Illinois, &c. T. Co.*, 20 Iowa, 195; *Murphy v. Chicago, &c. R. Co.*, 38 Iowa, 539; *O'Keefe v. Chicago, &c. R. Co.*, 32 Iowa, 467; *Canlin v. Chicago, &c. R. Co.*, 37 Iowa, 316; *Knight v. Pontchartrain R. Co.* 23 La. An. 462; *Klein v. Crescent City R. Co.*, 23 La. An. 729; *State v. Grand Trunk R. Co.*, 53 Me. 176; *State v. Baltimore, &c. R. Co.*, 24 Md. 84; *Frech v. Philadelphia, &c. R. Co.*, 39 Md. 574; *Bannon v. Baltimore, &c. R. Co.*, 24 Md. 119; *Pittsburgh, &c. v. Andrews*, 39 Md. 329; *State v. Philadelphia, &c. R. Co.*, 47 Md. 76; *Kelly v. Hendrie*, 26 Mich. 255; *Lake Shore, &c. R. Co. v. Miller*, 25 Mich. 274; *Le Barron v. Joslin*, 41 Mich. 313; *Harlan v. St. Louis, &c. R. Co.*, 65 Mo. 22; *Memphis, &c. R. Co. v. Whitfield*, 44 Miss. 466; *Grippen v. N. Y. Central R. Co.*, 40 N. Y. 34; *Moore v. Central R. Co.*, 24 N. J. L. 268; *Runyon v. Central R. Co.*, 25 N. J. L. 556; *Manly v. Wilmington, &c. R. Co.*, 74 N. C. 655; *Pittsburgh, &c. R. Co. v. Krichbaum*, 24 Ohio St. 119; *Conlin v. Charleston*, 15 Rich. (S. C.) 201; *Baltimore, &c. R. Co. v. Whittington*, 30 Gratt. (Va.) 805; *Baltimore, &c. R. Co. v. Sherman*, 30 Gratt. (Va.) 602; *Richmond, &c. R. Co. v. Anderson*, 31 Gratt. (Va.) 812. "The reason why the law does not hold the defendant responsible for an injury where the plaintiff has by his negligence or wrongful act contributed to the result complained of, is, not that the wrong of the plaintiff justifies or excuses the defendant, but because it is impossible to apportion damages

between the parties; and wherever this impossibility does not exist, the defendant's exemption from liability does not exist." *Needham v. San Francisco, &c. R. Co.*,² 37 Cal. 409.

¹ *Meyer v. People's R. Co.*, 43 Mo. 523; *Needham v. San Francisco, &c. R. Co.*, 37 Cal. 409; *McQuitken v. Central Pacific R. Co.*, 64 Cal. 163; 16 Am. & Eng. R. Cas. 353; *Meeks v. Southern Pacific R. Co.*, 56 Cal. 513; *Meyers v. Chicago, &c. R. Co.*, 59 Mo. 223; *Fowler v. Baltimore, &c. R. Co.*, 18 W. Va. 579; 8 Am. & Eng. R. Cas. 482; *Trow v. Vermont Central R. Co.*, 24 Vt. 487; 58 Am. Dec. 191; *Marcott v. Marquette, &c. R. Co.*, 47 Mich. 1; 49 Mich. 99; 4 Am. & Eng. R. Cas. 548, 551; *Thirteenth St., &c. R. Co. v. Boudrou*, 92 Penn. St. 475. Thus where one driving along a street is injured through a defect which the city should have repaired, the fact that he was driving at a greater rate of speed than the city ordinances allowed cannot be set up as a bar to the action when it in no way contributed to cause the injury. *Baker v. Portland*, 58 Me. 199; 4 Am. Rep. 274. The negligence which disables the plaintiff from recovering *must be negligence which directly or by natural consequence conduces to the injury*. The question of negligence in a particular case is one of fact for the jury. *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351; *Central R. Co. v. Moore*, 24 N. J. L. 824. Where there is mutual negligence, and the negligence of both the company and the owner of the cattle was the proximate cause of the injury, no action can be sustained. And where the negligence of the plaintiff is proximate, and that of the defendant is remote, no action can be sustained. But where the negligence of the defendant is proximate, and that of the plaintiff is remote, the defendant will be held liable if the injury could have been prevented by the exercise of reasonable care. *Stucke v. Milwaukee, &c. R. Co.*, 9 Wis. 202; *Indianapolis, &c. R. Co. v. Caldwell*, 9 Ind. 397. Any negligence,

negligence of the defendant is an efficient intervening cause. That is, when the negligence of the defendant is subsequent to and independent of the carelessness of the person injured, and ordinary care on the part of defendant would have discovered the negligence of the injured party in time to have avoided its effects, and prevented the injury, there is no contributory negligence because the fault of the injured party was remote in the chain of causation.¹ In such a case the want of care on the part of the injured party becomes a mere remote cause or a condition of injury.² And not only must the causal connection between the act of the party injured and the injury be shown, but it must also appear that his conduct *was negligent*; that is, that the injured party was guilty of a want of ordinary care, — that his conduct was not what that of an ordinarily prudent and careful man would have been under the same circumstances.³ Therefore, if the injury was not the ordinary or probable result of plaintiff's conduct, but was due to some wholly unlooked for and

however slight, on the part of the injured person, *if proximate, or contributing to the injury*, would prevent a recovery in an action therefor. *Potter v. Chicago, &c. R. Co.*, 21 Wis. 372. Where the injury complained of by the plaintiff is the result of his own negligence or fault, or of the negligence or fault of both parties, without intentional wrong on the part of the defendant, no action can be maintained. *Williams v. Michigan Central R. Co.*, 2 Mich. 259; *Memphis, &c. R. Co. v. Whitfield*, 44 Miss. 466.

¹ *Morrissey v. Wiggins' Ferry Co.*, 47 Mo. 521; *Vickburg, &c. R. Co. v. Patton*, 31 Miss. 156; 66 Am. Dec. 552; *Richmond, &c. R. Co. v. Anderson*, 31 Gratt. (Va.) 812; 31 Am. Rep. 754; *Kerwhacker v. Cleveland, &c. R. Co.*, 3 Ohio St. 172; 62 Am. Dec. 768; *Pacific R. Co. v. Hants*, 12 Kan. 328; *Whalen v. St. Louis, &c. R. Co.*, 60 Mo. 323; *Brown v. Hannibal, &c. R. Co.*, 50 Mo. 461; 11 Am. Rep. 420; *Button v. Hudson River R. Co.*, 18 N. Y. 248, 258; *Manly v. Wilmington, &c. R. Co.*, 74 N. C. 655. *Therefore where the negligence of the injured party is seen by the employés of the railway company in time to prevent injury from such negligence, their failure to exercise care to prevent the injury will render their employer liable.* *Morris v. Chicago, &c. R. Co.*, 45 Iowa, 29; *Harlan v. St. Louis, &c. R. Co.*, 65

Mo. 22; *Yarnall v. St. Louis, &c. R. Co.*, 75 Mo. 575; *Karle v. Kansas City, &c. R. Co.*, 55 Mo. 476; *Little Rock, &c. R. Co. v. Parkhurst*, 36 Ark. 371; *Kansas Pacific R. Co. v. Cranmer*, 4 Col. 524; *Healey v. Dry Dock, &c. R. Co.*, 46 N. Y. Superior Ct. 473; *Cook v. Central R. & B. Co.*, 67 Ala. 533; *Bunting v. Central Pac. R. Co.*, 16 Nev. 277; *Chicago, &c. R. Co. v. Johnson*, 103 Ill. 512; *post*, § 320. Contributory negligence of plaintiff is no bar to his action when it appears that defendant might, by the exercise of ordinary care, have prevented the injury in spite of such negligence. *Island Coasting Co. v. Tolson*, 139 U. S. 651, *affirming* 6 Mackey (D. C.), 39; *Carrico v. West Virginia, &c. R. Co.*, 35 W. Va. 389; 14 S. E. Rep. 12.

² *Tuff v. Warman*, 2 C. B. N. s. 740; 5 C. B. N. s. 573 (a leading case on this subject); *Murphy v. Dean*, 101 Mass. 455; 3 Am. Rep. 390; *Pollock on Torts*, pp. 375, 376.

³ *Thompson v. Flint, &c. R. Co.*, 57 Mich. 300; 23 Am. & Eng. R. Cas. 295; *Creaner v. Portland*, 36 Wis. 92; *Kennard v. Burton*, 25 Me. 39; 43 Am. Dec. 253; *Strong v. Sacramento, &c. R. Co.*, 61 Cal. 326; 8 Am. & Eng. R. Cas. 275; *Illinois, &c. R. Co. v. Hall*, 72 Ill. 222; *Gothard v. Alabama, &c. R. Co.*, 67 Ala. 114; 12 Am. Rep. 69; *New York, &c. R. Co. v. Atlantic Refining Co.*, 129 N. Y. 597; 29 N. E. Rep. 829.

unexpected event which could not reasonably have *been anticipated or regarded as likely to occur*, such conduct is not negligent, and cannot be set up as a bar to the action. Thus, if the customer of a banker, who is desired to keep his check-book locked up, nevertheless negligently leaves it on his table, and thus enables his servant to get possession of it, and tear out a check and forge his master's signature to it, and commit a fraud upon the bankers, this will not enable the bankers to throw the loss upon their customer, as being the result of his negligent keeping of his check-book, for it could not reasonably have been anticipated that the power of obtaining a check would induce a servant to commit a forgery.¹

In all cases where negligence on the part of the plaintiff is connected with the cause of injury, the question to be determined is whether the defendant, by the exercise of ordinary care and skill, might have avoided the injury. If he could have done so, the negligence of the plaintiff cannot be set up as an answer to the action.² Thus, where the plaintiff negligently left his donkey in a public highway, tied together by the forefeet, and the defendant carelessly drove over and killed the ass with his horses and wagon, in broad daylight, the animal being unable to get out of the way of the wagon, it was held that the misconduct of the plaintiff in leaving the ass in the highway was no answer to the action, for although the ass might have been wrongfully there, still the defendant was bound to go along the road with care, and at such a pace as would be likely to prevent mischief. "Were this not so, a man might justify the driving over goods left in a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."³ Contributory negligence on the part

¹ Bank of Ireland v. Trustees of Evans's Charity, 5 H. L. C. 411; Taylor v. Gt. Ind. Penins., 28 Law J. Ch. 285, 714; Donaldson v. Gillott, L. R. 3 Eq. Cas. 274; Johnston v. Renton, L. R. 9 Eq. Cas. 181; Re United Service Co., L. R. 6 Ch. App. 212.

² Greenland v. Chaplin, 5 Exch. 248; Richmond, &c. R. Co. v. Anderson, 31 Gratt. (Va.) 812; Meyers v. Chicago, &c. R. Co., 59 Mo. 223; Chicago, &c. R. Co. v. Becker, 76 Ill. 25; Tanner v. Louisville, &c. R. Co., 60 Ala. 621.

³ Davies v. Mann, 10 M. & W. 549; Mayor of Colchester v. Brooke, 7 Q. B. 376. A passenger on a Brooklyn and New York

ferry was thrown down and injured by the shock of the striking of the boat against the bridge. He was standing near the chain. It was held that, as ordinarily one could so stand without danger, the question of contributory negligence was for the jury. Gannon v. Union Ferry Co., 29 Hun (N. Y.), 631. In a Pennsylvania case a gas-pipe underground, near a sewer, had a defect in it, and the gas escaped into the sewer. The city engineer, in charge of the sewer, knowing that there was a leakage, entered the sewer with a lighted lamp, when an explosion took place, and he was injured, and brought suit against the gas company. It was held that the gas com-

of the plaintiff, therefore, will not bar his right to recover, *unless it was such that but for that negligence the misfortune could not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff.*¹ The rule may be said to be well established that a person cannot recover for an injury resulting from the mere negligence of

pany's negligence was the proximate, and not the remote cause of the injury, but that the plaintiff was guilty of contributory negligence. *Oil City Gas Co. v. Robinson*, 99 Penn. St. 1. The mere fact that a traveller knew a turnpike to be dangerous, was held not necessarily to make him chargeable with contributory negligence in travelling over it. *Henry County Turnpike Co. v. Jackson*, 86 Ind. 111; 44 Am. Rep. 274; *Toledo, &c. R. Co. v. Braunagin*, 75 Ind. 490. Where the plaintiff, a farmer, fastened defendant's stallion with an ordinary halter in the same part of a barn with a mare and gelding belonging to the plaintiff, which were similarly fastened, with no barrier between them, and the stallion broke loose and injured the gelding, it was held that the plaintiff was guilty of contributory negligence. *Milne v. Walker*, 59 Iowa, 186. An instruction that "if the plaintiff knowingly allowed his horse to be upon and to frequent the depot and station grounds of the defendant, where it was not required to fence, and where there was danger of the horse being struck by the trains of the defendant, he is guilty of contributory negligence, and cannot recover in this action," — that is, for double damages, under Iowa Code, § 1289, — was held properly refused. *Miller v. Chicago, &c. R. Co.*, 59 Iowa, 707. In a case before the United States Circuit Court the plaintiff arrived at midnight by a train at a depot. The exit from the depot-grounds lay across the main track of the railroad. The plaintiff entered a hotel wagon; the driver undertook to cross the track while a train was approaching; the plaintiff jumped from the wagon and was injured. It was held that the questions of negligence and contributory negligence were for the jury, but that, as matter of law, the railroad company could not escape liability because of the negligence of the driver of the team, nor because

the plaintiff, frightened, jumped. *Haff v. Minneapolis, &c. R. Co.*, 14 Fed. Rep. 558. A workman, employed in removing ballast from a vessel, found, on attempting to leave the vessel to go to dinner, that the ladder ordinarily in place on the vessel's side had been removed. He went aft, and used a ladder temporarily placed there, and which was insecurely fastened, and which fell, so that he was injured. The missing ladder had been removed by his fellow-workmen, and placed in the hold for their use there. The workmen had been notified not to use the ladder aft. It was held, in a libel against the vessel, that the injured man was negligent, and that his negligence contributed to his injury. *The Privateer*, 14 Fed. Rep. 872. In an action for personal injuries occasioned to a woman sixty-seven years old, by being knocked down by a horse and wagon while crossing a street on some flagstones at a point where the street forms a junction with two other streets, all much travelled, in the compact part of a city, the fact that, before attempting to cross, and while crossing, she did not look up or down the street, but straight ahead, is not conclusive evidence of a want of due care, but the question is rightly submitted to the jury. *Shapleigh v. Wyman*, 134 Mass. 118. In an action against a city to recover damages for a fall caused by ice upon a sidewalk, it appeared that the plaintiff saw the ice three days before and avoided it; but he testified that, when he fell, the sidewalk was crowded, and he did not see the ice. It was held that the question of contributory negligence was for the jury. *Thomas v. New York*, 28 Hun (N. Y.), 110.

¹ *Tuff v. Warman*, 5 C. B. n. s. 585; *Scott v. Dublin & Wicklow Ry. Co.*, 11 Irish C. L. 396; *Addison on Torts* (Wood's ed.) 41.

another, if he directly contributed to the injury by his own want of care;¹ but the negligence of the plaintiff, in order to excuse the negligence of the defendant, must have been such that, except for his "co-operating fault," the injury would not have happened to him.² The fact that he was negligent, and in fault, is not enough; his fault must have immediately contributed to the injury, or have been the proximate cause thereof. *If the injury would have happened if his want of care had not contributed thereto*, the person whose negligence immediately inflicted it will be liable therefor.³

The contributory negligence of the party injured is no defence to an action to recover damages for personal injuries, when it is shown that they were inflicted wilfully or intentionally, or so recklessly that wilfulness is conclusively presumed; a party inflicting a wilful injury is responsible for all the consequences flowing from it, whether they be proximate or not.⁴ But in order to avoid the defence of contributory negligence, it is not necessary, it is said, that the wrongful act of the defendant, or its agents and servants, should be wanton and intentional.⁵

It cannot be laid down as a rule of law that a less degree of care is required of a woman than of a man; and an instruction to that

¹ Newhouse v. Miller, 35 Ind. 463; Central R. Co. v. Moore, 24 N. J. L. 824; Beers v. Housatonic R. Co., 19 Conn. 566; Runyon v. Central R. Co., 25 N. J. L. 556; Heil v. Glandring, 42 Penn. St. 493; West v. Martin, 31 Mo. 375; Winship v. Enfield, 42 N. H. 147; Noyes v. Morristown, 1 Vt. 353; Lindsey v. Danville, 45 Vt. 72; Stitis v. Gusey, 71 Penn. St. 439.

² Wilds v. Hudson River R. Co., 24 N. Y. 430; Callahan v. Warne, 40 Mo. 131; Williams v. Mich. Central R. Co., 2 Mich. 259.

³ Lindsey v. Danville, 45 Vt. 72; Newhouse v. Miller, 35 Ind. 463; Brown v. Elliott, 45 How. Pr. (N. Y.) 182; Beiseigel v. N. Y. Central R. Co., 14 Abb. Pr. (N. Y.) 42; Walsh v. Mississippi, &c. Co., 52 Mo. 434; Sutton v. Wauwatosa, 29 Wis. 21; Sleeper v. Sandown, 52 N. H. 244.

⁴ Cook v. Central R. & B. Co., 67 Ala. 533; Louisville Safety Vault, &c. Co. v. Louisville, &c. R. Co. (Ky.), 17 S. W. Rep. 567; Terre Haute, &c. R. Co.,

v. Graham, 95 Ind. 263; 12 Am. & Eng. R. Cas. 77; Pennsylvania Co. v. Sinclair, 62 Ind. 301; 30 Am. Rep. 158. Where a case is submitted to the jury upon a count which charges "wanton and wilful" negligence or injury, it is proper to refuse to instruct the jury on the question of contributory negligence, since if the count be sustained contributory negligence would be no defence. Lake Shore, &c. R. Co. v. Bodemer, 139 Ill. 596; 29 N. E. Rep. 692, *affirming* 32 Ill. App. 479.

There may be cases, however, in which the injured party by his own act invited the injury, and in such a case he cannot recover unless he can show that defendant's act was *wrongful*, notwithstanding his own misconduct. See New Orleans, &c. R. Co. v. Jopes, 142 U. S. 18 (passenger shot by conductor); *ante*, § 315, last paragraph.

⁵ Tanner v. Louisville, &c. R. Co., 60 Ala. 621.

effect is erroneous.¹ The sex of the injured party may be considered, however, in determining his or her actual capacity for self-protection.

¹ *Hassenyer v. Michigan Central R. Co.*, 48 Mich. 205 ; 42 Am. Rep. 470 ; 6 Am. & Eng. R. Cas. 590. But in a case where the wrong-doer was a woman, an instruction which charged that she was bound to observe the care of a woman of common and ordinary prudence, was considered not erroneous. *Bloomington v. Perdue*, 99 Ill. 329. In the first of these cases (48 Mich. 205), COOLEY, J., said : "The decedent was killed at the crossing of the railroad with one of the principal streets in the village. She was a girl thirteen years of age, and was proceeding along the street with a small pail of milk in her hands. The morning was somewhat cold and stormy. As she approached the railroad track a train was passing in one direction, and its bell was being rung. From the other direction an engine was backing up several cars, and its bell was also being rung. It was by this train that the girl was struck and killed. There was a flagman at the crossing and no negligence seemed attributable to him. The brakeman on the backing train was upon the ground, walking along by its side to guard against accidents, but did not notice the girl until she had been thrown to the ground and killed. No one saw the girl when she was struck; and the place where she was lying when first seen was outside the limits of the street. With a single exception we think no error was committed to the prejudice of the party now complaining. The exception is found in the instructions to the jury respecting the degree of care required of the decedent to avoid the danger to which she fell a victim. It was contended for the plaintiff below that the law did not require the same degree of care of a child as of an adult person, and the court so instructed the jury. This was unquestionably correct. *Railway Co. v. Bohn*, 27 Mich. 503. But it was also insisted that the law did not expect or require the same degree of care and prudence in a woman as in a man; and the court gave this instruction also. It is presumable therefore that the jury in considering whether the decedent was chargeable with contributory neg-

ligence made not only all proper allowances on account of her immature years, but further allowance on account of sex. No doubt the difference in sex has much to do with the application of legal principles in many cases. Police regulations with the utmost propriety sometimes make distinctions between men and women, in the conduct required of them under the same circumstances, and the unwritten law is in some particulars more indulgent to the one sex than the other. Words and conduct which in the presence of men might be condemned for bad taste only, in the presence of women may be punishable as criminal indecency, and a crime of violence committed upon the one would be condemned less severely by public opinion, and punished less severely by the law, than the same crime committed upon the other. And no doubt also the law ought, under all circumstances where they become important, to make allowances for any differences existing by nature between men and women, and also for any that grow out of their different occupations, modes of life, education, and experience. A woman, for example, driving a horse on a highway may be presumed somewhat wanting in the 'amount of knowledge, skill, dexterity, steadiness of nerve, or coolness of judgment, — in short, the same degree of competency' which we may presume in a man; and the person meeting her under circumstances threatening collision should govern his own conduct with some regard to her probable deficiencies. *Daniels v. Clegg*, 28 Mich. 33, 42. In *Snow v. Provincetown*, 120 Mass. 580, a question of contributory negligence was made against a young woman who, in attempting to pass a cart in a public way, which had commenced backing towards her, accidentally fell over an embankment and was injured. The following instruction by the trial judge, to indicate the degree of care required of the plaintiff, was held unexceptionable : 'Care implies attention and caution; and ordinary care is such a degree of attention and caution as a person of ordinary prudence, of the plaintiff's sex and age, would com-

Ordinary care, such as the law requires on the part of every one in protecting himself is the care which a man of ordinary prudence

monly and might reasonably be expected to exercise under like circumstances.' This no doubt is true. But while the authorities permit all the circumstances to be taken into the account, age and sex among the rest, in determining the degree of care to be reasonably required or looked for, no case, so far as we know, has ever laid it down as a rule of law that less care is required of a woman than of a man. Sex is certainly no excuse for negligence, — *Fox v. Glastonbury*, 29 Conn. 204, — and if we judge of ordinary care by the standard of what is commonly looked for and expected, we should probably agree that a woman would be likely to be more prudent, careful, and particular in many positions and in the performance of many duties than a man would. She would, for example, be more vigilant and indefatigable in her care of a helpless child; she would be more cautious to avoid unknown dangers; she would be more particular to keep within the limits of absolute safety when the dangers which threatened were such as only great strength and courage could venture to encounter. Of a given number of persons travelling by cars, several men will expose themselves to danger by jumping from the cars when they are in motion, or by standing upon the platform, where one woman would do the same; and a man driving a team would be more likely to cross in front of an advancing train than a woman would. In many such cases a woman's natural timidity and inexperience with dangers inclines her to be more cautious; and if we naturally and reasonably look for greater caution in the woman than in the man, any rule of law that demands less must be unphilosophical and unreasonable. Suppose, for instance, that a man and a woman standing together upon the platform of a moving car are accidentally thrown off and injured, could any rule of law be justified which would permit a jury to award damages to her but not to him, upon the ground that the law expected and required of him the higher degree of care? Or may the woman venture upon an unsafe

bridge from which the man recoils, under the protection of such a discrimination? or trust herself to a fractious horse, expecting, if she shall chance to be injured, the tenderness of the law will excuse her with a verdict of such care as was reasonably to be expected, when it would pronounce a man foolhardy? We think not. No person of any age or sex is chargeable with legal fault, who, when placed in a position of peril, does the best that can be done under the circumstances. *Voak v. Northern Central R. Co.*, 75 N. Y. 320. Even this statement indicates a more rigid rule than the law will justify, for the legal requirement is only the observance of ordinary care; and while in laying down rules that are of general application, it is no doubt better to employ general terms, lest they be supposed applicable to particular classes only, — *Tucker v. Henniker*, 41 N. H. 317, — yet when the actor is a woman, an instruction that she is bound to observe the conduct of a woman of common and ordinary prudence cannot be held legally erroneous because of being thus special. *Bloomington v. Perdue*, 99 Ill. 329. Women may enter upon and follow any of the occupations of life; they may be surgeons if they will, but they cannot as such claim any privilege of exemption from the care and caution required of men. A woman may be engineer of a locomotive if she can obtain the employment, but the law will expect and require of her the same diligence to avoid mischief to others which men must observe. The rule of prudent regard for the rights of others knows nothing of sex. Neither can sex excuse any one for the want of ordinary care when exposing one's self to known and obvious perils. If it was apparent that the error of the judge did not mislead in this case, we might affirm the judgment. But that fact is not apparent. No one witnessed this accident; the question of due care is involved in doubts, and the erroneous ruling may have been controlling. It follows that there must be a new trial."

and sagacity would have exercised *under the same circumstances and conditions*; he is not required to take all the precautions which a retrospective view of the circumstances would suggest as prudent. Therefore where one, in the face of great danger, and obliged to choose between two hazards, makes such choice as a person of ordinary prudence and care placed in the same situation might make, and is thereby injured, the fact that if he had chosen the other hazard he would have escaped injury will not relieve the one by reason of whose negligence he was put in jeopardy.¹

The doctrine of contributory negligence, as applied to the liability of railroad companies for their own negligence, is that the party relying on the contributory negligence of his adversary as a defence must not only prove such negligence, but show also that it was the proximate cause of the injury, and that his own act, if wrongful, was a mere remote cause. In other words, in order to prevent a recovery, *the plaintiff's negligence must proximately contribute to the injury. If the sole immediate cause of the injury was the defendant's negligence, the plaintiff can recover, notwithstanding previous negligence of his own.* Where the negligence of the defendant is proximate, and that of the plaintiff remote, the action will be sustained, though the plaintiff is not entirely without fault.² While a railroad company is bound to manage its road and machinery with the utmost care and vigilance, the freedom from negligence which is required of a plaintiff involves only that ordinary prudence and attention which sensible men are accustomed to give in similar cases.³ In Georgia, under the Code, — providing for the apportionment of damages in actions against railroad companies for personal injuries resulting from negligence on the part of such companies, — the rule is that if the plaintiff, by the exercise of ordinary care, would have avoided the consequences

¹ *Karr v. Parks*, 40 Cal. 188; *Haff v. Minneapolis, &c. R. Co.*, 14 Fed. Rep. 558; *Schultz v. Chicago, &c. R. Co.*, 44 Wis. 638; *Mark v. St. Paul, &c. R. Co.*, 51 Mich. 236; 47 Am. Rep. 566; 12 Am. & Eng. R. Cas. 86; *Moore v. Central R. Co.*, 47 Iowa, 688. Thus, where one jumps from a rapidly moving train in order to avoid an imminent danger threatened by collision, he cannot be said to be necessarily guilty of contributory negligence. *Ante*, § 305; *Southwestern R. Co. v. Paulk*, 24 Ga. 356; *Wilson v. Northern Pac. R. Co.*, 26 Minn. 278.

² *Mississippi, &c. R. Co. v. Mason*, 51 Miss. 234; *Kline v. Central Pacific R. Co.*, 37 Cal. 400; *Needham v. San Francisco, &c. R. Co.*, 37 Cal. 409; *Johnson v. Canal, &c. R. Co.*, 27 La. An. 53; *Meyer v. People's R. Co.*, 43 Mo. 523; *Kennayde v. Pacific R. Co.*, 45 Mo. 255; *Manly v. Wilmington, &c. R. Co.*, 74 N. C. 655; *Cleveland, &c. R. Co. v. Elliott*, 28 Ohio St. 340.

³ *Cook v. New York, &c. R. Co.*, 1 App. Abb. Dec. 432. But see *Lake Shore, &c. R. Co. v. Miller*, 25 Mich. 274.

to himself of the defendant's negligence, he cannot recover at all; but in cases where, by ordinary care, he could not have avoided the consequences of the defendant's negligence, the circumstance that the plaintiff may have, in some way, contributed to the injury sustained, will not entirely relieve the defendant, but that the damages must be apportioned according to the amount of default attributable to each.¹

The fact that a person is afflicted with an infirmity, like blindness or deafness, does not relieve him from the duty to exercise ordinary care to protect himself, but rather imposes upon him the duty to use greater care than one possessed of all his senses. His infirmity is his misfortune, and he cannot plead it in extenuation of his negligent conduct.² Railroad companies cannot be charged with a knowledge of such infirmities, but are entitled to presume that all persons are in possession of the ordinary faculties of mind and body.³ But after they have become aware of such defects, or had notice of them, a duty arises on their part to exercise care accordingly.⁴ While, therefore, blindness or deafness or similar infirmities do not necessarily make one guilty of contributory negligence, yet if it appears that, coupled with the exposure in which the party has placed himself, they are a proximate cause of the injury,

¹ *Macon, &c. R. Co. v. Johnson*, 38 Ga. 409.

² *Fenneman v. Holdeman*, 75 Ind. 1; 22 Atl. Rep. 1049 (deaf person must keep a more careful lookout for passing vehicles than if his hearing were good); *Cleveland, &c. R. Co. v. Terry*, 8 Ohio St. 570; *Purl v. St. Louis, &c. R. Co.*, 72 Mo. 168 (deaf person crossing railway track); *Winn v. City of Lowell*, 1 Allen (Mass.), 177 ("common prudence requires of a person of poor sight greater care in walking the streets to avoid obstructions than is required of persons of perfect sight"); *Simmerman v. Hannibal, &c. R. Co.*, 71 Mo. 476; *Elkins v. Boston, &c. R. Co.*, 115 Mass. 190. See also *City of Franklin v. Harter*, 127 Ind. 446 (blind person falling into cellarway on sidewalk). "The case is not altered, nor does it become more favorable for the plaintiff, by reason of his deafness. Such an affliction, so far from excusing one who might have seen the train, should rather add a spur to his vigilance and prompt him to employ his other

faculties so as to compensate as far as possible for the lacking one. 1 *Thompson on Neg.*, p. 430." *Purl v. St. Louis, &c. R. Co.*, 72 Mo. 168, 172. See also *Maloy v. Wabash, &c. R. Co.*, 84 Mo. 270 (deaf person negligent in being on a railroad track).

³ *Frazer v. South, &c. R. Co.*, 81 Ala. 185; 28 Am. & Eng. R. Cas. 565; *Louisville, &c. R. Co. v. Black*, 89 Ala. 313; 45 Am. & Eng. R. Cas. 38; *Kennedy v. Denver, &c. R. Co.*, 10 Col. 493; 34 Am. & Eng. R. Cas. 40; *Nichols v. Louisville, &c. R. Co. (Ky.)*, 6 S. W. Rep. 339; 34 Am. & Eng. R. Cas. 37; *Louisville, &c. R. Co. v. Cooper (Ky. 1882)*, 6 Am. & Eng. R. Cas. 5; *Lake Shore, &c. R. Co. v. Miller*, 25 Mich. 279; *International, &c. R. Co. v. Smith*, 62 Tex. 252; 19 Am. & Eng. R. Cas. 21; *Artus v. Missouri Pacific R. Co.*, 73 Tex. 191; 37 Am. & Eng. R. Cas. 288.

⁴ *City of Champaigne v. White*, 38 Ill. App. 233.

they constitute such negligence as will bar any recovery for the injury.¹

The fact that the person injured was at the time intoxicated does not necessarily constitute contributory negligence on his part,² though this fact is to be considered with others in determining whether or not he exercised ordinary care to protect himself.³ One cannot voluntarily incapacitate himself from ability to exercise ordinary care for his own self-protection, and then set up such incapacity as an excuse for his failure to use care; and if the intoxication contributed to the injury as a proximate cause thereof, it is a complete bar to any action for damages sustained in consequence of it.⁴ The rule, therefore, is that the same care is required of a person when he is intoxicated as when he is sober,⁵ though if the defendant is aware of

¹ *Maloy v. Wabash, &c. R. Co.*, 84 Mo. 270; *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445; *Harris v. Uebelhoefer*, 75 N. Y. 169; *Sluper v. Sandown*, 52 Vt. 251; *Morris, &c. R. Co. v. Haslan*, 33 N. J. L. 147; *Central, &c. R. Co. v. Fellar*, 84 Penn. St. 226; *Shapley v. Wyman*, 134 Mass. 118.

² *Alger v. Lowell*, 3 Allen (Mass.), 406; *Houston, &c. R. Co. v. Reason*, 61 Tex. 613; *Lower v. Sedalia*, 77 Mo. 413; *Salina v. Trosper*, 27 Kan. 545; *Ditchett v. Spuyten Duyvil, &c. R. Co.*, 5 Hun (N. Y.), 165; *Thorpe v. Brookfield*, 36 Conn. 320; 2 *Shear. & Red. on Neg.*, § 487.

³ *Buddenberg v. Charles Transp. Co.*, 108 Mo. 394; *Yarnell v. St. Louis, &c. R. Co.*, 75 Mo. 575; 10 *Am. & Eng. R. Cas.* 726; *Baltimore, &c. R. Co. v. Boteler*, 38 Md. 568; *Marquette, &c. R. Co. v. Handford*, 39 Mich. 537; *Southwestern R. Co. v. Haukerson*, 61 Ga. 114; *O'Keefe v. Chicago, &c. R. Co.*, 32 Iowa, 467; 4 *Am. & Eng. Ency. Law*, p. 79; 1 *Shear. & Red. on Neg.* (4th ed.), § 110, *n.*; *Beach on Contrib. Neg.* (1st ed.), § 66. In a suit to recover for the death of a person caused by defendant's negligence, there being evidence that deceased was intoxicated at the time, it is error to charge the jury that although deceased was under the influence of liquor, yet his intoxication was no defence, unless he was so intoxicated as to be unable to exercise ordinary care. And this error is not cured by a further instruction that there can be no recovery if the intoxication of the deceased resulted in the want of reasonable care on

his part which directly contributed to the accident. *Buddenberg v. Charles Transp. Co.*, 108 Mo. 394; 18 *S. W. Rep.* 970. See also *Wallace v. St. Louis, &c. R. Co.*, 74 Mo. 549; *Meyer v. Pacific R. Co.*, 40 Mo. 161.

⁴ *Illinois Central R. Co. v. Cragin*, 71 Ill. 177; *McClelland v. Louisville, &c. R. Co.*, 94 Ind. 276; 18 *Am. & Eng. R. Cas.* 260; *Little Rock, &c. R. Co. v. Parkhurst*, 36 Ark. 371; 5 *Am. & Eng. R. Cas.* 535; *McGuire v. Middlesex R. Co.*, 115 Mass. 239; *Fitzgerald v. Weston*, 52 Wis. 354; *Chicago, &c. R. Co. v. Bell*, 70 Ill. 102. In the first of these cases (71 Ill. 177), the court went on to say: "A person who voluntarily uses intoxicating drinks until he has become helpless, or his powers so far impaired that he is unable to exert the necessary effort to avoid danger, is guilty of negligence when he puts himself in a position of danger; and so when he stupefies and deadens his intellectual powers, so that he is unable to foresee and guard against danger." See *ante*, § 318 *a*.

⁵ In *Lower v. Sedalia*, 77 Mo. 431, the court said: "It was the duty of the plaintiff to use every care and precaution to avoid falling from said bridge that a sober man of ordinary prudence would have used under the same circumstances; and if he failed to use such care and precaution, and such failure directly contributed to causing his injuries, he cannot recover." See also *Chicago City R. Co. v. Lewis*, 5 Bradw. (Ill. App.) 242; *Kean v. Baltimore, &c. R. Co.*, 61 Md. 154; 19 *Am. & Eng. R. Cas.* 321.

his state before the injury occurs, it is bound to exercise greater care to avoid inflicting an injury upon him.¹

What is negligence in a given case is necessarily a mixed question of law and fact. When there is no dispute about the facts, nor any doubt as to the proper inference to be drawn from them, the question as to what is proper care may be a question of law;² but where either the facts or the conclusions to be drawn therefrom are at all doubtful, the question must always be submitted to the jury. And because in determining the character of plaintiff's conduct it is necessary to find whether or not he acted as a man of ordinary prudence would have acted under the same circumstances, the question is necessarily one for the jury, except in very plain cases where there is no room for a reasonable difference of opinion.³ If the facts are such that a

¹ See the rule very clearly stated in *Isbell v. New York, &c. R. Co.*, 27 Conn. 393; 71 Am. Dec. 78. The rule of the text is also upheld in *St. Louis, &c. R. Co. v. Wilkinson*, 46 Ark. 513; *Kean v. Baltimore, &c. R. Co.*, 61 Md. 154; 19 Am. & Eng. R. Cas. 321; *Dinwiddie v. Louisville, &c. R. Co.*, 9 Lea (Tenn.), 309, 311-312; *Houston, &c. R. Co. v. Simpkins*, 54 Tex. 615; 6 Am. & Eng. R. Cas. 11.

² *Aspey v. Detroit, &c. R. Co.*, 83 Mich. 440; 47 N. W. Rep. 513; *Merrill v. North Yarmouth*, 78 Me. 200; 57 Am. Rep. 794; *Todd v. Old Colony, &c. R. Co.*, 3 Allen (Mass.), 18; 80 Am. Dec. 49; *Emery v. Raleigh, &c. R. Co.*, 109 N. C. 589; 14 S. E. Rep. 352; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391; 54 Am. Rep. 718; *Schofield v. Chicago, &c. R. Co.*, 114 U. S. 615; 19 Am. & Eng. R. Cas. 353. "Ordinarily the question of negligence is one of mixed law and fact, and it is the duty of the court to submit the same to the jury, with proper instructions as to the law. What is proper care is some times a question of law, when there is no controversy about the facts; but where there is evidence tending to prove negligence on the part of the defendant, and a question arises whether the plaintiff has, by his own fault, contributed to the injury, it is ordinarily a question for the jury." *Filer v. N. Y. Central R. Co.*, 49 N. Y. 50. See also *Fernandes v. Sacramento City R. Co.*, 52 Cal. 45; *Delaware, &c. R. Co. v. Toffey*, 38 N. J. L. 525;

Bonnell v. Delaware, &c. R. Co., 39 N. J. L. 189; *Penn. R. Co. v. Righter*, 42 N. J. L. 180.

³ *Harmon v. Washington, &c. R. Co.*, 7 Mackey (D. C.), 275; *Central R. Co. v. Hubbard*, 86 Ga. 623; *Hendriken v. Meadows*, 154 Mass. 599; *Eichel v. Senhenn*, 2 Ind. App. 208; *Conolly v. Waltham*, 156 Mass. 368; *Williams v. Mich. Central R. Co.*, 2 Mich. 259; *Memphis, &c. R. Co. v. Whitfield*, 44 Miss. 466; *Ramsey v. Rushville, &c. Road Co.*, 81 Ind. 394; *Thomas v. New York, &c. R. Co.*, 28 Hun (N. Y.), 110; *Gannon v. Union Ferry Co.*, 29 Hun (N. Y.), 631; *Haff v. Minneapolis, &c. R. Co.*, 14 Fed. Rep. 558; *North Pennsylvania R. Co. v. Heileman*, 49 Penn. St. 60; s. c. 1 Thompson on Neg., p. 401; *Montgomery v. Wright*, 72 Ala. 411; 47 Am. Rep. 422; *Marietta, &c. R. Co. v. Picksley*, 24 Ohio St. 654; *McNarra v. Chicago, &c. R. Co.*, 41 Wis. 69; *McHugh v. Chicago, &c. R. Co.*, 41 Wis. 75; *Penn. R. Co. v. Fortney*, 90 Penn. St. 323; *Kansas Pacific R. Co. v. Ward*, 4 Col. 30; *Corcoran v. New York Elevated R. Co.*, 19 Hun (N. Y.), 368; *Nehrbas v. Central Pacific R. Co.*, 62 Cal. 320. It is not enough merely that the facts are undisputed. "When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or other of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain

verdict for the plaintiff could not be sustained, the question is one of law, and should be determined by the court.¹

The doctrine of contributory negligence is affected in some jurisdictions by the adoption of what is known as the rule of comparative negligence, by which the negligence of the parties is compared in the degrees of slight, ordinary, and gross, and a recovery allowed if the defendant's negligence is gross and that of the injured party slight.² But this rule is confined to the courts of Illinois,³ though modifications of it seem to have been adopted in one or two other States.⁴

SEC. 320. Injuries to Trespassers on Track, etc.: Children.—A railway company owes no duty to a trespasser upon its track or premises other than that which every person owes to another, and that is to refrain from inflicting upon him a wilful or malicious injury.⁵ "Negligence," observes the New York court, "is a violation

and incontrovertible, or they cannot be decided by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ." *COOLEY, J.*, in *Detroit, &c. R. Co. v. Van Steinburg*, 17 Mich. 99. See also *Hathaway v. East Tennessee R. Co.*, 29 Fed. Rep. 489.

¹ *Filer v. N. Y. Central R. Co.*, 49 N. Y. 47; *Baltimore, &c. R. Co. v. State*, 30 Md. 366; *Rudolph v. Fuchs*, 44 How. Pr. (N. Y.) 155; *Barton v. St. Louis, &c. R. Co.*, 52 Mo. 253; *Dickens v. N. Y. Central R. Co.*, 1 Abb. App. Cas. (N. Y.) 504; *Bernhard v. Rensselaer, &c. R. Co.*, 1 Abb. App. Cas. (N. Y.) 181; *Cook v. N. Y. Central R. Co.*, 1 id. 432; *Jetho v. N. Y. & Harlem R. Co.*, 2 Abb. App. Cas. (N. Y.) 458; *Kay v. Pennsylvania R. Co.*, 65 Penn. St. 269; *Marks v. St. Paul, &c. R. Co.*, 32 Minn. 208.

² See the doctrine discussed *post*, § 322 *b*; 3 Am. & Eng. Ency. Law, pp. 367 *et seq.*; *Chicago, &c. R. Co. v. Gretzner*, 46 Ill. 74.

³ *Illinois, &c. R. Co. v. Wren*, 43 Ill. 77; *Chicago, &c. R. Co. v. Sweeney*, 52 Ill. 325; *Toledo, &c. R. Co. v. McGinnis*, 71 Ill. 346; *Illinois, &c. R. Co. v. Hammer*, 72 Ill. 347; *Grand Tower Mfg. Co. v. Hawkins*, 72 Ill. 386.

⁴ See *Kansas Pacific R. Co. v. Pointer*, 14 Kan. 37; *Illinois Central R. Co. v. Dick* (Ky.), 15 S. W. Rep. 665. See also the Tennessee and the Georgia rule as set

out *post*, § 322 *b*; *Jackson v. Nashville, &c. R. Co.*, 13 Lea (Tenn.), 491; 49 Am. Rep. 663; *Georgia R. Co. v. Pittman*, 73 Ga. 325; 26 Am. & Eng. R. Cas. 476.

⁵ *Savannah, &c. R. Co. v. Meadows* (Ala.), 10 So. Rep. 141; *Glass v. Memphis, &c. R. Co.*, 94 Ala. 581; *Central R. Co. v. Brinson*, 70 Ga. 207; 19 Am. & Eng. R. Cas. 42; *Terre Haute, &c. R. Co. v. Graham*, 95 Ind. 286; 12 Am. & Eng. R. Cas. 77; *Palmer v. Chicago, &c. R. Co.*, 112 Ind. 250; 31 Am. & Eng. R. Cas. 264; *Louisville, &c. R. Co. v. Howard*, 82 Ky. 212; 19 Am. & Eng. R. Cas. 98; *Wright v. Boston, &c. R. Co.*, 142 Mass. 296; 28 Am. & Eng. R. Cas. 652; *Johnson v. Boston, &c. R. Co.*, 125 Mass. 75; *Baltimore, &c. R. Co. v. State*, 62 Md. 479; 19 Am. & Eng. R. Cas. 83; *Henry v. St. Louis, &c. R. Co.*, 76 Mo. 288; 12 Am. & Eng. R. Cas. 136; *Dahlstrom v. St. Louis, &c. R. Co.*, 96 Mo. 99; 35 Am. & Eng. R. Cas. 387; *Cauley v. Pittsburgh, &c. R. Co.*, 95 Penn. St. 398; 40 Am. Rep. 664; 2 Am. & Eng. R. Cas. 4; *Carter v. Columbia, &c. R. Co.*, 19 S. C. 20; 15 Am. & Eng. R. Cas. 414; *East Tennessee, &c. R. Co. v. Humphreys*, 12 Lea (Tenn.) 200; 15 Am. & Eng. R. Cas. 472; *East Tennessee, &c. R. Co. v. Fain*, 12 Lea (Tenn.), 35; 19 Am. & Eng. R. Cas. 102; *Houston, &c. R. Co. v. Simpkins*, 54 Tex. 615; 6 Am. & Eng. R. Cas. 11; *Norfolk, &c. R. Co. v. Carper* (Va.), 14 S. E. Rep. 328; *Tyler v. Sites* (Va.),

of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties there can be no such thing as negligence in the legal sense of the term. *A man is under no obligation to be cautious and circumspect towards a wrong-doer.* A horse, straying in a field, falls into a pit left open and unguarded; the owner of the animal cannot complain, for, as to all trespassers, the owner of the field had a right to leave the pit as he pleased, and they cannot impute negligence to him. But injuries inflicted by design are not thus to be excused. A wrong-doer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief.¹

But if a person can be easily seen lying upon the track, in season to stop the train, the company is not warranted in running him down simply because he has no business there, but is bound to use due care to stop the train, and prevent the injury if possible.² The duty

13 S. E. Rep. 978; *Tyler v. Kelley* (Va.), 15 S. E. Rep. 509; *Spicer v. Chesapeake, &c. R. Co.*, 34 W. Va. 514; 45 Am. & Eng. R. Cas. 28. The injury must be wilful, and proof of mere "recklessness," "gross negligence," or "wantonness," so-called, will not suffice, though the negligence of the engineer may be so culpable that the law will presume wilfulness. *Chicago, &c. R. Co. v. Hedges*, 105 Ind. 398; 25 Am. & Eng. R. Cas. 550; *Terre Haute, &c. R. Co. v. Graham*, 95 Ind. 286; 12 Am. & Eng. R. Cas. 82; *post*, pp. 1467, 1468, *n.* See also in support of the view of the text, *Kansas Pacific R. Co. v. Ward*, 4 Col. 30; *Little Schuylkill Nav. &c. Co. v. Norton*, 24 Penn. St. 465; *Pittsburgh, &c. R. Co. v. Collins*, 87 Penn. St. 405; *Philadelphia, &c. R. Co. v. Hummell*, 44 Penn. St. 375; *Mulherrin v. Delaware, &c. R. Co.*, 81 Penn. St. 365; *Rothe v. Milwaukee, &c. R. Co.*, 21 Wis. 256; *Illinois, &c. R. Co. v. Hall*, 72 Ill. 222; *Illinois, &c. R. Co. v. Hetherington*, 83 Ill. 510; *Robertson v. N. Y., &c. R. Co.*, 22 Barb. (N. Y.) 191; *Johnson v. Boston, &c. R. Co.*, 125 Mass. 75; *McKenna v. N. Y. Central R. Co.*, 8 Daly (N. Y.), 304; *Van Schaick v. Hudson River R. Co.*, 43 N. Y. 527; *Cogswell v. Oregon, &c. R. Co.*, 6 Oreg. 417; *Lang v. Halliday Creek R. Co.*, 42 Iowa, 677; *Osterlog v. Pacific R. Co.*, 64 Mo. 421; *O'Donnell v. Mo. Pacific R. Co.*, 7 Mo. App. 190; *Deville*

v. Southern Pacific R. Co., 50 Cal. 383; *Burns v. Boston, &c. R. Co.*, 101 Mass. 50. As a general legal proposition, where both parties are equally guilty of negligence, the plaintiff cannot recover damages sustained by the negligence of the defendant. *Mason v. Missouri Pacific R. Co.*, 27 Kan. 83; 41 Am. Rep. 405.

¹ *BEARDSLEY, C. J.*, in *Tonawanda R. Co. v. Munger*, 5 Denio (N. Y.), 266, 277.

² *Mulherrin v. Delaware, &c. R. Co.*, 81 Penn. St. 366; *Houston, &c. R. Co. v. Smith*, 52 Tex. 178; *Chicago, &c. R. Co. v. Kellarn*, 92 Ill. 245; 34 Am. Rep. 128; *Kansas, &c. R. Co. v. Fitzsimmons*, 22 Kan. 686; 31 Am. Rep. 203; *McCarty v. Delaware, &c. R. Co.*, 17 Hun (N. Y.), 74; *Gillis v. Penn. R. Co.*, 59 Penn. St. 129; *Rounds v. Delaware, &c. R. Co.*, 64 N. Y. 129; *Evansville, &c. R. Co. v. Lowdermilk*, 15 Ind. 120; *Penn. R. Co. v. Sinclair*, 62 Ind. 301; *Lafayette, &c. R. Co. v. Adams*, 26 Ind. 76; *Evansville, &c. R. Co. v. Hiatt*, 17 Ind. 120; *Lovett v. Salem, &c. R. Co.*, 9 Allen (Mass.), 557. In *Houston, &c. R. Co. v. Sympkins*, 54 Tex. 615, 38 Am. Rep. 632, it was held that one who without authority enters upon a railway track, and while there becomes insensible from providential causes, and while in this state and in plain view is injured by a train, may recover damages of the company, although the injury was not wanton or wilful; but

of the company in such cases exists when the trespasser is first discovered and the engineer becomes aware that he is ignorant of the approaching danger;¹ and if after becoming aware of the trespasser's presence the engineer fails to exert every effort possible to prevent the injury, the company must be held liable.² So also in cases where

otherwise if his insensibility was in consequence of his voluntary intoxication. In *Baltimore, &c. R. Co. v. State*, 33 Md. 542, the court laid down the rule as follows: "If a man does imprudently and incautiously go on a railroad track, and is killed or injured by a train of cars, the company is responsible, unless it has used reasonable care and caution to avert it, provided the circumstances were not such when the party went on the track as to threaten direct injury, and provided that being on the track he did nothing, positive or negative, to contribute to the immediate injury." In *Weymire v. Wolfe*, 52 Iowa, 533, the court said: "If a person lies down upon a railroad track in a state of helpless intoxication, the company will not be justified in running a train over him, if it can be avoided in the exercise of reasonable care after the person is discovered in his exposed condition." In *Little Rock, &c. R. Co. v. Parkhurst*, 36 Ark. 371, the decedent, walking on the defendant's track while drunk, was run over. The court charged that although he was in fault in being on the track, yet if the defendant's agents could by the exercise of reasonable diligence have seen him in time to avoid the accident, "the failure to use such diligence alone must be considered the proximate cause of the accident." This was reversed, the court observing that although the defendant was negligent, in not having a light and lookout, "yet the deceased's own negligence in being voluntarily on the track, and from intoxication unable to get out of the way of the train, was the proximate cause of his death." In *Laverenz v. Chicago, &c. R. Co.*, 56 Iowa, 689, it was said: "It is true that where a person voluntarily goes upon a railroad track where there is an unobstructed view or the track, and fails, without excuse, to look or listen for danger, as matter of law he is not entitled to recover. *He must take the chances of injury from an ap-*

proaching train upon himself, unless the persons in charge of the train see his danger in time to avert it." *Carlin v. Chicago, &c. R. Co.*, 37 Iowa, 316; *Benton v. Central R. Co.*, 42 Iowa, 192; *Lang v. Holliday Creek R., &c. Co.*, 49 Iowa, 469; *Artz v. Chicago, &c. R. Co.*, 34 Iowa, 153.

¹ *Louisville, &c. R. Co. v. Black*, 89 Ala. 313; 45 Am. & Eng. R. Cas. 38; *Gunn v. Ohio River R. Co. (W. Va.)*, 14 S. E. Rep. 465.

² *Kansas Pac. R. Co. v. Whipple*, 37 Kan. 539; 37 Am. & Eng. R. Cas. 320; *Bergman v. St. Louis, &c. R. Co.*, 88 Mo. 678; 28 Am. & Eng. R. Cas. 588; *Synder v. Natchez, &c. R. Co.*, 42 La. An. 302; 44 Am. & Eng. R. Cas. 278; *St. Louis, &c. R. Co. v. Monday*, 49 Ark. 257; 31 Am. & Eng. R. Cas. 234; *St. Louis, &c. R. Co. v. Freeman*, 36 Ark. 41; *Central R. Co. v. Brinson*, 70 Ga. 207; 19 Am. & Eng. R. Cas. 42; *McAllister v. Burlington, &c. R. Co.*, 64 Iowa, 395; 19 Am. & Eng. R. Cas. 103; *Burnett v. Burlington, &c. R. Co.*, 16 Neb. 332; 19 Am. & Eng. R. Cas. 25. In an action for the death of a child caused by the negligent operation of the train, it appeared that the track was straight for nearly half a mile before reaching the place where the child was run over, and that had the train been running at the rate of speed prescribed by the ordinance it could have been stopped within forty feet, but that at the rate at which it was actually running it required from one hundred to four hundred feet to stop it. It was held that the jury were authorized to find as a fact that the unlawful rate of speed was the proximate cause of the injury. *Tobin v. Missouri Pac. R. Co. (Mo.)*, 18 S. W. Rep. 996. In this case the child was playing on the track where it was crossed by a highway, and the court held that he was not a trespasser. In *West Virginia*, it is held that a child of four years, killed by a train while sitting on or near the track, cannot be held to have been

persons have long been accustomed to use the track of the company for a passage-way at certain localities, the company is charged with notice of such usage and is under obligation to keep a careful lookout at such places, even though the parties thus using the track do so without authority and are really trespassers.¹ But where pedestrians use the track as a thoroughfare in spite of posted notices and other warnings forbidding it, they are trespassers and cannot claim a license by usage.²

But except at highway crossings the company's right to the use of its tracks and premises is exclusive, and it is entitled to assume that they are clear;³ it is not bound to anticipate that persons will violate its property rights and be on the tracks, and owes no duty to

a trespasser so as to release the company from liability, where it appears that, by the exercise of ordinary care, the company might have seen him and prevented the injury. *Gunn v. Ohio River R. Co.* (W. Va.), 14 S. E. Rep. 465. *Contra* *Woodruff v. Northern Pac. R. Co.*, 47 Fed. Rep. 689.

¹ *Illinois Central R. Co. v. Dick* (Ky.), 15 S. W. Rep. 665; *Tomely v. Chicago, &c. R. Co.*, 53 Wis. 326; 4 Am. & Eng. R. Cas. 562; *Whalen v. Chicago, &c. R. Co.*, 75 Wis. 654; 41 Am. & Eng. R. Cas. 558; *Conley v. Cincinnati, &c. R. Co.* (Ky.), 12 S. W. Rep. 764; 41 Am. & Eng. R. Cas. 537; *Frick v. St. Louis, &c. R. Co.*, 5 Mo. App. 435; *Palmer v. Chicago, &c. R. Co.*, 112 Ind. 250; 31 Am. & Eng. R. Cas. 250; *St. Louis, &c. R. Co. v. Crosure*, 72 Tex. 79; 37 Am. & Eng. R. Cas. 313; *Western R. Co. v. Meigs*, 74 Ga. 857; *Sutherland v. Wilmington, &c. R. Co.*, 106 N. C. 101; *Taylor v. Delaware, &c. R. Co.*, 113 Penn. St. 162; 28 Am. Eng. R. Cas. 656; *Byrne v. N. Y. Central R. Co.*, 104 N. Y. 362; 58 Am. Rep. 512; 19 Am. & Eng. Ency. Law, p. 937. In an action against a railroad company for alleged negligence, causing the death of plaintiff's intestate, it appeared that the decedent was run over and killed in attempting to cross defendant's tracks at a point where the owners of adjoining lands had a right of way, and where the public for thirty years had been in the habit of crossing. *Held*, that the acquiescence of defendant for so long a time in this public use amounted to a

license or permission to all persons to cross at this point, and imposed a duty upon it as to persons so crossing, to exercise reasonable care in the movement of its trains, so as to protect them from injury. *Barry v. N. Y. Central R. Co.*, 92 N. Y. 289, *distinguishing* *Hownsell v. Smyth*, 97 E. C. L. 731; *Nicholson v. Erie R. Co.*, 41 N. Y. 525; *Sutton v. N. Y. Central R. Co.*, 66 N. Y. 243.

² *Hyde v. Missouri Pacific R. Co.* (Mo), 19 S. W. Rep. 483; *Meredith v. Richmond, &c. R. Co.*, 108 N. C. 616. And one who uses a right of way across a railroad by license is not relieved of the duty to exercise care. *Richards v. Chicago, &c. R. Co.*, 81 Iowa, 426.

³ *St. Louis &c. R. Co. v. Monday*, 49 Ark. 257; 31 Am. & Eng. R. Cas. 324; *Mason v. Missouri Pac. R. Co.*, 27 Kan. 83; 6 Am. & Eng. R. Cas. 1; *Isabel v. Hannibal, &c. R. Co.*, 60 Mo. 475; *Yarnell v. St. Louis, &c. R. Co.*, 75 Mo. 575; 10 Am. & Eng. R. Cas. 726; *Omaha, &c. R. Co. v. Martin*, 14 Neb. 295; 19 Am. & Eng. R. Cas. 236; *Jersey City, &c. R. Co. v. Jersey City R. Co.*, 20 N. J. Eq. 61; *Cauley v. Pittsburgh, &c. R. Co.*, 95 Penn. St. 398; 2 Am. & Eng. R. Cas. 4; *Mulherin v. Delaware, &c. R. Co.*, 82 Penn. St. 366, where it was said: "Except at crossings, where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril. The company has not only a right of way, but it is exclusive at all times and for all purposes." *Railroad Co. v. Norton*, 24 Penn. St. 465.

provide for the safety of such trespassers.¹ Therefore where an adult person appears on the track, the company has a right to presume that he will heed the warnings of approaching danger and protect himself, and is not bound either to stop the train or to slacken its speed. The presumption is that he can and will protect himself.² Nor is the company bound to keep a lookout ahead of its trains, except when they are about to cross a highway or private crossing;³ though in some jurisdictions it has been held otherwise, and in still others the duty has been created by statute.⁴

In a Connecticut case,⁵ the court laid down the rule applicable to insensible or unintelligent living objects upon a railway track. In that case the action was for running down and killing the plaintiff's cattle. The court said: "A remote fault in one party does not of course dispense with care in the other. It may even make it more necessary and important, if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common

¹ *Chrystal v. Troy, &c. R. Co.*, 105 N. Y. 164; 31 Am. & Eng. R. Cas. 411; *Terre Haute, &c. R. Co. v. Graham*, 46 Ind. 239; 95 Ind. 286; 12 Am. & Eng. R. Cas. 77; *Savannah, &c. R. Co. v. Meadows* (Ala.), 10 So. Rep. 141; *Hale v. Columbia, &c. R. Co.*, 34 S. C. 292.

² *Louisville, &c. R. Co. v. Black*, 89 Ala. 313; 45 Am. & Eng. R. Cas. 38; *Mobile &c. R. Co. v. Blakely*, 59 Ala. 471; *Tanner v. Louisville &c. R. Co.*, 60 Ala. 621; *St. Louis, &c. R. Co. v. Monday*, 49 Ark. 257; 31 Am. & Eng. R. Cas. 424; *Needham v. San Francisco, &c. R. Co.*, 37 Cal. 409; *St. Louis &c. R. Co. v. Manley*, 58 Ill. 300; *Chicago, &c. R. Co. v. Austin*, 69 Ill. 426; *Chicago, &c. R. Co. v. Lee*, 68 Ill. 576; *Chicago &c. R. Co. v. Damsell*, 81 Ill. 450; *Ohio, &c. R. Co. v. Walker*, 113 Ind. 196; 32 Am. & Eng. R. Cas. 121; *Indianapolis, &c. R. Co. v. McClaren*, 62 Ind. 566; *Terre Haute, &c. R. Co. v. Graham*, 46 Ind. 239; 95 Ind. 286; 12 Am. & Eng. R. Cas. 277; *Nichols v. Louisville, &c. R. Co. (Ky.)*, 6 S. W. Rep. 339; 34 Am. & Eng. R. Cas. 37; *Frech v. Philadelphia, &c. R. Co.*, 39 Md. 574; *Lake Shore, &c. R. Co. v. Miller*, 25 Mich. 274; *Mobile, &c. R. Co. v. Stroud*, 64 Miss. 784; 31 Am. & Eng. R. Cas. 443; *Bell v. Hannibal, &c. R. Co.*, 72 Mo. 50;

4 Am. & Eng. R. Cas. 580; *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *Card v. New York, &c. R. Co.*, 50 Barb. (N. Y.) 39; *Herring v. Wilmington, &c. R. Co.*, 10 Ired. (N. C.) 402; *Cogswell v. Oregon, &c. R. Co.*, 6 Oreg. 417; *International, &c. R. Co. v. Smith*, 62 Tex. 352; 19 Am. & Eng. R. Cas. 21; *Bemis v. Connecticut, &c. R. Co.*, 42 Vt. 575.

³ *Terre Haute, &c. R. Co. v. Graham*, 46 Ind. 239; 95 Ind. 286; *McAllister v. Burlington, &c. R. Co.*, 64 Iowa, 395; 19 Am. & Eng. R. Cas. 108; *Mobile, &c. R. Co. v. Stroud*, 64 Miss. 784; *Yarnell v. St. Louis, &c. R. Co.*, 75 Mo. 575; 10 Am. & Eng. R. Cas. 726; *Cauley v. Pittsburgh, &c. R. Co.*, 95 Penn. St. 398; 2 Am. & Eng. R. Cas. 4. See also *Louisville, &c. R. Co. v. Greene* (Ky.), 19 Am. & Eng. R. Cas. 95. Compare, however, *Houston, &c. R. Co. v. Symkins*, 54 Tex. 615; 6 Am. & Eng. R. Cas. 11.

⁴ Such a statute exists in Tennessee. Code of Tenn. (1884), § 1298; *Louisville, &c. R. Co. v. Robertson*, 9 Heisk. (Tenn.) 276; *East Tennessee, &c. R. Co. v. White*, 5 Lea (Tenn.), 540; 8 Am. & Eng. R. Cas. 65.

⁵ *Isbell v. New York, &c. R. Co.*, 27 Conn. 393; 71 Am. Dec. 78.

justice and common humanity demand this, and it is no answer for the neglect of it to say that the complainant was first in the wrong, since intention and accidents are to a greater or less extent incident to human affairs. Preventive remedies must therefore always be proportioned to the case in its peculiar circumstances, — to the imminency of the danger, the evil to be avoided, and the means at hand of avoiding it. And herein is no novel or strange doctrine of the law ; it is as old as the moral law itself, and is laid down in the earliest books on jurisprudence. A boy enters a door-yard to find his ball or arrow, or to look at a flower in the garden ; he is bitten and lacerated by a vicious bull-dog ; still he is a trespasser, and if he had kept away would have received no hurt. Nevertheless, is not the owner of the dog liable ? A person is hunting in the woods of a stranger, or crossing a pasture of his neighbor, and is wounded by a concealed gun, or his dog is killed by some concealed instrument, or he is himself gored by an enraged bull ; is he in all these cases remediless because he is there without consent ? Or an intoxicated man is lying in the travelled part of the highway, helpless, if not unconscious ; must I not use care to avoid him ? May I say that he has no right to encumber the highway, and therefore carelessly continue my progress, regardless of consequences ? Or if such a man has taken refuge in a field of grass or a hedge of bushes, may the owner of a field, knowing the fact, continue to mow on, or fell trees, as if it was not so ? Or if the intoxicated man has entered a private lane or by-way, and will be run over if the owner does not stop his team which is passing through it, must he not stop them ?" The doctrine of this case has been approvingly cited by the courts, in several cases, and seems to us to define the true rule of duty and obligation resting upon railway companies as well as to persons lying upon their tracks, and young children, as to animals.¹ The rule may be said to be that a railway company is bound to keep a reasonable lookout for trespassers upon its track, and is bound to exercise such care as the circumstances require to prevent injury to them. If the person seen upon the track is an adult person, and apparently in the possession of his or her faculties, the company has a right to presume that he will exercise his senses and remove himself from his dangerous position ; and if he fails to do so, and is injured, the fault is his own, and there is, in the absence of wilful

¹ *Isbell v. New York, &c. R. Co.*, 27 Meeks v. Southern Pacific R. Co., 56 Cal. Conn. 393 ; 71 Am. Dec. 79. See also 513, 38 Am. Rep. 67.

negligence on its part, no remedy against the company for the results of an injury brought upon him by his own recklessness.¹

In a Michigan case,² the court said, "If an engineer sees a team and carriage, or a man in the act of crossing the track, far enough ahead of him to have ample time, in the ordinary course of such

¹ *Baltimore, &c. R. Co. v. State*, 33 Md. 542; *Lake Shore, &c. R. Co. v. Miller*, 25 Mich. 279. Where a locomotive with cars, attached is standing on a railroad track near a railroad station, or other place where cars are frequently moved forward or backward, a person who goes upon the railroad track, seeing the locomotive and cars, and knowing that they would, within a few minutes, be moved towards him, and walks upon the track away from the train without keeping watch of its movements, when there was nothing to hinder him from seeing the movements of the train in time to avoid danger, and when he could have gone in the same direction without walking on the track, is guilty of such negligence as will prevent his recovery for an injury caused by the carelessness or unskilfulness of the employes of the railroad, not amounting to wilfulness on their part. A person so walking upon a railroad track is not free from negligence if he omits to keep watch of the movements of the train, relying upon a rule or custom of the employes of the railroad, to give a signal for the moving of the train. The expectation that such signal would be given does not relieve a person in such situation from constant watchfulness for his safety. *Baltimore & Ohio R. Co. v. Depew*, 40 Ohio St. 121; *Richmond, &c. R. Co. v. Anderson*, 31 Gratt. (Va.) 312. In this case BURKE, J., said: "Negligence is the gist of the action. If the injury which resulted in the death of the plaintiff's intestate was occasioned by the negligence of the defendant, and solely by such negligence, there can be no doubt of the plaintiff's right to recover damages for the injury; but if there was negligence on the part of the defendants, and also on the part of the deceased, and the negligence of the latter contributed to the injury, the right of recovery depends upon the circumstances." *Richmond, &c. R. Co. v. Morris*, 31 Gratt. (Va.) 200; *Northern Central R. Co. v.*

State, 17 Md. 8; *Baltimore & Ohio R. Co. v. State*, 33 Md. 542; *Brown v. Hannibal, &c. R. Co.*, 50 Mo. 461; 11 Am. Rep. 420; *Central R. & B. Co. v. Davis*, 19 Ga. 437; *Isbell v. New York, &c. R. Co.*, 25 Conn. 556; *Macon, &c. R. Co. v. Davis*, 18 Ga. 679; *Herring v. Wilmington, &c. R. Co.*, 10 Ired. (N. C.) 402; *Balt. & Ohio R. Co. v. Sherman*, 30 Gratt. (Va.) 602; *Baltimore, &c. R. Co. v. Whittington*, 30 Gratt. (Va.) 805. See also, holding the doctrine stated in the text, *Terre Haute, &c. R. Co. v. Graham*, 46 Ind. 239; 95 Ind. 286; 48 Am. Rep. 719; *Jeffersonville R. Co. v. Goldsmith*, 47 Ind. 43; *Tonawanda R. Co. v. Munger*, 5 Denio (N. Y.), 255.

² *Lake Shore, &c. R. Co. v. Miller*, 25 Mich. 279.

See as upholding the same views, *Harris v. Whelhoer*, 75 N. Y. 169; *Frech v. Philadelphia, &c. R. Co.*, 39 Md. 574; *Cleveland, &c. R. Co. v. Terry*, 8 Ohio St. 570; *St. Louis, &c. R. Co. v. Manly*, 58 Ill. 300; *Schierhold v. North Beach, &c. R. Co.*, 40 Cal. 447; *Illinois Central R. Co. v. Hutchinson*, 47 Ill. 408; *Poole v. North Carolina R. Co.*, 8 Jones (N. C.), 340. But there is no presumption that a young child or a drunken person will heed the signals of danger, and the engineer is bound to stop the train if he sees that they make no attempt to leave the track. *Kenyon v. N. Y. Central R. Co.*, 5 Hun (N. Y.), 479; *Sheridan v. Brooklyn, &c. R. Co.*, 36 N. Y. 39; *Colt v. Sixth Ave. R. Co.*, 33 N. Y. Superior Ct. 189; *Philadelphia, &c. R. Co. v. Spearen*, 47 Penn. St. 300; *Daniels v. Clegg*, 28 Mich. 32; *Robinson v. Cone*, 22 Vt. 213; *Chicago, &c. R. Co. v. Dewey*, 26 Ill. 255. Infirm persons, however, have no business to expose themselves upon a railway track. *Gonzales v. N. Y. Central R. Co.*, 38 N. Y. 440; *Central R. Co. v. Filder*, 84 Penn. St. 226; *Evansville, &c. R. Co. v. Hiatt*, 17 Ind. 102; *Cogswell v. Oregon, &c. R. Co.*, 6 Ore. 417.

movements, to get entirely out of the way before the approach of the engine; or if he sees a man walking along upon the track at a considerable distance ahead, and is not aware that he is *deaf* or *insane*, or from some other cause insensible of the danger;¹ or if he sees a team or man approaching a crossing too near the train to get over in time, he has a right to rely upon the laws of Nature and the ordinary course of things, and to presume that the man driving the team or walking upon the track has the use of his senses, and will act upon the principles of common-sense and the motive of self-preservation common to mankind in general, and that they will therefore get out of the way, — that those on the track will get off, and

¹ In the case of *Michigan Central R. Co. v. Campeau*, 35 Mich. 470, the plaintiff was injured by being struck by an engine while he was walking on the company's right of way at a point where there were five parallel tracks, constructed near each other. Plaintiff stepped off one track to avoid an approaching engine, and was struck by another engine coming on one of the other tracks. This second engine might have easily been seen for some distance if plaintiff had looked. It appeared that this engine was being moved at a greater rate of speed than was allowed by law, and that the persons in charge of it acted recklessly in not giving any signals or keeping a lookout. The court held, however, that such facts would not render the defendant liable; the plaintiff, in being on the track, was guilty of contributory negligence, and had no right to recover except upon proof of wilful wrong on the part of defendant. See, as sustaining and applying this rule, *Nave v. Alabama Gr. So. R. Co.* (Ala.), 11 So. Rep. 391; *Reardon v. Missouri Pac. R. Co.* (Mo.), 21 S. W. Rep. 731; *Garteiser v. Galveston, &c. R. Co.* (Tex. App.), 21 S. W. Rep. 631. In the case of *Louisville, &c. R. Co. v. Hairston* (Ala.), 11 So. Rep. 300, the deceased was killed while walking between the tracks; it appeared that at the time of the injury the train was moving at a rate of speed greatly in excess of that allowed by statute at such places. The court held, however, that deceased was a trespasser, and his administrator had no right of recovery for his death in the absence of proof that the injury was wilful. See also *Louisville, &c. R. Co. v. Kellems* (Ky.), 21 S. W.

Rep. 230; *Gregory v. Southern Pac. R. Co.* (Tex. Civ. App.), 21 S. W. Rep. 417. In the case of *Garteiser v. Galveston, &c. R. Co.* (Tex. Civ. App.), 21 S. W. Rep. 631, the plaintiff was an employé of a contractor of the company, and with other employés was on his way to work riding on a hand-car. While they were crossing a bridge, and were half the way over, an engine appeared at the end of the bridge coming towards them; to avoid the collision, plaintiff with his companions jumped from the car, and was himself severely injured. The morning was foggy, and the engine on approaching the bridge came round a curve. There being a highway-crossing between this curve and the bridge, it was the statutory duty of the engineer to have sounded the whistle and bell, both of which signals were omitted. The court held that it was error to instruct the jury that the duty to give these signals was one owing only to persons crossing the track on the highway; it was held also that plaintiff was not a trespasser, and was entitled to recover upon proof that he had exercised ordinary care to avoid the injury. The court went on to say: "All that the law required of the appellant on the occasion in question was the exercise of such care for his own safety as ordinarily prudent persons would have exercised under like circumstances, and the court could not legitimately tell the jury that such care was the 'highest degree of care.'" *Citing Railway Co. v. Dyer*, 76 Tex. 156; 13 S. W. Rep. 377; *Railway Co. v. Garcia*, 75 Tex. 583; 13 S. W. Rep. 223. *Compare Artusy v. Railway Co.*, 73 Tex. 191; 11 S. W. Rep. 177; *Brown v. Griffin*, 71 Tex. 654; 9 S. W. Rep. 546.

those approaching it will stop in time to avoid the danger ; and he therefore has the right to go on without checking his speed until he sees that the team or man is not likely to get out of the way, when it would become his duty to give extra alarm by bell or whistle, and if that is not heeded, then, as a last resort, to check his speed or stop his train, if possible in time to avoid disaster. If, however, he sees a child of tender years upon the track, or any person known to him to be, or from his appearance giving him good reason to believe that he is, insane or badly intoxicated, or otherwise insensible of danger or unable to avoid it, he has no right to presume that he will get out of the way, but should act upon the belief that he might not, or would not, and he should therefore take means to stop his train in time. A more stringent rule than this, — a rule that would require the engineer to check his speed or stop his train whenever he sees a team crossing the track or a man walking on it, far enough ahead to get out of the way in time, until he can send ahead to inquire why they do not ; or which would require the engineer to know the deafness or blindness, or acuteness of hearing or sight, or habits of prudence or recklessness, or other personal peculiarities, of all those persons he may see approaching, or upon the track, and more especially of all those who may be approaching a crossing upon the highway, though not seen, — any such rule, if enforced, must effectually put an end to all railroads as a means of speedy travel or transportation, and reduce the speed of trains below that of canal-boats forty years ago ; and would effectually defeat the object of the legislature in authorizing this mode of conveyance. But how are railroad companies, or their engineers or employés, to know the personal peculiarities, the infirmities, personal character, or station in life, of the hundreds of persons crossing or approaching their track ? By inspiration, or intuition ? And if they do not know, then how and why shall the company be required to run their road or regulate their own conduct, or that of their servants, by such personal peculiarities of strangers of which they know nothing ? These questions suggest their own answers." And this we believe, is, an accurate statement of the duty of railway companies under the circumstances referred to.

In an Indiana case,¹ a charge to the jury, in an action to recover for an injury by a trespasser on the track, that there could be no

¹ *Terre Haute, &c. R. R. Co. v. Graham, Fayette, &c. R. R. Co. v. Huffman*, 28 95 Ind. 286 ; 48 Am. Rep. 719. In *La. Ind.* 287, the court said : "The complaint

recovery "unless it was wilfully, *wantonly*, and recklessly done," was held erroneous, inasmuch as it conveyed an idea that there is a middle ground of liability between ordinary negligence and wilfulness upon which there might be a recovery notwithstanding the plaintiff's negligence, when really in order to entitle the plaintiff to a recovery, the injury must have been "wilfully" inflicted.¹

The same rule prevails as to persons trespassing upon railway bridges, and other parts of the road where they have no right to be, and where the company has no reason to expect that persons will go.² A person who enters upon the track or premises of a railway

is fatally defective. After admitting facts which show negligence of the plaintiff, contributing to the injury, it charges that the defendant in a wanton and careless manner ran said locomotive, etc. The word 'wanton' does not mean wilful. It is defined by Webster as follows: 'Wandering or roving in gayety or sport; 'licentious,' 'lewd,' 'extravagant,' etc. The word adds no force to the charge that the act was done in a careless manner.' See also *Jeffersonville, &c. R. Co. v. Bowen*, 40 Ind. 545; 49 Ind. 154; *Evansville, &c. R. Co. v. Wolf*, 59 Ind. 89; *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335; *Johnson v. Boston & Maine R. Co.*, 125 Mass. 75; *Heil v. Glanding*, 42 Penn. St. 493; *Gillis v. Pennsylvania R. Co.*, 59 Penn. St. 129; *Jeffersonville, &c. R. Co. v. Goldsmith*, 47 Ind. 43; *Illinois Central R. Co. v. Godfrey*, 71 Ill. 500; *Peoria Bridge Ass'n. v. Loomis*, 20 Ill. 235.

¹ See also *Baltimore, &c. R. Co. v. Depew*, 40 Ohio St. 121. In *Johnson v. Boston & Maine R. Co.*, 125 Mass. 75, it was held that if a person buys a ticket which entitles him to a passage over a railroad from A. to C., and stops at B., intending to resume his journey to C. the same day, leaves the station at B., and afterward, while on his way to the station of another railroad corporation near by, for the purpose of meeting his son, returns to the station which he had left, and is injured while crossing the tracks through the negligence of the railroad corporation which had sold him the ticket, when he might have crossed the railroad at a high-

way crossing, he is a trespasser, and cannot, in the absence of evidence that the negligence was wilful, maintain an action for the injury, although the defendant's platforms extend between two highways crossing the track, and people have been accustomed to pass from the station on one railroad to that on the other at that point without objection by the corporation, and although his ticket does not forbid stopping over at B. In *Nicholson v. Erie R. R. Co.*, 41 N. Y. 525, the plaintiff's intestate was run over and killed by defendant's cars while he was crossing the track on their premises, not at a public crossing, but where persons had been accustomed to cross without objection. It was held that no action could be maintained. *Gramlich v. Wurst*, 86 Penn. St. 74; 27 Am. Rep. 684; *McAlpin v. Powell*, 70 N. Y. 126; 26 Am. Rep. 555; *St. Louis, &c. R. R. Co. v. Bell*, 81 Ill. 76; 25 Am. Rep. 269; *Keefe v. Milwaukee & St. Paul R. R. Co.*, 21 Minn. 207; 18 Am. Rep. 393; *Gray v. Scott*, 66 Penn. St. 345; 5 Am. Rep. 371; *Severy v. Nickerson*, 120 Mass. 306; 21 Am. Rep. 514; *Illinois Central R. R. Co. v. Godfrey*, 71 Ill. 500; 22 Am. Rep. 112; *Nicholson v. Erie R. R. Co.*, 41 N. Y. 525.

² In *Mason v. Missouri Pacific R. R. Co.*, 27 Kan. 83, the plaintiff's wife was injured by a car of the defendant while she was attempting to walk over a trestle-work or bridge crossing a creek in a city. The bridge was built exclusively for the railroad, and had no railings nor foot-planks, and was thirty feet above the water; and although at the point in ques-

by license is not a trespasser;¹ but the company owes him no special duty because he has been permitted to be there, beyond that which it owes to the public generally.² The licensee has no reason to expect that the company will graduate the running of its trains to suit his purposes or convenience, and can only expect from it

tion the track ran through lands platted for a public street, yet the street had not been graded nor improved, and the track was considerably elevated above the surface of the adjoining land. The court held that the exclusion of evidence to show a custom of foot-passengers to cross the bridge was not error, saying: "It cannot be well said that such trestle-work and bridge, as constructed, were either in law or in fact a public street. As there was no attempt to show that either the injured party or any other person was invited by the company to cross or travel upon the structure over the creek, or that the injured party was upon the structure with the consent of the company, the fact that other parties had crossed upon it did not make it less dangerous or less negligent for the wife of the plaintiff to attempt to do so. This is not a case where the legal right of the railway company and that of the public to use such trestle-work are about equal. The embankment and trestle-work are so much elevated above the street, and are so erected for the purpose of operating thereon cars and engines only, as to apparently forbid foot-passengers crossing the creek at this place; therefore we do not think that the railway company was bound to operate its cars with reference to foot-men undertaking the peril of attempting to step from tie to tie in crossing, the long span over the stream, especially in view of the frequent running of the cars on the track of such trestle-work. Counsel for plaintiff contends that as the bridge lay wholly within two of the streets of the city of Wyandotte, called Front street and Was street, which cross each other at the point where the bridge crosses the creek, and as a street belongs to the public, from the centre of the earth to the heavens above, persons had the right to climb up the embankment, and to use the trestle-work as a public street of the city. Not

so. The embankment and trestle-work were the property of the railway company. They were used for the purposes of the company in operating its cars and trains, and so built and constructed, as to render any travel thereon perilous, even without the operation of cars upon the track. . . . The railway company was in full occupation of it, and the public had no right to cross over such a dangerous structure, and knowing it to be unsafe for travel, to claim exemption from all negligence on their part, and charge the railway company with the fruits of their own imprudence. . . . Whenever a party infringes upon the rights of others, this negligence, or this wrong-doing, as the case may be, absolves others from using ordinary care and diligence toward such party. In brief, they are under no legal or moral obligation to be cautious and circumspect toward one who infringes upon their rights. *Union Pacific R. R. Co. v. Rollins*, 5 Kan. 167. A railway company has the exclusive right to occupy, use, and enjoy its railway tracks, bridges, and trestle-work, and such exclusive right is absolutely necessary to enable such a company to properly perform its duties, and any person going upon, or using or occupying the track or bridge of a railway company without the consent of the company, is held in law to be there wrongfully, and therefore to be a trespasser. . . . Therefore the instruction that the railway company was liable only for such negligence so gross as to amount to wantonness was a correct declaration of the law to the jury." See also *Tennbrook v. South Coast, &c. R. R. Co.*, 59 Cal. 269.

¹ *Harty v. N. Y. Central R. R. Co.*, 42 N. Y. 468; *Patterson v. Philadelphia, &c. R. R. Co.*, 4 Houst. (Del.) 103; *Illinois, &c. R. R. Co. v. Hammer*, 72 Ill. 347.

² *Hounsell v. Smyth*, 7 C. B. N. s. 731.

such consideration and ordinary care as it owes to the general public and the licensee is bound to exercise the highest care to shield himself from injury.¹

Of course, this rule requires the company, where there is reason to apprehend that a person seen upon the track will not heed the signals of danger and take himself out of the way of the train, to use reasonable diligence to stop the train and avert the serious consequences likely to ensue from failure to do so; but this condition, as we have seen, does not apply, as a rule, except where it is observable that the person is not in possession of his faculties,² or is so young that it cannot be reasonably expected that he will avoid the threatened danger. No higher degree of care is required of young children than might be expected from those of their age, and it is generally held that contributory negligence is not imputable to them;³ and

¹ *Matz v. N. Y. Central R. Co.*, 1 Hun (N. Y.), 417; *Nicholson v. Erie R. Co.*, 41 N. Y. 526; *Ill. Central R. Co. v. Godfrey*, 71 Ill. 500; *Aurora Branch R. Co. v. Grimes*, 13 Ill. 585; *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180; *Steele v. Central R. Co.*, 43 Iowa, 109; *Baltimore, &c. R. Co. v. Boiler*, 38 Md. 568; *Kay v. Penn. R. Co.*, 65 Penn. St. 269; *Hicks v. Pacific R. Co.*, 64 Mo. 630; *Penn. R. Co. v. Lewis*, 79 Penn. St. 53; *Bernhard v. Rensselaer, &c. R. Co.*, 1 Abb. Ct. App. Dec. (N. Y.) 131; *Lygo v. Newbold*, 9 Exchq. 302; *Tomely v. Chicago, &c. R. Co.*, 53 Wis. 326.

² *Ante*, p. 1456, 1457.

³ In *Birge v. Gardiner*, 19 Conn. 507, the defendant having set up a gate on his own land, by the side of a lane, through which the plaintiff, a child between six and seven years of age, with other children in the same neighborhood, were accustomed to pass from their places of residence to the highway, and *vice versa*, the plaintiff, in passing along such lane, without the liberty of any one, put his hands on the gate and shook it, in consequence of which it fell on him and broke his leg; in an action for this injury, the court instructed the jury, that if the defendant was guilty of negligence, he was liable for the injury, unless the plaintiff, in doing what he did, was guilty of negligence, or misbehavior, or of the want of proper care and caution; and in determining this

question, they were to take into consideration the age and condition of the plaintiff, and whether his conduct was not the result of childish instinct and thoughtlessness; after a verdict for the plaintiff, it was held that the charge was unexceptionable. And the court also held that the fact of the plaintiff's being a trespasser in the act which produced the injury complained of, will not necessarily preclude him from a recovery against a party guilty of negligence. *Neal v. Gillett*, 23 Conn. 437; *Norwich, &c. R. R. Co.*, 26 id. 591; *Bronson v. Southbury*, 37 Conn. 199; *Brown v. European, &c. R. R. Co.*, 58 Me. 384; *Lynch v. Smith*, 104 Mass. 52; *Elkins v. Boston, &c. R. R. Co.*, 115 Mass. 190; *Washington, &c. R. R. Co. v. Gladman*, 15 Wall. (U. S.) 401; *Sioux City, &c. R. R. Co. v. Stout*, 17 id. 657; *McMillan v. Burlington, &c. R. R. Co.*, 46 Iowa, 231. An infant, to avoid the imputation of negligence, is bound only to exercise that degree of care which can reasonably be expected of one of its age. *Byrne v. New York Central & Hudson River R. R. Co.*, 83 N. Y. 620; 14 Hun (N. Y.), 322; *Rockford, Rock Island, & St. Louis R. R. Co. v. Delaney*, 82 Ill. 198; *Mobile & Montgomery R. R. Co. v. Crenshaw*, 65 Ala. 566; *Chicago & Alton R. R. Co. v. Lammert*, 12 Brad. (Ill.) 408; *Dowling v. New York Central R. R. Co.*, 90 N. Y. 670; *Chicago & Alton R. R. Co. v. Murray*, 71 Ill. 601. Thus,

that, when seen upon the track a sufficient length of time in which to stop the train, the company is bound to do so, or it will be chargeable with the consequences. But in this class of cases the question is for the jury whether the company was guilty of negligence in view of the circumstances.¹ The degree of care required of a child, de-

it has been held that an infant under six years of age is not of sufficient discretion to be guilty of contributory negligence. *Bay Shore R. R. Co. v. Harris*, 67 Ala. 6. Generally, the question whether the capacity of a child is such that he can be charged with contributory negligence is one of fact, which must be determined by the jury. *Moore v. Metropolitan R. R. Co.*, 2 Mackey (D. C.), 437. But where a child is the plaintiff, whether the fault is that of the child or the negligence of the person having the care of the child, the doctrine of contributory negligence is by some of the cases held to apply. *Hathaway v. Toledo, Wabash, & Western R. R. Co.*, 46 Ind. 25; *Toledo, Wabash, & Western R. R. Co. v. Miller*, 76 Ill. 278. See also *Higgins v. Jeffersonville, &c. R. R. Co.*, 52 Ind. 110. But the better rule is that negligence cannot be imputed to a child not of sufficient capacity or discretion to understand the danger and guard against it. *Pittsburgh, &c. R. R. Co. v. Caldwell*, 74 Penn. St. 421; *Pennsylvania Co. v. James*, 81½ Penn. St. 194; *Government St. R. R. Co. v. Hanlon*, 53 Ala. 70; *Cleveland, &c. R. R. Co. v. Manson*, 30 Ohio St. 451; *Evansich v. G., C., & S. F. R. R. Co.*, 57 Tex. 126. A child two years and ten months old cannot be guilty of contributory negligence. Neither is it bound by the neglect of its parents. *Norfolk & Petersburg R. R. Co. v. Ormsby*, 27 Gratt. (Va.) 455. See also *Government St. R. R. Co. v. Hanlon*, 53 Ala. 70; *Casey v. N. Y. Central R. R. Co.*, 78 N. Y. 518; *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 445; *McGovern v. N. Y. Central R. R. Co.*, 67 N. Y. 417; *Reynolds v. N. Y. Central R. R. Co.*, 58 N. Y. 248; *Thurber v. Harlem, &c. R. R. Co.*, 60 N. Y. 326; *Haycraft v. Lake Shore, &c. R. R. Co.*, 64 N. Y. 638; *Costello v. Syracuse, &c. R. R. Co.*, 65 Barb. (N. Y.) 92; *Walter v. Chicago, &c. R. R. Co.*, 41

Iowa, 71; *Daniels v. Clegg*, 28 Mich. 32; *Schmidt v. Milwaukee, &c. R. R. Co.*, 23 Wis. 186; *Boland v. Missouri R. R. Co.*, 36 Mo. 484; *O'Flaherty v. Union R. R. Co.*, 45 Mo. 70; *Donahue v. Vulcan Iron Works*, 7 Mo. App. 447; *Ranch v. Lloyd*, 31 Penn. St. 358; *Philadelphia, &c. R. R. Co. v. Hassard*, 75 Penn. St. 367; *Penn. R. R. Co. v. Kelly*, 31 id. 372; *Crissey v. Hestonville, &c. R. R. Co.*, 75 Penn. St. 83; *Oakland R. R. Co. v. Fielding*, 48 Penn. St. 320; *Kay v. Penn. R. R. Co.*, 65 Penn. St. 269; *Glassey v. Hestonville, &c. R. R. Co.*, 57 Penn. St. 172; *Baltimore, &c. R. R. Co. v. State*, 30 Md. 47; *Baltimore City Pass. R. R. Co. v. McDonnell*, 43 Md. 534; *Chicago, &c. R. R. Co. v. Becker*, 84 Ill. 483; *Rockford, &c. R. R. Co. v. Delaney*, 82 Ill. 198; *Chicago, &c. R. R. Co. v. Becker*, 76 Ill. 25; *Kerr v. Forque*, 54 Ill. 482.

¹ In *Frick v. St. Louis, &c. R. R. Co.*, 75 Mo. 595, a child two years old was killed on a railroad, and it was held that the defendant was not entitled to an instruction that it is liable only in case its servants failed to exercise ordinary care to prevent the injury after they became aware of the danger to which the plaintiff was exposed. The court said that the qualification in the last clause would be proper in the case of an adult, but not in case of a child. See also, holding that there can be no recovery where negligence is not imputable to the company, as where the child could not be seen in season to stop the train, *Phila., &c. R. R. Co. v. Hummell*, 44 Penn. St. 375; *Phila., &c. R. R. Co. v. Long*, 75 Penn. St. 257; *Bulger v. Albany R. R. Co.*, 42 N. Y. 459; *Meyers v. Midland Pacific R. R. Co.*, 2 Neb. 319; *Citizens' St. R. R. Co. v. Carey*, 56 Ind. 396; *Penn. R. R. Co. v. Morgan*, 82 Penn. St. 134; *Hestonville, &c. R. R. Co. v. Connell*, 88 Penn. St. 520; *Chicago, &c. R. R. Co. v. Becker*,

pend upon its age and intelligence, and it is a question for the jury in each case whether the care exercised by it in a given case was

76 Ill. 25. In another Missouri case, in an action by a parent for an injury received by his son upon a turn-table belonging to a railroad, causing his death, it appeared that the son, aged six, was allowed to go to a circus in charge of his sister, aged eleven, and was left by the latter near the circus-ground, neither she nor their mother knowing that there was a turn-table in the vicinity. It was held that the question of contributory negligence was properly left to the jury. A child playing with others upon an unlocked turn-table, which was under the control of a railroad and in a public locality, was injured by another of the children revolving it. Children had been accustomed to play on it, and had been injured to the knowledge of the company. It was held that the company was liable although not owning the turn-table. *Nagel v. Missouri Pacific R. R. Co.*, 75 Mo. 653; 42 Am. Rep. 418. A boy ten years old attempted to board a train while it was in motion. The train was not a passenger train, and in no event would the boy have had a right to get on it. There was no negligence on the part of any of the trainhands. It was held that a verdict for the boy in his suit against the company for an injury thus sustained should be set aside. *Chicago & Alton R. R. Co. v. Lammert*, 12 Ill. App. 408. The company is not bound to keep guards stationed around its tracks, turn-tables, cars, &c., to keep children from getting injured upon them. *Central Branch, &c. R. R. Co. v. Henigh*, 23 Kan. 347; *Chicago, &c. R. R. Co. v. McLaughlin*, 47 Ill. 265; *Chicago, &c. R. R. Co. v. Stamps*, 69 Ill. 409. That a boy six years old was upon a railroad track near a street-crossing does not establish the fact of contributory negligence, although it is shown that the boy's father saw him going toward the track a short time before he was struck by a train. *Johnson v. Chicago & Northwestern R. R. Co.*, 56 Wis. 274. The negligence of a parent or other person rightfully having charge or control of an infant *non sui juris* is imputable to the infant. *Fitzgerald v. St. Paul, Min-*

neapolis, &c. R. R. Co., 29 Minn. 336; 43 Am. Rep. 212. In *Ex parte Stell*, 4 Hughes (U. S. C. C.), 172, a child was seen upon a railroad track by the engineer of an approaching train, then 450 feet away. Everything possible was done to stop the train, but it could not be stopped within that distance. Common brakes were used on the train. It was held that there was no evidence of negligence to submit to a jury. In another case before the same court, a lame boy, eight years old, climbed upon an engine as it was moving slowly through a city street. The engineer at once stopped the engine with a jerk, the fireman calling to the boy to hold on. The boy either lost his hold or jumped, and was killed. It was held that there was nothing to submit to a jury. *Miles v. Atlantic, Mississippi, &c. R. R. Co.*, 4 Hughes (U. S. C. C.), 172. In a New York case, the plaintiff's intestate, seven years old, and another boy, attempted to cross the track in front of a train. Two flagmen did everything in their power to stop the boys. The plaintiff's intestate fell on the track, and, although the flagman tried to pull him off, he was struck and killed. The case was submitted to a jury, who found for the plaintiff. It was held that contributory negligence was shown, and that a nonsuit should have been entered. *Wendell v. New York Central, &c. R. R. Co.*, 91 N. Y. 420. But in the case of a child of tender years, where the circumstances would justify an inference that he was misled or confused in respect to the actual situation, and that his conduct was not unreasonable in view of those circumstances and his age, the question of contributory negligence is for the jury, although he may have omitted some precaution which in the case of an adult would be deemed conclusive evidence of negligence. *Barry v. New York Central, &c. R. R. Co.*, 92 N. Y. 289. In an action by a child less than two years old, for injuries received by being run over by a street-car, evidence that he and his sister, about three years old, frequently played in the street unattended was held

such as in view of the age and intelligence of the child it ought to have exercised.¹ It is not enough to show that the child was upon

incompetent. *Smith v. Grand Street, Prospect Park, &c. R. R. Co.*, 11 Abb. (N. Y.) N. Cas. 62. In a Pennsylvania case the defendant owned an abandoned and unenclosed brickyard, with an open and unguarded, but plainly visible, well in it, about 80 feet from the nearest highway. The public were accustomed to cross the yard, but the paths were somewhat distant from the well. The nearest dwelling-house was 300 yards distant. The lot was a common place of resort for children and adults. A boy eight years old was found drowned in the well, having evidently been fishing in it by daylight. It was held that no action would lie. *Gillespie v. McGowan*, 100 Penn. St. 144; 45 Am. Rep. 365. In Alabama, the courts hold that a child under six years old cannot be guilty of contributory negligence. *Bay Shore R. R. Co. v. Harris*, 67 Ala. 6. In a Louisiana case, a municipal ordinance required drivers of street-cars to keep the boys off the cars. While a driver was at the rear of his car performing this duty, a child two years old placed itself inside the fore-leg of the mule drawing the car. The position of the child was such that the driver could have seen it only by stooping. He started up the mule, and the child was killed. It was held that there was no liability on the part of the company. *Hearn v. St. Charles Street R. R. Co.*, 34 La. An. 160. In Texas, a railroad company is liable for injuries sustained by a child seven years old, while playing on the company's turn-table, which had been left unlocked and unguarded near a public street, the company having knowledge that children were accustomed to play on the turn-table. *Evansich v. Gulf, Colorado, &c. R. R. Co.*, 57 Tex. 126; 44 Am. Rep. 586. In another case a two-years old child of the woman who boarded and kept the section-hands on a railroad undergoing construction, got on to the track, between which and the section-house was no fence, and was run over and its arm cut off. The preponderance of the testimony was to the effect that the engineer and train-hands used every precaution in looking out, in trying

to stop the train, and to rescue the child, which was seen before it was struck; but there was evidence from which the jury might have inferred that an insufficient lookout was kept. It was held that a verdict of \$8,000 would not be disturbed. *Texas & Pacific R. R. Co. v. O'Donnell*, 58 Tex. 27.

¹ In Pennsylvania a charge that: "If the boy (being on the track) had sufficient judgment and discretion to know his danger, and did not exercise the ordinary care that one of his age and maturity should, he was guilty of such negligence as would prevent him from recovering," etc., was held proper. *Pennsylvania R. R. Co. v. Lewis*, 79 Penn. St. 33. In a Maryland case, where a boy, in attempting to pass under a car moving along the street, was run over and seriously injured, it was held that he was not entitled to recover damages from the railway company for the injury sustained; as the attempt to pass under the car while in motion was such an act of carelessness as amounted in law to contributory negligence. The child in this case was five years and nine months old. *McMahon v. Northern Central R. R. Co.*, 39 Md. 438. In a New York case, while an engine-driver was backing his engine northerly across a street in Schenectady at the rate of two miles an hour, to take in water, the plaintiff, a boy under four years of age, ran easterly on the south side of the street towards the engine, approached near to it, turned northerly, ran alongside and beyond it, then turned across the track in front of it, was struck by it and injured. It was held that the railway company was not liable. *Schwier v. New York Central & Hudson River R. R. Co.*, 15 Hun (N. Y.), 572. In an action against a railroad company for running over a child which had strayed upon the track, it appeared that the child was seen by the engineer in time to avoid the collision, but was mistaken for something else; and that by the exercise of a proper degree of care and caution, he might, after first observing the object, have discovered that it was a child in time to stop the train before the accident occurred. It was held

the track, and was killed by a passing train or locomotive, but it must also be shown *that it was killed or injured through the negligence*

that, although some negligence might have been attributable to those having charge of the infant, it was not the proximate cause of the casualty, and the company would be liable. *Isabel v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 475. In a New York case the plaintiff, a girl in her seventeenth year, while crossing defendant's tracks, five in number, at a street crossing, had passed over two tracks and was standing near the third track awaiting the passage of an express train. She looked once up and down the track as she stopped. While she waited, an engine which approached without signal, ran upon and injured her. It was held that the same degree of caution was not required of her as of an older person, and the question whether she was negligent was one for the jury. *Haycroft v. Lake Shore, &c. R. R. Co.*, 64 N. Y. 636. In a Pennsylvania case a boy ten years old, bright, intelligent, strong, healthy and of rather exceptional capacity, was sent by his parents upon an errand along a street in a populous suburb of a city on which a railroad track was constructed. He was killed by a passing train, moving at a very high rate of speed, without whistle or other signal. The only witness of the accident declared that he saw the boy walking upon the outer ends of the sleepers a single instant before he was struck. The street was of ample breadth and had sufficient sidewalks, and the errand upon which the boy was sent did not require him to cross the track at the point where he was killed. In an action by the boy's parents against the railway company to recover damages for his death, the plaintiffs adduced evidence which showed the facts to be as above. The court awarded a nonsuit on the ground of the boy's contributory negligence, and it was held that this was not error. *Moore v. Pennsylvania R. R. Co.*, 99 Penn. St. 301. In a California case, an action was brought by the father to recover damages for loss of five children, ranging from five to sixteen years old, killed in a collision with a train belonging to defendant. The children killed were returning home from a May-day pic-

nic, in a light wagon drawn by one gentle horse. The oldest, a girl of sixteen, was driving. She was acquainted with the highway over which she was passing and with the point at which it was crossed by the track. Several persons in vehicles preceded her on the highway, and had crossed over, the nearest one being some four hundred feet in advance; and she was followed by a boy thirteen years old, at a considerable distance in the rear. On the track, about three hundred and thirty-five feet from the point of crossing, was a covered bridge. On either side of the track, between the bridge and its intersection with the highway, were a number of trees planted by the defendant, and which had attained such size, as according to some of the testimony, prevented—in connection with some of the neighboring orchards—an approaching train from being seen by those travelling the highway, until the traveller should reach a point very close to the track. There was also evidence going to show that at the time of the accident the train was slightly behind time, and was running at the rate of from thirty-three to thirty-five miles an hour, whereas the rate at which the trains usually ran at that point was from twenty-five to thirty miles an hour, and there was some evidence tending to show that the bell was not rung nor the whistle blown. It was held that this evidence, especially that relating to the increased speed, under the circumstances, tended to show negligence on the part of the defendant, and it was for the jury to pass upon the effect of this testimony, which was sufficient to justify the verdict. *Nehrbas v. Central Pacific R. R. Co.*, 62 Cal. 320. In a New York case, in an action for the negligent killing of plaintiff's intestate, the evidence showed that he was an intelligent boy thirteen years of age, living near defendant's road, which he crossed daily. He was familiar with the road and the manner of running the trains; the tracks (of which there were two) crossed the highway nearly at right angles. Upon the day of his death, the boy was last seen going from school at noon, toward the tracks, and about one

of the company ; and to establish this, it must be shown that it could have been seen by the engineer a sufficient distance from the place of the

hundred feet therefrom ; a moment thereafter two trains, going in opposite directions, passed each other at the crossing ; after the passage of the trains he was found dead in the cattle-guard between the tracks. At a point in the highway, ten feet from the crossing, the engine of the train by which, as the circumstances indicated, the deceased was killed, could have been seen seventy-five feet distant. It was a fair day, with but little wind. As the evidence tended to show, no signal was given of the approach of the train by which he was killed. It was held, that the proof was insufficient to sustain a verdict for plaintiff, as it did not warrant a finding that there was no negligence on the part of the deceased. *Reynolds v. New York Central, &c. R. R. Co.*, 58 N. Y. 248 ; *Day v. Flushing, North Shore, &c. R. R. Co.*, 75 N. Y. 610. In a Kentucky case it was held that a girl twelve years of age must exercise what is to be regarded as a reasonable precaution for one of her years for her own safety, and that it is her duty to take notice of the usual and customary signals given by trains on their approach at crossings. *Paducah, &c. R. R. Co. v. Hoehl*, 12 Bush (Ky.), 41. In Pennsylvania it is held that a child of the age of fourteen years is presumed to have sufficient capacity to be sensible of danger and to have the power to avoid it ; and this presumption will stand until overthrown by clear proof of the absence of such discretion as is usual with children of that age. *Nagle v. Allegheny Valley R. R. Co.*, 88 Penn. St. 35. In New York in a suit for damages for alleged negligence causing the death of W., plaintiff's intestate, who was killed at a crossing on the defendant's road, in the city of S., it appeared that the deceased was a bright, active boy, seven years old, considered competent by his parents to go to school and on errands alone. He was in the habit of crossing the railway at the place where the accident happened ; he had been stopped while attempting to cross by the flagmen stationed at that point, and been before cautioned by them against attempting to

cross in front of an approaching train. Shortly before the accident the deceased was standing near the flagman's shanty with a companion, on the street, fifty-one feet from where he was struck ; the approaching train was in plain sight from the place where he stood, for a distance of about five hundred feet from the crossing. The flagmen (two in number) had left the shanty and approached the track in the performance of their duty. The boys both started on a run to cross in front of the train ; the flagmen shouted to them to stop and waved their flags ; one of the flagmen, who stood on the sidewalk ten or fifteen feet distant from the track on which the train was approaching, endeavored to intercept the deceased, but he eluded him and reached the track, where he slipped and fell and was killed. It was held that a motion for nonsuit, on the ground of contributory negligence, was improperly denied. *Wendell v. New York Central, &c. R. R. Co.*, 91 N. Y. 420. But in the case of a boy nine years of age who waited on the westerly side of the defendant's road at a public crossing until a long freight train, which was going in a southerly direction had passed, and then immediately attempted to run across the track, without looking along it to see whether another train was approaching, was struck by the locomotive of a passenger train, going north at a speed of about thirty or thirty-five miles an hour, and which could not be seen because of a curve just south of the crossing, which hid the tracks beyond it, and only about thirty-five seconds elapsed from the time the locomotive passed it until it struck the boy, — it was held that the court properly refused to nonsuit the plaintiff on the ground that the deceased had been guilty of contributory negligence. *Powell v. New York Central, &c. R. R. Co.*, 22 Hun (N. Y.), 56. In a Missouri case, a child two years old, while walking upon a railway track, was injured by the train backing over it ; there was evidence tending to show that no one on the train saw the child, and that if some one on the train had been on the lookout the accident could have been

*disaster so that the train could have been stopped.*¹ Children have no right to be upon the track of a railway, and it is contrary to all the

avoided. It was held that it was not error to refuse to instruct that defendant was not liable for the damages occasioned by the child being run over. *Frick v. St. Louis, Kansas City, & Northern R. R. Co.*, 5 Mo. App. 435. In a Kansas case, it appeared that the Atchison, Topeka, & Santa Fe R. R. Co. owned a side track about four hundred and fifty feet long, situated upon its own right of way, and partially within the limits of Osage City, and near several dwelling-houses. It was not inclosed, and children occasionally played upon it. A coal-shaft was situated by the side of it, about three hundred feet from where it connected with the main track; and from the coal-shaft toward the main track it descended to a point within about seventy-five feet from the main track, and then ascended to the main track, so that cars loaded at the coal-shaft would descend of their own weight to the lowest point, or beyond it, but would finally settle at that point. One car was loaded at the coal-shaft and was allowed to run down the side track to the lowest point, where it settled and remained. Afterward another car was loaded and allowed to run down against the standing car, and in so doing the plaintiff, who was a child two years old, was run over and injured. Whether the employes at the coal-shaft looked to see whether the track was clear, is a disputed question of fact; also, whether they could have seen the plaintiff, is likewise a disputed question of fact; and whether the plaintiff was under or behind the first car, is also a disputed question of fact. But supposing that the employes at the coal-shaft did not look before permitting the second car to move, and supposing that they could not have seen the plaintiff if they had so looked, it was then held that their acts did not constitute negligence *per se*, for which the court could, as a matter of law, declare the railroad company to be responsible. *Atchison, Topeka, & Santa Fe R. R. Co. v. Smith*, 28 Kan. 541. In an Illinois case the deceased was a boy of the age of six or seven years, and it appeared that the defendant's train, which ran over and killed him, was not

running at an unusual rate of speed, or at a rate prohibited by the ordinance of the town; that the whistle was sounded at the proper place, and a bell kept continuously ringing until the crossing was passed where the accident occurred; that the deceased heard the whistle, and, in company with two other boys, started for the crossing; that the other two crossed over the track, and the deceased, in attempting to follow, when the engine was but about sixty feet from him, stumbled and fell upon the track, and that those in charge of the train used every exertion to check the train, which was a heavy freight train, but could not in time to avoid the accident. It was held that a recovery could not be sustained. *Chicago & Alton R. R. Co. v. Becker*, 76 Ill. 25. In a New York case, where the plaintiff's intestate was a boy ten years of age, the train which ran over him went over the crossing followed by a freight train. The bell on the freight train was ringing, and the flagman on the crossing was flagging it, paying no attention to the other. The first train was switched on to another track and backed up on the track the boy attempted to cross. There was no direct proof as to what precautions he took before crossing the track; but it was held that the question of contributory negligence was properly submitted to the jury, and that it was competent for them to infer that the boy, seeing the first train pass, supposed it was going on, and, his attention being attracted by the freight train, he did not observe that the first train had changed its direction, and was backing up. *Barry v. N. Y. Central, &c. R. R. Co.*, 92 N. Y. 289.

¹ *Frick v. St. Louis, &c. R. R. Co.*, 75 Mo. 595; *Ex parte Stell*, 4 Hughes (U. S. C. C.), 157. In Pennsylvania, the courts hold that except at public crossings, where the public has a right of way, a railway company has the exclusive right to its track, and it owes no duty to the father of a child of tender years trespassing thereon, nor to the child itself. *Cauley v. Pittsburgh R. R. Co.*, 99 Penn. St. 398. But a railway company is responsible for an

principles underlying this branch of the law, to hold that the company is bound to respond in damages for an injury to them, when

injury to a child trespassing on its track, *where the injury might have been prevented had the employes of the company used ordinary care in keeping an outlook.* Texas & Pacific R. R. Co. v. O'Donnell, 58 Tex. 27. While the defendant's train was running at an unlawful speed within the limits of a city, a boy nearly ten years of age attempted to cross the track in front of it, and in attempting to do so, was killed. The jury found that he was in a position to see the train before he ran upon the track, and that he had sufficient intelligence to know the danger he was incurring, but also found that, in the circumstances of the case, he could not have avoided the injury by the exercise of ordinary care. There was no evidence tending to show any necessity for his crossing before the train should pass. It was held that the findings are inconsistent, and a judgment against the defendant must be reversed. Haas v. Chicago, &c. R. R. Co., 41 Wis. 44. When a child, who was walking upon a railroad bridge, fell therefrom as a train was passing over, it was held, in an action against the company by his administratrix, that it was not necessary for plaintiff to prove that the child was struck by the train to enable her to recover, but that the defendant was liable if the fall was occasioned by the negligent acts of its employes, in the absence of negligence on the part of child. McMillan v. Burlington, &c. R. R. Co., 46 Iowa, 231. The fact that a boy has been warned to keep away from a depot as a place of danger does not necessarily constitute him a trespasser in going there. He was injured by a projecting timber from a freight car. It was held that the liability of the railway company embraced a want of ordinary care, and was not confined to the result of wanton acts. Hicks v. Pacific R. R. Co., 64 Mo. 430. A statutory provision that "any corporation operating a railway, that fails to fence the same against live-stock running at large, at all points where such right to fence exists, shall be liable to the owner of any stock injured or killed by reason of the want of such fence, or for the value of the property or damage

caused, unless the same was occasioned by the wilful act of the owner or agent," does not impose on the corporation the absolute duty of fencing, and it will not be liable for an injury caused to a child by reason of the absence of a fence alone, no other fault or negligence being charged. Walkenhauer v. Chicago, &c. R. R. Co., 17 Fed. Rep. 136; -Walkenhauer v. Chicago, &c. R. R. Co., 3 McCrary (U. S. C. C.), 553; Fitzgerald v. St. Paul, Minneapolis, &c. R. R. Co., 29 Minn. 336. But in a case before the United States Supreme Court recently decided but not yet reported, — Hayes v. Railroad Co., 31 Alb. L. J. 32, — where a municipal ordinance, granting to a railroad the right of way through the city, requires it to maintain suitable fences, and provides that upon the acceptance by the company of the benefit of the ordinance, covenants shall be executed by both parties, embodying its terms, the enactment is not merely a contract between the public corporation and the railroad, but a positive mandate for the benefit of the individual citizens, any one of whom is entitled to recover damages suffered by him through the neglect of the company to discharge the duties thus imposed. The ordinance requiring such sufficient walls and fences to be maintained as would secure persons and property from danger, "said structure to be of such height as the city council may direct," it was held that the obligation to build sufficient fences was absolute. The right of the council was to give specific directions if it saw proper, and to supervise the work when done, if necessary; but it was matter of discretion, and they were not required to act in the first instance, nor at all, if they were satisfied with the work as executed by the railroad company. The plaintiff, a child, who was playing in a public park strayed upon the railway and was injured; it was held that it was a question of fact for the jury whether the absence of a fence was the cause of the mishap. It is not necessary, in order to charge the company with the responsibility, that its negligence should be the efficient cause of the injury; if the injury

they are there wrongfully, *unless it could have prevented the injury by the exercise of such care as ought to be observed by them in view of the*

would not have occurred but for such negligence, that is enough. 'The nature of the duty,' said COOLEY, J., in *Taylor v. Lake Shore, &c. R. R. Co.*, 45 Mich. 74, 40 Am. Rep. 457, 'and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit. See also *Railroad Co. v. Terhune*, 50 Ill. 151; *Schmidt v. Milwaukee, &c. R. R. Co.*, 23 Wis. 186; *Siemers v. Eisen*, 54 Cal. 418; *Galena, &c. R. R. Co. v. Loomis*, 13 Ill. 548; *Q. & M. R. R. Co. v. McClelland*, 25 id. 140; *St. Louis, &c. R. R. Co. v. Dunn*, 78 id. 197; *Massoth v. Railroad Co.*, 64 N. Y. 521; *B. & O. R. R. Co. v. State*, 29 Md. 252; *Pollock v. Eastern R. R. Co.*, 124 Mass. 158. In an English case, the defendant's line crossed a public foot-path on the level; but the defendant had not erected any gate or stile as provided by 8 and 9 Vict., c. 20, s. 61. The plaintiff, a child of four years and a half old, having been sent on an errand, was shortly afterwards found lying on the level crossing, a foot having been cut off by a passing train; it was held that there was evidence to go to the jury that the accident was caused by the neglect of the defendant to fence. *Williams v. Great Western Ry. Co.*, L. R. 9 Exchq. 157. Where a railroad track is constructed in a populous neighborhood near a city, and children often go upon the track, and a portion of the track has a steep grade down which cars will run with great force when the brakes are loosened, and the persons operating the road loosen the brakes of a car loaded with coal, and let it run down this steep grade, without any person being on the car, or without any means of stopping it, and without first looking to see whether the track was clear, or whether any person was on the track or not, and a child who was on the track was run over and injured, and there is a conflict in the evidence as to whether the child could have been seen by the persons operating the road before they loosened the brakes,

— it was held that the court cannot say, as a matter of law, that the persons operating the road were not guilty of negligence; but it a question of fact, which should be submitted to the jury. *Smith v. Atchison, &c. R. R. Co.*, 25 Kan. 738. Where a boy sitting on trestle-work under one of a train of freight-cars was run over and killed by the starting of the train, an instruction was held proper which declared, as a matter of law, that his position was an unsafe one, without leaving the question to the jury to determine, under all the circumstances. *Osterlog v. Pacific R. R. Co.*, 64 Mo. 421. A child about nine years old was sent by his mother, who resided in Harrisburg, near defendant's railway, on an errand across the road; whilst on the track he was killed by an engine going westward; there were iron-works, and houses for the hands on the opposite side of the track at that point, which was in the outskirts of the city; and the hands of the works and other persons were frequently crossing about the place. East of where the boy was struck was a curve which prevented the engine-driver from seeing him till within too short a distance to stop the train after he was seen. There was no ordinance of the city limiting the rate of running trains at that point. There was evidence that the train was running at a high rate of speed. It was held that whether the train was running at a rate of speed which was safe and prudent under the circumstances was for the jury. *Penn. R. R. Co. v. Lewis*, 79 Penn. St. 33. The mere fact that a boy, between six and seven years old, was upon a railway track at or near a street crossing, even though his father had, a short time previous, seen him going toward the track, is not enough to establish contributory negligence as a matter of law. *Johnson v. Chicago, &c. R. R. Co.*, 56 Wis. 274. But it is negligence in a parent to permit a child between three and four years of age to be upon a railway where trains are frequently passing; and if the child is killed by a train the parent cannot recover damages therefor, unless such killing be done purposely or wilfully. *Jefferson-*

locality. In Massachusetts¹ it is held that a railway company owes no higher duty to an infant trespasser upon its track — as, in the case

ville, &c. R. R. Co. v. Bowen, 49 Ind. 154; *Albertson v. Keokuk & Des Moines R. R. Co.*, 48 Iowa, 292. In a Wisconsin case, it was held that where a boy was killed by an engine in crossing the defendant's track, if it was clear from the undisputed facts that the boy himself, considering his age and intelligence, did not exercise proper care in crossing the track, or that, in view of his tender years, his mother was guilty of contributory negligence in permitting him to go alone on the errand upon which he was sent, the trial court might determine, as a proposition of law, that there could be no recovery. The court instructed the jury that "looking at the case as the person injured in fact was, as to age and intelligence," if he was not "in the exercise of ordinary care and caution in going on the track, but was guilty of negligence in doing so, and by reason thereof was killed," no recovery could be had, although the defendant was running the engine at an unlawful speed; but if he was of such tender years as to be unfit to be allowed to go alone in such a place, and not capable of exercising ordinary care, it was negligence on the part of those having him in charge to allow him to do so; and "if the injury was occasioned or contributed to by reason of his inability to exercise ordinary care," plaintiff could not recover. It was held that there was no error, as against the defendant, in these instructions, nor in a refusal to further charge that if the mother sent the boy across the tracks, and failed to caution him to use care in crossing them, she was guilty of negligence which would prevent a recovery. *Ewen v. Chicago, &c. R. R. Co.*, 38 Wis. 613. When the parents of an infant are unable to give him their personal care, and intrust him to the supervision of a suitable person, the negligence of the latter cannot be imputed to the parents, and will not defeat a recovery for negligence resulting in the death of the infant. *Walters v. Chicago, &c. R. R. Co.*, 41 Iowa, 71. A child two years of age, without the knowledge of its parents, escaped from its home and strayed upon a railroad track, where it was injured. It

did not appear how it got upon the track, or that it was ever known to have been there before, or that its absence had been discovered when the accident occurred. Its father was a butcher, and at the time was at his shop in another part of the city. Its mother, besides the care of her household duties, in which she had no help, had charge of an infant about one month old. It was held that under these circumstances the father could not, as a matter of law, be held chargeable with negligence in permitting the escape of the child. *Frick v. St. Louis, &c. R. R. Co.*, 75 Mo. 542. The operation of a railway over and along public highways in a village or city being necessarily attended with great peril to human life, railway companies are held to the utmost care on the part of their servants to avoid inflicting injury under such circumstances. And in this action against a company for the killing of a child of six years by a train while crossing a city street, a judgment of nonsuit is reversed on the ground that the questions of negligence on defendant's part, and contributory negligence of the child or its parents, should have been submitted to the jury on the evidence. *Johnson v. Chicago, &c. R. R. Co.*, 49 Wis. 529.

¹ *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377; 30 Am. Rep. 686. See also *Brown v. European, &c. R. R. Co.*, 58 Me. 384; *Mangan v. Atterton*, L. R. 1 Exchq. 1. In *Gavin v. Chicago*, 97 Ill. 66, 37 Am. Rep. 99, a municipal corporation maintaining a swing bridge in one of its streets, keeping it safe for persons using ordinary care, was held not bound to erect barriers or station watchmen for the protection of young children playing about the same without the knowledge of their parents. In Pennsylvania and Iowa it is held that a railway company, as a matter of law, is not bound to stop a train upon seeing a child upon the track. *Penn. R. R. Co. v. Morgan*, 82 Penn. St. 134; *Walters v. Chicago, &c. R. R. Co.*, 41 Iowa, 71. But in New York it is held that if a young child is seen upon the track, and the train might have been stopped in season to avoid the injury, the company is

referred to, a child six years old — than it owes to an adult, and is only liable for an injury inflicted upon him there when it is maliciously inflicted, or is the result of gross and reckless carelessness. But while this doctrine accords better with principle than some of the cases previously cited, yet the court seems to lose sight of the fact that children of tender years are not presumed to be possessed of judgment and discretion, and that the company has no right, as in the case of an adult person, to presume that they will take themselves out of danger. It seems to us that the better rule is,¹ that a

liable. *Kenyon v. New York, &c. R. R. Co.*, 5 Hun (N. Y.), 479.

¹ *Chicago, &c. R. R. Co. v. Becker*, 84 Ill. 483; *McGovern v. N. Y. Central R. R. Co.*, 67 N. Y. 417; *Willettts v. Buffalo, &c. R. R. Co.*, 14 Barb. (N. Y.) 585; *Kenyon v. New York Central R. R. Co.*, 5 Hun (N. Y.), 479; *Lafayette, &c. R. R. Co. v. Huffman*, 28 Ind. 287; *Colt v. Sixth Ave. R. R. Co.*, 33 N. Y. Superior Ct. 189; *Gonzales v. New York, &c. R. R. Co.*, 38 N. Y. 446; *Central R. R. Co. v. Fuller*, 84 Penn. St. 226; *Cleveland, &c. R. R. Co. v. Terry*, 8 Ohio St. 570; *Walters v. Chicago, &c. R. R. Co.*, 41 Iowa, 71; *Philadelphia, &c. R. R. Co. v. Hummell*, 44 Penn. St. 375; *Citizens' St. R. R. Co. v. Carey*, 56 Ind. 396; *Philadelphia, &c. R. R. Co. v. Long*, 75 Penn. St. 257; *Schwieb v. N. Y. Central R. R. Co.*, 15 Hun (N. Y.), 572; *Bulger v. Albany, &c. R. R. Co.*, 42 N. Y. 459; *McKenna v. New York, &c. R. R. Co.*, 8 Daly (N. Y. C. P.), 304; *Morrissey v. Eastern R. Co.*, 126 Mass. 377. In a case before the Nebraska court, G., a boy between eleven and twelve years of age, while walking on a railroad track at a point where there was no thoroughfare, by accident stepped between the guard and main rail at a switch, and was unable to extricate his foot, and a switch engine being turned on to that line, ran over and crushed his foot. It was held that if the employes of the company, after becoming aware of the perilous condition of the plaintiff, by the exercise of a reasonable degree of care, could have prevented the injury, the company was liable. The rule is well settled that a party who is injured by the mere negligence of another cannot recover for the injury, if he by his ordinary negligence or wilful wrong, proximately

contributed to produce the injury complained of, so that but for his co-operating fault it, would not have occurred, except where the proximate cause of the injury is the omission of the defendant, after becoming aware of the danger to which the plaintiff is exposed, to use a proper degree of care to avoid injuring him. *Cleveland, &c. R. R. Co. v. Elliott*, 4 Ohio St. 474; *Brown v. Hannibal, &c. R. R. Co.*, 50 Mo. 461; *Railroad Co. v. Davis*, 18 Ga. 679; *Cooper v. Central R. R. Co.*, 44 Iowa, 134; *Cooley, Torts*, 674; *Trow v. Railroad Co.*, 24 Vt. 487; *Isbell v. Railroad Co.*, 27 Conn. 393; *Hicks v. Railroad Co.*, 64 Mo. 430. If therefore the employes of the defendant in charge of the locomotive, after being aware of the perilous condition of the plaintiff, did not exercise a reasonable degree of care to prevent the injury, the defendant cannot rely on the plaintiff's negligence to defeat the recovery. *Burnett v. Burlington, &c. R. Co.*, 16 Neb. 332; 20 N. W. Rep. 280. In a Michigan case, in an action for injuries to a child, eight years old, by the sudden starting of a locomotive upon the step of which he had been standing and from which he had just been ordered away by the fireman, it appeared that in getting down he accidentally fell, and the tender passed over his arm. He was a trespasser upon the premises, had been warned against going there, and was a child of more than average intelligence. It was held that the railway company could not be held liable without showing that the engineer or other servant of the company in charge of the locomotive knew that the plaintiff was in the way of the engine, or that they had been reckless or negligent in their management, or could have anticipated the injury. *Chicago &*

railway company is bound to keep a proper lookout, especially in populous localities, for objects upon the track ahead of a moving train, and if a child is seen thereon, to bring its train to a stop; and that upon its failure to do so it is chargeable with actionable negligence; but that, if the child is upon the track at a point where it

N. R. Co. v. Smith, 46 Mich. 504. It is well settled that a railroad company must provide for a careful lookout in the direction that the train is moving, in places where people, and especially where children, are liable to be upon the track. If they do not, and a person has been injured, then the company may, in the absence of contributory negligence, be held liable. *Butler v. Milwaukee, &c. R. Co.*, 28 Wis. 487; *Ewen v. Chicago, &c. R. Co.*, 38 Wis. 613; *Farley v. Chicago, &c. R. Co.*, 56 Iowa, 337; 9 N. W. Rep. 230; *Cheney v. N. Y. Central R. Co.*, 16 Hun (N. Y.), 415. Even though the statute makes it unlawful for a person not connected with or employed upon a railroad to walk along the track thereof, "except when the same shall be laid along public roads or streets," yet where, in an action against a railway company for injury from negligence, the question is whether a person injured while walking upon a railroad track was guilty of a want of ordinary care, it is error to reject evidence showing that many persons, men, women, and children, had, for years before the accident in question, been in the habit of passing daily and hourly up and down in the same pathway on which the injured person was passing, — since such testimony would tend to show a license, or to repel the inference of a want of ordinary care, and also to show a lack of such care on defendant's part as the facts required. Under such a statute in Missouri it has been held that "*though it is unlawful for one not connected with a railroad to walk upon its tracks, and it is presumed that every one will obey the law, yet this will not relieve the railroad corporation from the duty of keeping a careful lookout while running its trains upon the streets of a city.*" *Frick v. St. Louis, &c. R. Co.*, 5 Mo. App. 435. See also *Daley v. Norwich, &c. R. Co.*, 26 Conn. 591. Ordinary care is such care as would ordinarily be exercised by persons of the age and in the situation of the person sought

to be charged with negligence; and the fact that the person injured was a child of tender years is to be considered in determining the question of contributory negligence. *Johnson v. Chicago, &c. R. Co.*, 49 Wis. 529. It is now almost universally held that a child of tender years is not to be held to the same rule of care and diligence in avoiding the consequences of the negligent or unlawful acts of others, that is required of persons of full age and capacity. *Pennsylvania R. Co. v. Kelly*, 81 Penn. St. 372; *Rauch v. Lloyd*, 31 Penn. St. 358; *Glassey v. Hestonville, &c. R. Co.*, 57 Penn. St. 172; *Pittsburgh R. Co. v. Caldwell*, 74 Penn. St. 421; *East Saginaw R. Co. v. Bohn*, 27 Mich. 503; *Bellefontaine R. Co. v. Snyder*, 18 Ohio St. 399; *Robinson v. Cone*, 22 Vt. 213; *Railroad Co. v. Stout*, 17 Wall. (U. S.) 657; *Boland v. Missouri River R. Co.*, 36 Mo. 484; *Chicago R. Co. v. Gregory*, 58 Ill. 226; *McMillan v. Burlington, &c. R. Co.*, 46 Iowa, 231. In *Lynch v. Nurdin*, 1 Q. B. 29, the plaintiff was but seven years of age, and at the time of the injury was committing a trespass by getting upon the defendant's cart hitched to his horse, and which had been negligently left by him in the street unattended, and Lord DENMAN, C. J., said: "Ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation, and this would evidently be very small indeed in so young a child. But this case presents more than the want of care; we find in it the positive misconduct of the plaintiff, — an active instrument towards the effect." He then reviews the authorities and concludes that "for these reasons we think that nothing appears in the case which can prevent the action from being maintained. It was properly left to the jury, with whose opinion we fully concur." See opinion of CASSIDAY, J., in *Townley v. Chicago, &c. R. Co.*, 53 Wis. 626.

cannot be seen a sufficient distance away to bring the train to a stop, or in the night-time, the company is not chargeable with negligence; and this seems to be substantially the rule generally held.

In a recent case in Mississippi, it appeared that a child of seven years lay down on the track and went to sleep there. The engineer of an approaching train saw it while at a sufficient distance from it to have stopped his train, but supposing that it was a dog or a bundle kept on, and did not discover his mistake until so near that it was impossible to stop the train in time to save the child. Immediately on perceiving his mistake, however, he reversed his engine, put on the breaks, and did everything in his power to avoid the injury. The court held that the child was a trespasser, that the evidence showed no negligence on the part of the engineer, and that the company was therefore not liable.¹ It appears that this case applies the

¹ Louisville, &c. R. Co. v. Williams, 69 Miss. 631. As to children on the track, and the rights and duties of the company in such cases, see *ante*, pp. 1470 *et seq.*

In Moore v. Pennsylvania R. Co., 99 Penn. St. 301, an intelligent boy, ten years old, was walking on the ends of the sleepers of defendant's track laid in a public street in a populous neighborhood; there was an ample sidewalk on each side of the track; he was struck and killed by a rapidly passing train. A non-suit was sustained, two judges dissenting. The court said: "Of course, in such circumstances, he was a trespasser, and not only put himself in peril by his rashness, but also endangered the safety of any passing trains and the lives of passengers. We have so frequently held, that in such circumstances there can be no recovery, that it is unnecessary to quote the authorities. As the testimony was entirely undisputed, it was the duty of the court to pass upon it, which they did by directing a non-suit. In this there was no error. The circumstance that the trespasser in this instance was a boy ten years of age cannot affect the application of the rule. The defendant owed him no greater duty than if he had been an adult. They are not subject to an obligation to take precautions against any class of persons who may walk on and along their tracks. In Phila., &c. R. Co. v. Hummell, 44 Penn.

St. 375, the rule was applied to the case of a child seven years old. And so also in Cauley v. Pittsburgh, &c. R. Co., 98 Penn. St. 498, the rule was in nowise relaxed, although the person injured was a boy of tender years. In the first of these cases we used the following language, having reference to the facts in evidence: 'But if the use of a railroad is exclusively for its owners or those acting under them, if others have no right to be upon it, if they are wrong-doers whenever they intrude, the parties lawfully using it are under no obligations to take precautions against possible injuries to intruders upon it. *Ordinary care they must be held to, but they have a right to presume and act on the presumption that those in the vicinity will not violate the laws; will not trespass upon the right of a clear track; that even children of a tender age will not be there; for though they are personally irresponsible, they cannot be upon the railroad without a culpable violation of duty by their parents or guardians. Precaution is a duty only so far as there is reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act.*' See also Mason v. Missouri Pac. R. Co., 27 Kan. 83; 41 Am. Rep. 405. An engineer is not bound to expect that helpless infants will be on the track, without sufficient knowledge

correct doctrine though it must be conceded that there are a number of authorities holding the other way.¹ Infancy is an "infirmity" which is obvious, and differs therefore from blindness or deafness, and the employés of a railroad company and other persons are bound to recognize it as indicating a less capacity for self-preservation than where the age is greater.² But where, as in the cases under consid-

orability to escape when warned of danger. *Chrystal v. Troy, &c. R. Co.*, 105 N. Y. 164; 31 Am. & Eng. R. Cas. 411.

¹ In *Isabel v. Hannibal, &c. R. Co.*, 60 Mo. 475, where an infant lying on the track was mistaken for a hog or dog, and no effort was made to stop the train, the company was held liable. But in this case it appeared that the train could have been stopped after the engineer should have seen his mistake. And in *East Tennessee, &c. R. Co. v. St. John*, 5 Sneed (Tenn.), 524, where a train ran over a slave eight years old, asleep on the track, and visible a quarter of a mile distant, but mistaken for a coat of one of the laborers, the company was held liable. These cases go upon the principle that where a human life is involved, in the case of a possible doubt, it must be resolved in favor of the preservation of the life; in other words, that under such circumstances the train should be stopped, rather than involve the risk of taking a life; but the correctness of this reasoning admits of doubt. *Mulherrin v. Delaware, &c. R. Co.*, 81 Penn. St. 366; *Indianapolis, &c. R. Co. v. McClaren*, 62 Ind. 566; *Lake Shore, &c. R. Co. v. Miller*, 25 Mich. 279. In the case of *Meeks v. Southern Pacific R. Co.*, 56 Cal. 513, 38 Am. Rep. 67, an infant, six or seven years old, lying insensible or asleep on a railway track, near a highway crossing, was injured by a train. He was perceived by the fireman and engineer in time to stop, but they supposed him a bunch of leaves or weeds, until too late. No warning signal was given. His parents had forbidden him to go on the track. It was held that a recovery was warranted. The court observed: "The question remains: Does the case show such contributory negligence on the part of the plaintiff or his parents as will preclude a recovery by him? In our opinion, the doctrine of the cases of *Needham v. San*

Francisco, &c. R. Co., 37 Cal. 409, *Kline v. Central Pacific R. Co.*, id. 400, and the other cases in this court approving them, determines the question in the negative. Said the court in *Needham v. San Francisco, &c. R. Co.*: 'No more in law than in morals can one wrong be justified or excused by another. A wrong-doer is not an outlaw, against whom every man may lift his hand. Neither his life, limbs, nor property are held at the mercy of his adversary. On the contrary, the latter is bound to conduct himself with reasonable care and prudence, notwithstanding the fault of the former; and if by so doing he can avoid injuring the person or property of the former, he is liable if he does not, if by reason thereof injury ensues.' Referring to the rule adopted in New York, the court proceeds: 'The error of the New York courts lies in the fact that they ignore all distinction between cases where the negligence of the plaintiff is proximate, and where it is remote, and in not limiting the rule which they announce, to the former.'" See also where company was held liable for injury to infant trespassers on its track, *Keyser v. Chicago, &c. R. Co.*, 56 Mich. 559; *Barry v. New York, &c. R. Co.*, 92 N. Y. 289; 44 Am. Rep. 377; 13 Am. & Eng. R. Cas. 615; *Taylor v. Delaware, &c. R. Co.*, 113 Penn. St. 162; 57 Am. Rep. 446; *Scoville v. Hannibal, &c. R. Co.*, 81 Mo. 434.

² "The rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years, are quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his

eration, it is impossible to distinguish whether the object on the track is a human being or not, this principle can have no application. And it would be a harsh rule that would require an engineer to stop his train at every appearance of any object on the track ahead because there is a possibility of its being a child.¹

SEC. 321. Children injured by Dangerous Agencies left exposed in Public Places. — In some of the States, and in the United States Court, it is held that if a railway company leaves dangerous machinery or agencies exposed in a locality where it is accessible to children, it will under most circumstances be liable, although it would not be so, under the same circumstances, to an adult person. Thus, in a case before the United States Supreme Court,² the plaintiff, a child six years old, was injured while playing with the turn-table of a railroad company. The table was on the company's land, but near two public roads, without visible separation from them, and was left unattended and unlocked, and easily revolved on its axis. The injury happened by the table being set in motion by other boys. *It appeared that the boys of the neighborhood were in the habit of resorting to the place for play.* A verdict for the injured child against the railroad company was sustained. In a Minnesota case,³ a child was

age and apparent knowledge. Of a child of three years of age less caution would be required than from one of seven, and of a child of seven less than one of twelve." *Railroad Co. v. Gladmon*, 15 Wall. (U. S.) 402. Quoted and applied in *Kansas Pac. R. Co. v. Whipple*, 39 Kan. 531; 37 Am. & Eng. R. Cas. 320 (injury to child trespassing on track).

¹ *Lake Shore, &c. R. Co. v. Miller*, 25 Mich. 279; *ante*, 1467.

² *Sioux City, &c. R. Co. v. Stout*, 17 Wall. (U. S.) 657. See this case followed in other turn-table cases, *Barrett v. Southern Pac. R. Co.*, 91 Cal. 296; 27 Pac. Rep. 666; *Callahan v. Eel River R. Co.*, 92 Cal. 89; *Fort Worth, &c. R. Co. v. Measles*, 81 Tex. 474; *Gulf, &c. R. Co. v. McWhirter*, 77 Tex. 356; 14 S. W. Rep. 26; *Fort Worth, &c. R. Co. v. Robertson (Tex.)*, 16 S. W. Rep. 1093; *Ilwaco R. & Nav. Co. v. Hedrick*, 1 Wash. St. 446; 25 Pac. 335; *Ferguson v. Columbus, &c. R. Co.*, 77 Ga. 102; *Harriman v. Pittsburgh, &c. R. Co.*, 45 Ohio St. 11; *Taylor v. Delaware, &c. R. Co.*, 113 Penn. St. 162; 57 Am. Rep. 446. See also *Earl v. Crouch*, 57 Hun (N. Y.),

586; 16 N. Y. Supp. 770; 131 N. Y. 131 (child injured by playing on lumber piled in an open place—recovery allowed). Compare *Bates v. Nashville, &c. R. Co. (Tenn.)*, 15 S. W. Rep. 1069.

³ *Keffe v. Milwaukee, &c. R. Co.*, 21 Minn. 207; 18 Am. Rep. 393. See the same principle applied in *Gunderson v. Northwestern Elevator Co.*, 47 Minn. 161; 49 N. W. Rep. 694, where a child was injured while playing with part of the elevator machinery, his presence being known to the employé in charge; and in *Gay v. Essex Electric R. Co. (Mass.)*, 34 N. E. Rep. 186, recovery allowed where child was injured while playing on a car left in the public street with unfastened brakes. In *Hydraulic Works Co. v. Orr*, 83 Penn. St. 332, an action was brought by the parents of the child who was killed, and who was six years old. The facts appear in the opinion, which is as follows: "It is true that where no duty is owed, no liability arises. If, therefore, one leaves a stick of timber standing upright against his wall, or an open pit in his private yard to which others have not access, and a per-

injured by a turn-table left unfastened and unguarded in a place where children were likely to stray, and the company was held liable. The court said: "The defendant knew that by leaving this turn-table unfastened and unguarded, it was not merely inviting young children to come upon the turn-table, but was holding out an allurement which, acting upon the natural instincts by which children are controlled, drew them by those instincts into hidden danger."

In a Kansas case,¹ a boy twelve years old having been injured while playing on a railway turn-table left unlocked and unguarded, the jury found a verdict in his favor, and the court, in refusing to disturb it, went on to say: "It would seem from the evidence that the turn-table was a dangerous machine for boys to use, and yet that it was easily turned or revolved upon its axis, and that it was of that alluring character which would naturally invite boys to use it and to play upon it. It was situated less than half a mile from Leavenworth, a populous city, in an open prairie, where the cattle of citizens roamed and grazed, where persons fre-

son strays in without invitation, or comes in without right, and pulls down the timber upon himself, or falls into the pit, he can have no action against the owner of the yard for the alleged negligence. He had no business there, and the owner owed him no duty. But it has been often said duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to accident, the rule will vary. The question then becomes one for a jury, to be determined upon all its facts of the probability of danger and the grossness of the act of imputed negligence."

¹ Kansas Central R. Co. v. Fitzsimmons, 22 Kan. 686; 31 Am. Rep. 203. In Sioux City, &c. R. Co. v. Stout, 17 Wall. (U. S.) 657, at the trial in the court below the jury were instructed as follows: "To maintain the action, it must appear by the evidence that the turn-table, in the condition, situation, and place where it then was, was a dangerous machine,—one which, if unguarded or unlocked, would be likely to cause injury to children; that if, in its construction and the manner in which it was left, it was not dangerous in its nature, the defendants were not liable for negligence; that they were further to consider whether, situated as it was as the defend-

ant's property, in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence." This instruction was distinctly approved by the Supreme Court of the United States. In the opinion they say: "Upon the facts proven in such cases, it is matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used and that negligence existed; another man, equally sensible and equally impartial, would infer that proper care had been used and that there was no negligence. It is this class of cases, and those akin to it, that law commits to the decision of a jury. . . . It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than a single judge." See also Atchison, &c. R. Co. v. Bailey, 12 Neb. 333.

quently passed and repassed, and where boys often played, and yet it was left without locks or fastenings, and without being watched or guarded, or even fenced in. That it would naturally attract boys and induce them to ride upon it, all men ought to know. Everybody knows that by nature and by instinct boys love to ride, and love to move by other means than their own locomotion. They will cling to the hind ends of moving wagons, ride upon swings and swinging gates, slide upon cellar-doors and the rails of stair-cases, pull sleds up hill in order to ride down upon them on the snow, and even pay to ride upon imitation-horses and imitation-chariots swung around in a circle by means of steam or horse power. This last is very much like riding around in a circle upon a turn-table. Now, everybody knowing the nature and the instincts common to all boys must act accordingly. No person has a right to leave, even on his own land, dangerous machinery calculated to attract and entice boys to it, there to be injured, unless he first take proper steps to guard against all danger; and any person who thus does leave dangerous machinery exposed, without first providing against all danger, is guilty of negligence. It is a violation of that beneficent maxim *sic utere tuo ut alienum non lædas*. It is true that the boys in such cases are technically trespassers. But even trespassers have rights which cannot be ignored, as numerous cases which we might cite would show.¹

¹ *Sionx City R. R. Co. v. Stout*, 17 Wall. (U. S.) 657, and *Keefe v. Milwaukee, &c. R. R. Co.*, 21 Minn. 207; 18 Am. Rep. 393. In *Houston, &c. R. R. Co. v. Simpson*, 2 Tex. L. Rev. 167, a child ten years old recovered for an injury sustained while playing on the defendant's turn-table. The court said: "It appears that the turn-table was uninclosed, and near a pond to which boys were accustomed to go for the purpose of fishing. The entry upon such a place was not a trespass in a child which would deprive it of its right to recover for an injury resulting from the attempted use of a dangerous machine to which children would be attracted for sport or pastime, for it is the duty of every person to use due care to prevent injuries to such persons, even from dangerous machinery upon the premises of the owner, if its character be such as to attract children to it for amusement. The evidence is conflicting as to whether or not an employé of the defendant warned the

plaintiff and other boys, who were moving the turn-table after the locomotive passed from it, that it was dangerous, but it does appear that the employé knew that they were playing with the turn-table, and that he took no steps to fasten it so that they could not use it. The turn-table had no fastenings whatever, and though almost constantly in use, there were times when it was not in use, and besides it appears that the boys were accustomed to use it at times when employés of the company were present. The plaintiff himself, it seems, had played upon the turn-table on former occasions. Under such state of facts it was for the jury to determine whether the plaintiff used such care as is required of one of his age." See also *Nagle v. Mo. Pac. R. R. Co.*, 75 Mo. 653; 42 Am. Rep. 418. In *Cauley v. Pittsburgh, &c. R. R. Co.*, 95 Penn. St. 398, a recovery was denied to a child seven years old, injured by the defendant's negligence while playing on a flat-car standing on its track.

Was the plaintiff guilty of contributory negligence? This question was fairly submitted to the jury, and they found against the defendant and in favor of the plaintiff. The plaintiff was a boy a little over twelve years old, and from his own testimony, we should think was not a very bright boy, even for that age. He was born in Ireland, and his father was a common day-laborer. On the day on which the accident occurred, the boy went to hunt his father's cow, and found her near the turn-table. He then, with other boys of about his own age, went to the turn-table. He had never before seen one. He had previously been warned to stay away from the railroad, and from the cars, *but had never been warned from the turn-table.* There is some conflict in the evidence as to how he got on the turn-table, and in what position he was when thereon and when the accident occurred, whether sitting, standing, or otherwise, and whether he was told by any one of the boys not to get on at the time he did so; but we must presume that the jury believed such only of the conflicting evidence as was most favorable to the plaintiff. Now, take this boy, at his premature age, with his limited knowledge and experience, and his lowly station in life, and probably it was intense amusement, almost irresistible, for him to ride upon a turn-table; and probably he did not imagine that he was a trespasser, or in the slightest danger. Much of what we have said while discussing the defendant's negligence will apply here. Boys can seldom be said to be negligent when they merely follow the irresistible impulses of their own natures — instincts common to all boys. In many cases where men, or boys approaching manhood, would be held to be negligent, younger boys, and boys with less intelligence would not be. And the question of negligence is, in nearly all cases, one of fact for the jury, whether the person charged with negligence is of full age or not.”¹

¹ Holding a contrary doctrine, see *St. Louis, &c. R. R. Co. v. Bell*, 81 Ill. 76; 25 Am. Rep. 269; *Kerr v. Forgue*, 54 Ill. 482; 5 Am. Rep. 146; *McAlpin v. Powell*, 70 N. Y. 126; 26 Am. Rep. 561. In *Wood v. Independent School District of Mitchell*, 44 Iowa, 27, a party who had contracted with the defendant for drilling a well in the school-house grounds, left his drilling-machine unlocked and unguarded, and in his absence one of the school-children was injured while playing with it. It was held in an

action by the child that the danger arose not from the character of the work but from the machinery used, and accordingly the defendant was not liable for the negligence of its contractor; and also, that the machinery, although dangerous when thus left unguarded, was not a nuisance, being properly stationed for a legitimate purpose. After disposing of the first point the court said: “This brings us to consider the only remaining ground upon which appellant claims that the district is liable, and that is, that the district owned,

It will be observed that in these cases the court went upon the ground that the dangerous agencies were left in a place to which

occupied, and controlled the ground upon which said Pratt and Moses had introduced the machinery, and the said district suffered it to remain there in its dangerous condition. In other words it is claimed that the district suffered a nuisance to remain upon its ground, and that the injury sued for resulted therefrom." In *Church of Ascension v. Buckhart*, 3 Hill (N. Y.), 193, the walls of a church edifice belonging to the plaintiff in error were negligently permitted to stand after the rest of the building had been destroyed by fire, and a part of the wall afterwards fell upon a person while passing; and the defendant was held liable. In *Bishop v. Union Railroad Co.*, 14 R. 1., while two horse-cars attached together in charge of a driver on the front platform of the leading car, and drawn by a single horse, were driving over the tracks of the company in a public highway in the city of Providence from the stables to the repair shops, a lad six years old, to outstrip a playmate with whom he was racing, jumped on the rear platform of the leading car and soon afterward fell off or jumped off and was seriously injured. The lad's mother testified that he told her that he fell off, but in cross-examination when asked if he did not say that he was afraid the driver would see him and therefore jumped off, replied, "Yes, sir; I think probably he did, but am not quite sure he told me he fell off." The driver testified that he did not see the boys and knew nothing of the accident, which occurred between two and three P. M., until the evening. In an action against the horse-car company to recover damages for the injury, it was held that the company was not chargeable with negligence, and that the driver of the car was not chargeable with any neglect of duty. It was also held that the company was not bound to employ a second man to guard the cars from intrusion during their transit, nor was it under any duty or obligation of care to the boy; and that a city ordinance providing that "cars driven in the same direction shall not approach each other within a distance of three hundred feet

except in case of accident, when it may be necessary to connect two cars together, and also except at stations," applied only to cars going in the same direction and driven separately, and was inapplicable to the case at bar. The court in commenting upon the doctrine of the cases previously cited, said: "In *Mangam v. Atterton*, L. R. 1 Exch. 239, the defendant left a dangerous machine, which might be set in motion by any passer-by, unguarded, in a public place. The plaintiff, a boy four years old, put his fingers in the machine at the direction of his brother, seven years old, whilst another boy was turning the handle which moved it, and his fingers were crushed. The court held that the plaintiff could not maintain any action for the injury. And see *Hughes v. Macfie*, 2 H. & C. 744. The case at bar differs very much from the three cases previously stated; for in the case at bar the cars, instead of being left unattended, were in the charge of the driver who was in the act of driving them, so that there was nothing done to encourage the trespass, which was merely the result of a momentary impulse. Ordinarily a man who is using his property in a public place is not obliged to employ a special guard to protect it from the intrusion of children, merely because an intruding child may be injured by it. We have all seen a boy climb up behind a chaise or other vehicle for the purpose of stealing a ride, sometimes incurring a good deal of risk. It has never been supposed that it is the duty of the owner of such vehicle to keep an outrider on purpose to drive such boys away, and that if he does not, he is liable to any boy who is injured while thus secretly stealing a ride. In such a case no duty of care is incurred. See *Lygo v. Newbold*, 9 Exch. 302; and the remark of BLACKBURN, J., in *Austin v. Great Western Ry. Co.*, L. R. 2 Q. B. 442, 446; and yet such a case is very much like the case at bar. There are some risks in regard to which a child ought to be enlightened before he is committed to the chances of the street. In *Hestonville Passenger R. R. Co. v. Connell*, 88 Penn. St. 520,

the company knew that children resorted to play, and therefore that it was bound to guard against the dangerous consequences likely to ensue if these agencies were left unguarded or unfastened. These cases have been made the subject of some severe criticism, but we are inclined to think that the doctrine finds support, both in principle and authority. A man's dominion over his own land is not entirely absolute, but is qualified by that time-honored maxim *sic utere tuo ut alienum non lædas*; and it has been held, and the doctrine never denied, that a man may not set spring-guns, spears, or man-traps upon his land, so as to injure even a trespasser thereon;¹

32 Am. Rep. 472, the plaintiff, a boy between six and seven years old, was injured in an attempt to climb upon the front platform of a horse-railroad car while the car was in moderate motion. The car was a car used for suburban travel, and according to custom was in the charge of no one but the driver, who at the time of the accident was engaged on the rear platform. The court held that the railway company was not liable for the injury, the injury having resulted, not from any neglect of the person in charge, 'but from the sudden and unanticipated act of the child itself.' 'It may be assumed,' say the court, 'that a child old enough to be trusted to run at large has wit enough to avoid ordinary danger, and so persons who have business on the streets may reasonably conclude that such a one will not voluntarily thrust itself under the feet of their horses or under the wheels of their carriages; and *a fortiori* may they conclude that they are not to provide against possible damages that may result to the infant from its own wilful trespass.' The doctrine of this case is well supported by other cases. *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377; 30 Am. Rep. 686; *Gavin v. City of Chicago*, 97 Ill. 66; 37 Am. Rep. 99; *McAlpin v. Powell*, 70 N. Y. 126; 26 Am. Rep. 555; 55 How. Pr. (N. Y.) 163; *Snyder v. Han. & St. Jos. R. R. Co.*, 60 Mo. 413. These are all cases of injury to intrusive or trespassing children, in which the defendants were held to be exempt from liability, although they might have prevented the injury; because the kind of care which would have been required to prevent it

was not obligatory upon them. And see *Zoebisich v. Tarbell*, 10 Allen (Mass.), 385. The case at bar is in our opinion a case of the same class. The defendant company is not liable for the injury to the plaintiff, because it never incurred any duty or obligation of care to him. If the driver had seen the boy on the platform it might have been his duty, notwithstanding the boy was a mere intruder, to stop the car and put him safely off. If the driver had stopped the cars so as to afford the boy an inviting opportunity to get on them, thus tempting his childish instinct, it might have been his duty to look through the cars before starting, and if he found the boy, to remove him. The case presents no such circumstances. We think therefore that on this point there was no evidence on which the case could have been properly left to the jury, and that if it had been left to them, and they had found for the plaintiff, it would be our duty to set the verdict aside. Therefore the nonsuit was rightly granted." *Brown v. European, &c. R. R. Co.*, 58 Me. 384.

¹ *Jordin v. Crump*, 8 M. & W. 787. In *Whirley v. Whiteman*, 1 Head (Tenn.), 610, the defendant owned a paper-mill, the machinery of which was propelled by steam. There was a shaft proceeding from the engine-house and extending through the wall of the mill-house. On the end of this shaft, some eight or ten inches outside of the wall, was fixed a cog-wheel geared into another cog-wheel. The wheels revolved from ten to twenty inches from the ground. They were about twenty feet from the street, in an open space, entirely exposed, without any cover, guard

that he may not throw poisoned corn upon his land, which may be eaten by his neighbors' hens trespassing there;¹ or keep a ferocious dog upon his premises, unchained, or so as to bite even a trespasser² without being liable for the injurious consequences. Indeed, numerous instances might be referred to in which this principle has been adopted. Again, railway companies do not hold their property by precisely the same tenure as an individual does. They are *quasi* public corporations, and by a species of common consent which may be said to amount to a usage, people enter upon their tracks and grounds with nearly the same freedom that they do upon public grounds, and without feeling that they are trespassers. While this may not be done as a strict matter of legal right, yet it is idle to say that, permitting such use, knowingly, and without objection, they nevertheless have the right to expose such *quasi* licensees to any species of danger they may choose to, particularly those not competent to judge of the danger, without incurring liability for the consequences.

In a recent case in New York,³ the Court of Appeals acting upon this principle held that, where a railway company has for more than

or enclosure. The wheels were generally in motion. Plaintiff and other children were in the habit of playing about the mill. The plaintiff was about three years old, and lived with his mother, across the street and nearly opposite the mill. One day when the engine and other hands were absent at dinner, leaving the wheels running, the plaintiff was caught by the wheels and injured. The wheels might easily have been boxed or enclosed, so as to have avoided the danger of injury to any one. The jury found for the defendant, and the court set aside the verdict as contrary to evidence, saying: "We feel clear from the facts proved in this record, that the defendants were guilty of negligence, perhaps it might be said, gross negligence, in leaving machinery so exposed as that by possibility it might be the cause of injury to others. . . . In playing about the cog-wheels the plaintiff was but indulging the natural instinct of a child in yielding to the temptation into which he was led by the negligence of the defendant. These cases rest upon the principle that the law imposes restrictions upon every one, as well in the use and en-

joyment of his property as in his personal actions and conduct, and that though a man may do a lawful thing, yet if any damage thereby befall another, he should be answerable if he might have avoided it."

¹ Johnson v. Patterson, 14 Conn. 1.

² Mann v. Reed, 4 Allen (Mass.), 431.

³ Barry v. N. Y. Central R. R. Co., 92 N. Y. 289; 44 Am. Rep. 377. But see Morgan v. Pennsylvania R. R. Co., 19 Blatchf. (U. S. C. C.) 239. In a recent English case, — Clark v. Chambers, L. R. 3 Q. B. Div. 327, — the defendant had placed in a private road adjoining his ground a hurdle with *cheveaux de frise* on the top in order to prevent the public from looking over the barrier at athletic sports in his ground. Some one, not known, removed the hurdle to another spot without the defendant's authority, and the plaintiff, passing of right along the road soon afterward in the dark, and knowing the original position of the hurdle but not that it was moved, ran his eye against the *cheveaux de frise* and lost his sight. The jury, in an action for negligence, held that the defendant's original

thirty years permitted the public to cross its tracks at a certain point not in itself a public crossing, it owes the duty of reasonable care to

erection of this hurdle was unauthorized and wrongful; that the *cheveaux de frise* were dangerous to the safety of persons using the road, and that there was no contributory negligence. They gave the plaintiff a substantial verdict. It was held that the plaintiff's injury was not an improbable consequence of the defendant's act; that it was the defendant's duty to take all necessary precautions, under the circumstances, to protect persons exercising their right of way, and that the action was maintainable. COCKBURN, C. J., in delivering judgment, said: "The ground of defence in point of law taken at the trial and on the argument on the rule was, that although if the injury had resulted from the use of the *cheveaux-de-frise* hurdle, as placed by the defendant on the road, the defendant, on the facts as admitted or as found by the jury, might have been liable, yet as the immediate cause of the accident was not the act of the defendant, but that of the person, whoever he may have been, who removed the spiked hurdle from where the defendant had fixed it, and placed it across the footway, the defendant could not be held liable for an injury resulting from the act of another. On the part of the plaintiff it was contended that as the act of the defendant in placing a dangerous instrument on the road had been the primary cause of the evil by affording the occasion for its being removed and placed on the footpath and so causing the injury to the plaintiff, he was responsible in law for the consequences. Numerous authorities were cited in support of this position." The court then review *Scott v. Shepherd*, 3 Wils. 403; 2 W. Bl. 892, the "squib" case; *Dixon v. Bell*, 5 M. & S. 198, the loaded-gun case; *Ilott v. Wilkes*, 3 B. & A. 304, the spring-gun case; *Jordin v. Crump*, 8 M. & W. 782, the dog-spear case, and continue: "In *Illidge v. Goodwin*, 5 C. & P. 190, the defendant's cart and horse were left standing in the street without any one to attend to them. A person passing by whipped the horse, which caused it to back the cart against the plaintiff's window. It was urged that the man who whipped the

horse, and not the defendant, was liable. It was also contended that the bad management of the plaintiff's shopman had contributed to the accident. But TINDAL, C. J., ruled that even if this were believed it would not avail as a defence. 'If,' he says, 'a man chooses to leave a cart standing in the street he must take the risk of any mischief that may be done.' *Lynch v. Nurdin*, 1 Q. B. 29, is a still more striking case. There, as in the former case, the defendant's cart and horse had been left standing unattended in the street. The plaintiff, a child of seven years of age playing in the street with other boys, was getting into the cart when another boy made the horse move on. The plaintiff was thrown down and the wheel of the cart went over his leg and fractured it. A well considered judgment was delivered by Lord DENMAN. He says: 'It is urged that the mischief was not produced by the mere negligence of the servant as asserted in the declaration, but at most, by that negligence in combination with two other active causes, — the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart, and so committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell on it at any length, for if I am guilty of negligence in leaving anything dangerous where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.' And then, by way of illustration, the Chief Justice puts the case of a gamekeeper leaving a loaded gun against the wall of the playground where school-boys were at play, and one of the boys in play letting it off and wounding another. 'I think it will not be doubted,' says Lord DENMAN, 'that the gamekeeper must answer in damages to the wounded party. This,' he adds, 'might possibly be

those so using the crossing. This doctrine was not put upon the ground that the public had acquired the right by long user, to cross

assumed as clear in principle, but there is also the authority of the present Chief Justice of the Common Pleas in its support in *Illidge v. Goodwin*. It is unnecessary to follow the judgment in the consideration of the second part of the case, namely, whether the plaintiff, having contributed to the accident by getting into the cart, was prevented from recovering in the action, as no such question arises here. In *Daniels v. Potter*, 4 C. & P. 262, the defendants had a cellar opening to the street. The flap of the cellar had been set back while defendant's men were lowering coals into it, as the plaintiff contended, without proper care having been taken to secure it. The flap fell and injured the plaintiff. The defendant maintained that the flap had been properly fastened, but also set up a defence that its fall had been caused by some children playing with it. But the only question left to the jury by *TINDAL, C. J.*, was whether the defendant's men had used reasonable care to secure the flap. His direction implies that in that case only would the intervention of a third party causing the injury be a defence. The cases of *Hughes v. Macfie*, and *Abbott v. Macfie*, 2 H. & C. 744,—two actions arising out of the same circumstances and tried in the Passage Court at Liverpool,—though at variance with some of the foregoing so far as relates to the effect of the plaintiff's right to recover where his own act as a trespasser has contributed to the injury of which he complains, is in accordance with them as respects the defendant's liability for his own act where that is the primary cause, though the act of another may have led to the immediate result. The defendants had a cellar opening to the street. Their men had taken up the flap of the cellar for the purpose of lowering casks into it, and having reared it against the wall nearly upright, with its lower face, on which there were cross-bars, towards the street, had gone away. The plaintiff in one of the actions, a child of five years old, got upon the cross-bars of the flap and in jumping off them brought down the flap on himself and another child (the plaintiff in the other action) and both

were injured. It was held that while the plaintiff whose act had caused the flap to fall could not recover, the other plaintiff who had been injured could, provided he had not been playing with the other so far as to be a joint actor with him. *Bird v. Holbrook*, 4 Bing. 628, is another striking case, as there the plaintiff was undoubtedly a trespasser. The defendant being the owner of a garden which was at some distance from his dwelling-house, and which was subject to depredations, had set in it without notice a spring-gun for the protection of his property. The plaintiff, who was not aware that a spring-gun was set in the garden, in order to catch a pea-fowl, the property of a neighbor, which had escaped into the garden, got over the wall, and his foot coming, in his pursuit of the bird, into contact with the wire which communicated with the gun, the latter went off and injured him. It was held, though his own act had been the immediate cause of the gun going off, yet that the unlawful act of the defendant in setting it, rendered the latter liable for the consequences. In the course of the discussion a similar case of *Jay v. Whitfield* was mentioned, tried before *RICHARDS, C. B.*, in which a plaintiff, who had trespassed upon premises in order to cut a stick, and had been similarly injured, had recovered substantial damages, and no attempt had been made to disturb the verdict." The court then reviews *Harrison v. Great Northern Railway Co.*, 3 H. & C. 231, and concludes as follows: "We acquiesce in the doctrine thus laid down as applicable to the circumstances of the particular case; but we doubt its applicability to the present, which appears to us to come within the principle of *Scott v. Shepherd*, *Dixon v. Bell*, and other cases to which we have referred. At the same time it appears to us that the case before us will stand the test thus said to be the true one. For a man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction by some one entitled to use the way as a thing likely to happen; and if this should be done, the

the railway at the point in question, but upon the principle that the acquiescence of the company in such use amounts to a license and permission to the public to cross there.¹ In a recent North Carolina

probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near; thus if the obstruction be to the carriage-way, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, wheresoever placed, it may, as was also the case here, become a source of danger, from which should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that if a person places a dangerous obstruction in a highway or in a private road, over which persons have a right of way, he is bound to take all necessary precautions to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences. It is unnecessary to consider how the matter would have stood had the plaintiff been a trespasser. The case of *Mangam v. Atterton*, 4 H. & C. 388, L. R., 1 Ex. 239, was cited before us as a strong authority in favor of the defendant. The defendant had there exposed in a public market-place a machine for crushing oil-cake, without its being thrown out of gear, or the handle being fastened, or any person having the care of it; the plaintiff, a boy four years of age, returning from school with his brother, a boy of seven, and some other boys, stopped at the machine. One of the boys began to turn the handle; the plaintiff, at the suggestion of his brother, placed his hand on the cogs of the wheels, and the machine being set in motion, three of his fingers were crushed. It was held by the Court of Exchequer that the defendant was not liable; first, because there was no negligence on the part of the defendant, or if there was such negligence, it was too remote; secondly, because the injury was caused by the act of the boy who turned the handle, and of the plaintiff himself, who was a trespasser. With the latter ground of the decision we have in the present case nothing to do, otherwise we should have to consider whether it should prevail against the cases cited

with which it is obviously in conflict. If the decision as to negligence is in conflict with our judgment in this case, we can only say we do not acquiesce in it. *It appears to us that a man who leaves in a public place along which persons, and among them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion. But be this as it may, the case cannot govern the present. For the decision proceeded expressly on the ground that there had been no default in the defendant; here it cannot be disputed that the act of the defendant was unlawful. On the whole, we are of opinion, both on principle and authority, that the plaintiff is entitled to our judgment."*

¹ In *Coppner v. Penn.* R. R. Co. 12 Ill. App. 600, the plaintiff, a child four or five years old, was injured by the closing of the defendant's railway drawbridge while he was playing near or upon it. The court below directed a verdict for the defendant, but the appellate court held that the question of negligence should have been submitted to the jury. The bridge was a continuation of a public street, and the injury probably took place while the plaintiff was within the boundaries of the street, but the court declined to put the decision on that ground, and observed: "But even if we are to regard the *locus in quo* of the injury as being wholly upon the private grounds of the defendant, we think there was evidence which should have been submitted to the jury tending to charge the defendant with negligence. The general rule doubtless is, that the owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees, or others who come upon

case¹ a private way was opened by the defendant for his own convenience, and a bridge built over a creek which ran across it, *and the public used the same with his knowledge and permission*. The plaintiff sustained injury by the breaking of the bridge, which the defendant *knew* to be unsafe, but which was *apparently* safe. It was held that the defendant was liable.

But in all these cases the character of the dangerous agency must be such, and it must be in such a public or frequented place that the company are bound to know that it is liable to inflict injury unless proper care is used to prevent it, and that children or adults are accustomed to go there.² Thus, where a railroad company constructed

them, not by invitation either express or implied, but for their own convenience or pleasure, or to gratify their curiosity, however innocent or laudable their purpose may be. To this rule, however, there are various exceptions, and one well recognized by the authorities is, where the owners of grounds are held liable for injuries to children, although trespassing at the time, where, from the peculiar nature and exposed position of the dangerous defect or agent, the owner should reasonably anticipate such injury to flow therefrom as actually happened. In such cases it is held that the question of negligence is for the jury. See *Union Stock Yards, &c. v. Rourke*, 10 Brad. (Ill.) 474. The distinguishing principle upon which all such cases rest is, that the persons injured were mere children, without judgment or discretion, and likely to be drawn by childish curiosity, or the instincts of childhood, into places of danger. In the present case, the jury should have been left to find from the evidence, whether the bridge in question was a dangerous structure, from which the defendant should reasonably have anticipated such injury to happen as the plaintiff actually suffered therefrom, and whether the servant of the defendant in charge of said bridge, under all the facts and circumstances appearing in evidence, used ordinary and reasonable care and precaution to prevent the happening of such injury. The case of *City of Chicago v. Gavin*, 1 Brad. (Ill.) 302, decided by this court, and afterward by the Supreme Court, *Gavin v. City of Chicago*, 97 Ill. 66, 37 Am. Rep. 99, to which we are referred,

does not, so far as we can see, conflict in the least with the view we have taken in this case. In that case there was no charge of negligence in operating the bridge, but merely in the manner in which it was constructed and maintained. The question was simply as to the measure of care required of a municipal corporation in the maintenance of its bridges; and it was held to be its duty to keep and maintain them in a reasonably safe condition, but not so as to render injuries to persons using them impossible. Here the defendant is a private corporation charged with negligence in operating a bridge erected by it either on its own grounds or in the public highway, for its own convenience and benefit, and the question is, whether there is any evidence for the jury to consider, tending to support the charge of negligence." See *Nagle v. Mo. Pacific R. Co.*, 75 Mo. 653; 42 Am. Rep. 418.

¹ *Campbell v. Boyd*, 88 N. C. 129; 43 Am. Rep. 740.

² *Daniels v. New York, &c. R. Co.*, 154 Mass. 349 (company not liable for failure to lock a turn-table located 606 feet from any highway); *O'Connor v. Ill. Central R. Co. (La.)*, 10 So. Rep. 678 (children playing on dump cars in enclosed lot). From persons who leave dangerous openings, erections, machines, or other things exposed in or directly adjacent to streets or other public places, a due measure of care is of course exacted. This was held in *Lynch v. Nurdin*, 1 Q. B. D. 29, where a horse and wagon were left unfastened and unattended in a public street, and a boy seven years old, climbed on the cart, other children started the horse and

a certain switch-track, 667 feet in length, on its own land, near a small village, making the grade thereof 280 feet, at the rate of 80 feet to the mile, and afterwards for several years operated its railroad and switch-track, and then, in accordance with its usual custom, placed a flat-car on the switch-track and grade, and properly fastened it with an ordinary hand-brake, and on the next day a small boy four years, eight months, and a few days old, went to the car without any right or authority so to do, and without the knowledge or consent of the railroad company, and not accompanied by any person, and climbed upon the car and unfastened the brake, and the car then

the boy was injured; and also in *Lane v. Atlantic Works*, 107 Mass. 104, where the circumstances were quite similar, — 111 id. 136, — and in *Mullaney v. Spence*, 15 Abb. Pr. (N. Y.) N. S. 319, where an elevator opened on the street by a sliding door, and the door being left open and unguarded, a child four years and a half old, approached the opening and was injured by a descending car. So in *Whirley v. Whiteman*, 1 Head (Tenn.), 610, where a cog-wheel, connected with machinery in a mill, was left revolving, unguarded, and exposed in an open, uninclosed, unguarded space, about twenty feet from the highway, and a child three years old, who lived across the street, was caught and injured while playing about the wheel. In *Abbott v. Mcfie*, 2 H. & C. 744, where the defendant owned a warehouse, with a cellar in front, in a public street, opening with a flap or lid, raised and leaned against a wall, and a child five years old was hurt by the falling down of the lid, he was held liable. But in *Wood v. Independent School District*, 44 Iowa, 27, it was held not negligent to leave a well-drilling machine unlocked and unguarded in the yard of a public school-house, whereby one of the young investigators of science was injured, outside of the school "drill." The court said: "We are not prepared to hold that every person having upon his premises machinery, tools, or implements which would be dangerous playthings for children, and in their nature affording special temptation to children to play with them, is under obligation to guard them, in order to protect himself from liability for injuries to children received while playing with them, although

the children were rightfully on his premises. It would be improper to burden the mechanical industries of the country by such a rule. Without holding, therefore, that there may not be pieces of machinery so peculiarly dangerous that a right of action would exist at common law for injuries received from them if left unguarded, we do not think the drilling-machine in question is such machinery." In *Mangam v. Atterton*, L. R. 1 Ex. 239, where the defendant had left exposed, unguarded, and in gear, in a public market-place, a machine for crushing oil-cake, and a boy four years old, advised by his brother of seven, put his fingers in the gearing while others turned the crank, and was injured. Stress was laid on the fact that the immediate cause of the injury was the act of the others in turning the crank. *BRAMWELL, B.*, said: "The defendant is no more liable than if he had exposed goods colored with a poisonous paint, and the child had sucked them." He even suggests that if the child's fingers had injured the machine he would have been liable to the owner. The decision on the ground of negligence is criticised by *COCKBURN, C. J.*, in *Clark v. Chambers*, 3 Q. B. Div. 327. He says: "It appears to us that a man who leaves in a public place, along which persons, and among them children, have to pass, a dangerous machine, which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character." But if a child has been warned not to meddle with the dangerous thing in question, he meddles at his peril. *Hughes v. Mcfie*, 2 H. & C. 744.

by its own weight moved down the grade, and the boy either jumped off or fell off in front of the car, and was run over and killed,—it was held that the company was not guilty of any culpable negligence as towards the boy, nor liable for damages on account of his death.¹ In this case the accident which occurred was one which could not have been anticipated, and the company having properly fastened the brakes had done all that could be required of it. Said the court: “The cars were not dangerous machines left exposed near a populous city, nor were they of that alluring character to entice boys to play upon them, for when unfastened they would move only a few feet

¹ Central Branch U. P. R. R. Co. v. Henigh, 23 Kan. 347. In *Gillespie v. McGowan*, 100 Penn. St. 144, 45 Am. Rep. 365, the defendant owned an abandoned brickyard with an open and unguarded well in it, in plain sight, about one hundred feet from the highway. The public were accustomed to cross the field, but the paths were somewhat distant from the well. The nearest dwelling-house was three hundred yards off. A boy eight years old was found drowned in the well. He fell in by daylight. The Common Pleas sustained a verdict for the plaintiff, but it was reversed by the Supreme Court. In *Hydraulic Works Co. v. Orr*, 83 Penn. St. 332, a child six years old strayed from a street through a gate marked “private” and “no admittance,” but sometimes left open, into a private alley, and was there killed by the falling down upon it of a movable platform used in shipping goods. The court instructed the jury that “a child cannot be treated as a trespasser or wrong-doer;” and that “persons who hold premises opening on public thoroughfares must use them in such a way as to protect those who might accidentally stray upon them.” This instruction was affirmed. But this case is distinguished by the court from the *Gillespie* case on the ground that the defendant “maintained upon its premises what this court designated as a dangerous and deadly trap, weighing over eight hundred pounds, and liable to fall at any moment and crush children beneath it like mice in a dead fall.” It was in the heart of the city, close to a public highway, and the access to it frequently left open; and it was moreover so constructed as not to give any indica-

tion of its danger. But so far as it was intended to sanction the doctrine that a child cannot be treated as a trespasser or wrong-doer, it is explicitly overruled by *Gillespie v. McGowan*, 100 Penn. St. 144. The latter case also dissents from the doctrine laid down in the former case, that “the owner of premises in the neighborhood of a populous city, and opening on a public highway, must so use them as to protect those who stray upon them and are accidentally injured.” Such a doctrine was regarded as being in conflict with *Gramlich v. Wurst*, 86 Penn. St. 74, 27 Am. Rep. 684, in which it was held that “where the owner of land, in the exercise of lawful dominion over it, makes an excavation thereon, which is such a distance from the public highway that the person falling into it would be a trespasser upon the land before reaching it, the owner is not liable for an injury thus sustained.” In that case the defendant had made an excavation within eighty feet of a street in Philadelphia, and it was unguarded; but the court held the owner was not liable. The well established principle in such cases is that “where an excavation is made adjoining a public way, so that a person walking on it might, by making a false step or being affected with sudden giddiness, fall into it, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant’s land before he reached it, the case seems to be different.” The same doctrine was asserted in *Knight v. Abert*, 6 Penn. St. 472.

and then stop. Nor were they dangerous when moving, to ordinary boys. No one could have anticipated that a boy less than five years old would have gone to the cars unaccompanied by any older person, and have climbed upon one of them and unloosened the brake. No such thing ever occurred before, and certainly no one could have anticipated that a boy big enough to do that would have fallen off or jumped off in front of the car so that the car would have run over and killed him."

The same principle would apply in a recent Pennsylvania case¹ in which a boy five or six years old, while standing upon the platform of a station, was hit by a projection from a passing train and injured. He was there from curiosity and not upon business, and the court held that he could not recover. But in this case the court based its doctrine upon the broad ground that the company owed the plaintiff no duty to look out for his safety.² A similar doctrine was held in Indiana, as to an adult who was at one of the defendant's old freight-stations, without invitation, and injured.³

SEC. 322. Imputable Negligence: Parent and Child: Children Generally. — The doctrine of the imputable negligence of a parent, guardian, or other custodian of a child whereby the injured child is made chargeable with the negligence of its custodian, is based upon the assumption of the identification of the child and its custodian at the moment of the occurrence of the injury. The child not being *sui juris* is intrusted to another to whom its care is exclusively confided; this custodian is its keeper and agent, and in respect to all outside parties, it is contended, his negligence in the care of the

¹ Baltimore, &c. R. Co. v. Schwindling, 101 Penn. St. 261; 12 W. N. Cas. 349.

² GREEN, J., said: "At the time the plaintiff received his injury he was standing on the platform of the defendant, so close to its edge that, according to the theory upon which the case was tried for the plaintiff, he was struck by a slight projection from the side of a passing freight-car. He was not a passenger, he had no business of any kind with the defendant, or any of its agents or employés; in fact he was a boy five or six years of age, amusing himself looking at the moving train. He was not invited upon the platform by any agent of the defendant, and he was not engaged in the act of crossing either the track or the platform at the time of the accident. He was simply loitering upon

the edge of the platform, with no other purpose or motive than his own personal enjoyment. His elder brother, his principal witness, testified that he told him to come back from where he was standing, but he refused to do so. A passing car moving at a very slow rate of speed, not exceeding three or four miles an hour, with an iron step projecting but a few inches from the side of the car (as alleged by the plaintiff, though denied by the defendant), struck him and pulled him from the platform under the wheels of the car, so that he was run over and injured. In these circumstances was there any right of recovery? We think clearly not."

³ Lary v. Cleveland, &c. R. Co., 78 Ind. 323; 41 Am. Rep. 572.

child must be deemed that of the child itself. In the leading case on this subject, *Hartfield v. Roper*,¹ the child, an infant of two years, had been allowed to wander on to the public road at a time when the ground was covered with snow, and while standing alone in the road was run over by defendant in a sleigh. The court held that while the child was too young to be capable of exercising care, it was chargeable with the negligence of its parent in allowing it to stray to such a place of danger, and that there could be no recovery. The doctrine announced in this case has been followed in some jurisdictions,² but the modern tendency is to reject it, and to hold the negligent injurer liable for the consequences of his own wrongful act regardless of the contributory negligence of the child's parent or custodian.³ And it seems that this tendency is more in consonance

¹ 21 Wend. (N. Y.) 615; 34 Am. Dec. 278. The court went on to say: "It is a mistake to suppose that because the party injured is incapable of personal discretion, he is therefore above all law. An infant or lunatic is liable personally for wrongs which he commits against the person and property of others. *Bullock v. Babcock*, 3 Wend. (N. Y.) 394. And when he complains of wrongs to himself, the defendant has a right to insist that he should not have been the heedless instrument of his own injury. He cannot, more than any other, make a profit of his own wrong. If his proper agent and guardian has suffered him to incur mischief, it is much more fit that he should look for redress to that guardian, than that the latter should negligently allow his ward to be in the way of travellers, and then harass them in courts of justice, recovering heavy verdicts for his own misconduct." See also *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Bulger v. Albany R. Co.*, 42 N. Y. 459; *Thurber v. Harlem, &c. R. Co.*, 60 N. Y. 326; *Dowling v. New York Cent. R. Co.*, 90 N. Y. 678; *Willeys v. Buffalo, &c. R. Co.*, 14 Barb. (N. Y.) 585; *Dudley v. Westcott*, 18 N. Y. Supp. 130, reversing 15 N. Y. Supp. 952. See also *Weil v. Dry Dock, &c. R. Co.*, 119 N. Y. 147 (question of parent's contributory negligence left to the jury).

² *Schierhold v. North, &c. R. Co.*, 40 Cal. 447; *Meeks v. Southern, &c. R. Co.*, 52 Cal. 604; 56 Cal. 513; 38 Am. Rep. 67; *The Burgundia*, 29 Fed. Rep. 464;

Kyne v. Wilmington, &c. R. Co. (Del. 1888), 14 Atl. Rep. 922 (child of tender years driving with her father); *Kay v. Penn. R. Co.*, 65 Penn. St. 209; 3 Am. Rep. 628; *Mulherin v. Delaware, &c. R. Co.*, 82 Penn. St. 366; *Philadelphia, &c. R. Co. v. Hummell*, 8 Wright (Penn.) 278.

³ *Government St. Ry. Co. v. Hanlon*, 53 Ala. 71; *Bay Shore, &c. R. Co. v. Harris*, 67 Ala. 6; *Birge v. Gardner*, 19 Conn. 507; 50 Am. Dec. 251; *Daley v. Norwich, &c. R. Co.*, 26 Conn. 593; 68 Am. Dec. 413; *Bronson v. Southbury*, 37 Conn. 199; *Ferguson v. Columbus, &c. R. Co.*, 77 Ga. 102 (mother not negligent in allowing child to go near a turntable); *Chicago City R. Co. v. Wilcox* (Ill. 1890), 24 N. E. Rep. 419; affirming 33 Ill. App. 450 (parents not negligent in allowing child to stray beyond their control, when it was run over by street-car); *Chicago, &c. R. Co. v. Ryan*, 31 Ill. App. 621; 131 Ill. 474; *Lake Erie, &c. R. Co. v. Pike*, 31 Ill. App. 90; *Wymore v. Mahaska Co.*, 78 Iowa, 396; *Waterfield v. Lewis*, 43 La. An. 63; *Battis-hill v. Humphrey*, 64 Mich. 494; 28 Am. & Eng. R. Cas. 597; 57 Am. Rep. 474, n.; *Shippy v. Village of Au Sable*, 85 Mich. 280; 48 N. W. Rep. 584; *Louisville, &c. R. Co. v. Hirsch*, 69 Miss. 126; *Westbrook v. Mobile, &c. R. Co.*, 66 Miss. 560; *Boland v. Missouri R. Co.*, 36 Mo. 491; *Frick v. St. Louis, &c. R. Co.*, 75 Mo. 542, 595; 8 Am. & Eng. R. Cas. 280; *Winters v. Kansas City Cable R. Co.*, 99 Mo. 509 (parent not negligent in intrust-

with principle. The incapacity of children is not a doubtful matter like that of a lunatic or blind, deaf, or infirm person, and the engineer, motorman, or driver on seeing a child on the track ahead is bound to recognize the necessity of great care and the probability that the child will not or cannot protect itself, and ought to be held liable for a failure to use such care, instead of escaping by setting up the negligence of a parent in allowing the child to be in a place of danger.¹

Some authorities very properly limit the operation of the rule to cases where the parent or custodian is actually present, and directing and controlling the action of the child, and this seems to be the utmost limit to which the doctrine, doubtful at best, should be extended.² Therefore it is held that the fact that the parent merely

ing three year old child to ten year old sister, nor could negligence of such sister be imputed to the child); *Huff v. Ames*, 16 Neb. 139; 49 Am. Rep. 716; *Bisaillon v. Blood*, 64 N. H. 565; *Newman v. Phillipsburg Horse R. Co.*, 52 N. J. L. 446; 19 Atl. Rep. 1102; *Bellefontain, &c. R. Co. v. Snyder*, 18 Ohio St. 400; *Cleveland, &c. R. Co. v. Manson*, 30 Ohio St. 451; *Whirley v. Whiteman*, 1 Head. (Tenn.) 610; *Galveston, &c. R. Co. v. Moore*, 59 Tex. 64; 46 Am. Rep. 265; *Norfolk, &c. R. Co. v. Groseclose*, 88 Va. 267; 13 S. E. Rep. 454; *Robinson v. Cone*, 22 Vt. 213. See also on this general question, *Smith v. Atchison, &c. R. Co.*, 25 Kan. 738; *Wright v. Malden, &c. R. Co.*, 4 Allen (Mass.), 283; *Pittsburgh, &c. R. Co. v. Pearson*, 72 Penn. St. 169; *Pittsburgh, &c. R. Co. v. Bumstead*, 48 Ill. 221; *Fallon v. Central Park, &c. R. Co.*, 64 N. Y. 13; *Morgan v. Brooklyn R. Co.*, 38 N. Y. 458; *Prendergast v. New York, &c. R. Co.*, 58 N. Y. 652; *Toledo, &c. R. Co. v. Grapple*, 88 Ill. 441; *Ewen v. Chicago, &c. R. Co.*, 38 Wis. 613; *Pittsburgh, &c. R. Co. v. Vining*, 27 Ind. 512; *Evansville, &c. R. Co. v. Wolf*, 59 Ind. 89.

¹ "The reason lies in the irresponsibility of the child, who, itself being incapable of negligence, cannot authorize it in another. It is not correct to say that the parent is the agent of the child, for the child cannot appoint an agent. The law confides the care and custody of a child *non sui juris* to the parent, but if this duty be not performed, the fault is

the parent's, not the child's. There is no principle, then, in our opinion, upon which the fault of the parent can be imputed to the child. To do so is to deny to the child the protection of the law. Whart. on Neg., § 312; *Patterson's Ry. Acc. Law*, 93." *Lewis, P. J.*, in *Norfolk, &c. R. Co. v. Groseclose*, 88 Va. 270. See also *Newman v. Phillipsburg Horse R. Co.*, 52 N. J. L. 448 (opinion of BEASLEY, C. J.); *Wymore v. Mahaska Co.*, 78 Iowa, 396; 2 Thomp. on Trials, § 1687.

² This seems to be the English doctrine, *Waite v. Northeastern R. Co.*, 1 E. B. & E. 719; 96 E. C. L. 719. See *Galveston &c. R. Co. v. Moore*, 59 Tex. 64; 46 Am. Rep. 265; 1 Tex. L. Rev. 145; *Stillson v. Hannibal, &c. R. Co.*, 67 Mo. 671.

"If the parent is personally present, controlling the movements of the child, the parent's negligence will defeat an action for an injury to the child in like manner as if he had suffered the injury himself. *Pierce on Railroads*, 338." *Houston v. Vicksburgh, &c. R. Co.*, 39 La. An. 796; 34 Am. & Eng. R. Cas. 80. In *Galveston, &c. R. Co. v. Moore*, 59 Tex. 64; 46 Am. Rep. 265, the court had to say: "The basis of all obligation to compensate for an injury resulting to a child of tender age not capable of contracting arises from a breach of duty. In case of a parent the duty of protecting the child from injury is a legal one, which ordinarily finds sufficient promptings in parental affection to induce its full performance. The parent is under a legal

allowed the child to stray to a place of danger is not a bar to

obligation to educate and maintain the child, and it has no legal claim upon others to perform that duty; but the obligation to do no act which will result in injury to a child rests upon all persons and corporations as well as upon the parent, and in this respect it does not differ even in degree." See also *Lynch v. Smith*, 104 Mass. 52; 6 Am. Rep. 188; *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317; 7 Am. Rep. 450; *Kay v. Penn. R. Co.*, 65 Penn. St. 209; 3 Am. Rep. 628. In Pennsylvania, it is held that parents who permit their children to trespass upon the property of a railroad company are guilty of negligence; and where a child of tender years who is allowed to wander upon railroad property is injured, the company owes no duty to the child nor to the parent, and is not liable to either for the injury. In *Philadelphia, &c. R. Co. v. Hummel*, 8 Wright, 378, it is said that children "cannot be upon the railroad without a culpable violation of duty by their parents or guardians." In *Smith v. Hestonville, &c. R. Co.*, 92 Penn. St. 450; 37 Am. Rep. 705, the plaintiff permitted her son, a child of seven years, to go about the cars and upon the tracks of a street railroad, and supply the drivers and conductors of the railroad company with water for reward. It was held that this was negligence *per se* on the part of the parent which would preclude her from recovering for the death of the child through the negligence of the company. In *Smith v. O'Connor*, 62 Penn. St. 218, it is said: "In such a case it may be that the father should be treated as a concurrent wrong-doer. The evidence may reveal him such. His own fault may have contributed as much to the injury of the child and consequently to the loss of services due him, as did the fault of the defendant. He owes to the child protection. It is his duty to shield it from danger, and his duty is the greater the more helpless and indiscreet the child is. If by his own carelessness, his neglect of the duty of protection, he contributes to his own loss of the child's services, he may be said to be *in pari delicto* with a negligent defendant." These remarks were pertinent to

the point decided in *Glasse v. Railroad Co.*, 57 Penn. St. 172, that a father cannot recover for an injury to his infant son, which was partly caused by his own imprudent act in failure to perform his paternal duty, and it makes no difference whether the injury of which he complains was to his absolute or relative rights. Referring to that case the court said it very properly settled "that if the parents permit a child of tender years to run at large without a protector in a city traversed constantly by cars and other vehicles, they fail in the performance of their duties, and are guilty of such negligence as precludes them from a recovery of damages for any injury resulting therefrom. If the case is barely such, the negligence is a conclusion of law, and ought not to be submitted to the determination of the jury." *Railway Co. v. Pearson*, 52 Penn. St. 169. The principle was repeated in *Railway Co. v. Long*, 75 Penn. St. 267, where it was said: "To suffer a child to wander on the street has the sense of *permit*. If such permission or sufferance exist, it is negligence." Where an action is brought by a parent for an injury to a child, contributory negligence of the parent is available in defence, but not when the child is the plaintiff. *Penn. R. Co. v. Jones*, 81½ Penn. St. 194; *Smith v. Hestonville, &c. R. Co.*, 92 Penn. St. 450; 37 Am. Rep. 705. It is proper on the question of due care on the part of a child, to show that he was seen on the track prior to the injury, and warned that it was dangerous to stay there. *Fitzpatrick v. Fitchburg R. Co.*, 128 Mass. 13. Putting a young child—in one case less than five years old—upon a train without anything to pay his fare, and without any attendant, is such contributory negligence on the part of the parents as would prevent any recovery for an injury received by it in getting off the train. *Atchison, &c. R. Co. v. Flinn*, 24 Kan. 627. See also *Chicago, &c. R. Co. v. Schumilowsky*, 8 Ill. App. 613, where it was held that a mother who left a child only two years old with its uncle, and it strayed off on to the railroad track and was killed, was guilty of such contributory negligence as to prevent a recovery.

recovery by the child for injuries inflicted through the defendant's negligence.¹

The question as to imputable negligence cannot arise where the child though *non sui juris* has not been guilty of a want of ordinary care, but has exercised reasonable care to protect itself,² or where the defendant, by the exercise of ordinary care, might have prevented the injury in spite of the contributory negligence of the child.³ And as a matter of course there is no room for the question to arise where the child, though possibly of tender years, is old enough to know how to protect itself.⁴ In such cases the question becomes one of fact as to whether or not the party injured was negligent, or whether defendant exercised the proper care to prevent the injury, and is for the determination of the jury.⁵

Some of the cases make a distinction between actions by the injured child, and those in which the parent sues for the loss of the child, holding that in the latter case only will the contributory negligence of the parent bar recovery.⁶ But, in Louisiana, it is held that where the death of a child is caused by the negligence of a wrongdoer, the contributory negligence of its parents is not to be imputed to it, and is no defence to the right of action for the *damages to the*

¹ *Ferguson v. Columbus, &c. R. Co.*, 77 Ga. 102; *Chicago City R. Co. v. Wilcox* (Ill. 1890), 24 N. E. Rep. 419, *affirming* 33 Ill. App. 450.

² *Chicago City R. Co. v. Robinson*, 127 Ill. 1, *affirming* 27 Ill. App. 26.

³ *Chicago, &c. R. Co. v. Ryan*, 131 Ill. 474; 31 Ill. App. 621; *Baltimore, &c. R. Co. v. McDonnell*, 43 Md. 534; *Davies v. Mann*, 10 M. & W. 546. In *Meeks v. Southern Pac. R. Co.*, 56 Cal. 513; 38 Am. Rep. 67, a child of six or seven years, being insensible or asleep on the track near a highway crossing, was run over by a train and injured. He was seen by the engineer and fireman in time to stop, but they supposed him to be a bunch of weeds until it was too late. No warning signal was given; his parents had forbidden him to go on the track. It was held that a recovery might be had.

⁴ *Lynch v. Smith*, 104 Mass. 52; 6 Am. Rep. 188; *McMahon v. New York, &c. R. Co.*, 33 N. Y. 642; *Oakland R. Co. v. Fielding*, 48 Penn. St. 320; *Washington, &c. R. Co. v. Gladman*, 15 Wall. (U. S.) 401.

⁵ *Ehrman v. Brooklyn City R. Co.*, 14 N. Y. Supp. 336; 60 Hun (N. Y.), 580; *Reilly v. Hannibal, &c. R. Co.*, 94 Mo. 600; 34 Am. & Eng. R. Cas. 86; *Payne v. Humeston, &c. R. Co.*, 70 Iowa, 584 (negligence of parent left to jury).

⁶ In an action by a parent for the death of his daughter, it appeared that he knew of the dangerous character of the crossing where the child was killed, but that he sent her on her way to it a short time before the accident. It was held improper and a prejudicial error to refuse an instruction that plaintiff must himself have exercised ordinary care, and this error was not cured by an instruction for the defence that the jury must find plaintiff free from negligence in order to give him a verdict. *Chicago, &c. R. Co. v. Mason*, 27 Ill. App. 450. And in the case of *Mobile & Ohio R. Co. v. Watley*, 69 Miss. 145, a similar doctrine seems to have been applied and a father's negligence in allowing his child to wander on the track was considered a bar to any action by the father.

child which right of action, under the statute, passes to the parents by inheritance.¹

SEC. 322 *a*. **Imputable Negligence in Case of Passenger and Carrier.** — In the now famous case of *Thorogood v. Bryan*,² a passenger in an omnibus, himself free from negligence, was injured by the concurrent negligence of his driver and the driver of another omnibus. The court held that he could not maintain an action against the driver or owner of the second omnibus, as the contributory negligence of his own driver must be imputed to him and would bar his recovery. He was considered as standing in the position of a master, responsible for and bound by the acts of his driver as though he were his servant. And this view has received some recognition in the American courts. Thus, in Wisconsin, it is held that where one accepts an invitation to ride in a private vehicle, the contributory negligence of the driver with whom he rides must be imputed to him, and will bar his recovery in case he is injured through the concurrent negligence of such driver and a third party. And the same view is taken in Iowa.³ But in Pennsylvania the rule of the cases

¹ *Westerfield v. Lewis*, 43 La. An. 63.

² *Thorogood v. Bryan*, 8 C. B. 115; 65 E. C. L. 115; Thompson on Carr. 273; *Armstrong v. Lancashire, &c. R. Co.*, L. R. 10 Exch. 47; *Jones v. Liverpool*, 14 Q. B. Div. 890. See the opinion of the Justices in the first case reviewed in *Little v. Hackett*, 116 U. S. 373-374.

³ *Prideaux v. City of Mineral Point*, 43 Wis. 513; 28 Am. Rep. 560. The action in this case was by a husband and wife for injury to the latter, caused by a defective street. At the time of the injury she was riding by invitation in a private vehicle driven by a third person, whose negligence contributed to cause the injury. The court in holding that her action was barred by the contributory negligence of the driver went on to say: "One voluntarily in a private conveyance, voluntarily intrusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance for the time being as one's own, and assumes the risk of the skill and care of the person guiding it. *Pro hac vice*, the master of a private yacht or the driver of a private carriage is accepted as agent by every person voluntarily committing himself to it. When *pater familias* drives

his wife and children in his own vehicle, he is surely their agent in driving them, to charge them with his negligence. It is difficult to perceive on what principle he is less the agent of one who accepts his or their invitation to ride with them. There is a personal trust in such cases which implies an agency. So several persons, voluntarily associating themselves to travel together in one conveyance, not only put a personal trust in the skill and care of that one of them whom they trust with the direction and control of the conveyance, but appear to put a personal trust each in the discretion of each against negligence affecting the common safety. [*Beck v. East River Ferry Co.*, 6 Robt. (N. Y.) 82.] One enters a public conveyance, in some sort, of moral necessity. One generally enters a private conveyance of free choice, voluntarily trusting to its sufficiency and safety." *Haufe v. Fulton*, 29 Wis. 296; 9 Am. Rep. 568; 34 Wis. 608; 17 Am. Rep. 463; *Artz v. Chicago, &c. R. Co.*, 34 Iowa, 153; *Payne v. Chicago, &c. Co.*, 39 Iowa, 523; *Slater v. Burlington, &c. Co.*, 71 Iowa, 209. The same rule was applied in *Nichols v. Great Western Ry. Co.*, 27 U. C. Q. B. 382.

just stated has been repudiated in a case involving very similar circumstances,¹ though the rule of *Thorogood v. Bryan* was, until very recently, applied in the case of public carriers.² There are other cases sustaining the view that the contributory negligence of a husband, driving a private vehicle, is a bar to recovery by his wife for injuries sustained by her through the negligence of a third party while she was in the vehicle with her husband.³ Still other American cases apply the doctrine of the English case to a greater or less extent.⁴

But in a recent and well considered case in the Federal Supreme Court the doctrine of *Thorogood v. Bryan* has been repudiated entirely. It appeared that the plaintiff in the case had hired a public hack, and that he gave the driver directions as to where he wished to be carried, but exercised no other control over the driver's conduct. In the course of the journey, owing to the concurrent negligence of the train operatives and of the driver, a train ran into the vehicle

¹ *Carlisle v. Brisbane*, 113 Penn. St. 544; 57 Am. Rep. 483.

² *Lockhard v. Lichtenthaler*, 46 Penn. St. 151; *Philadelphia, &c. R. Co. v. Boyer*, 97 Penn. St. 91; 2 Am. & Eng. R. Cas. 172. These cases, upholding *Thorogood v. Bryan*, have been overruled in *Bunting v. Hogsett*, 139 Penn. St. 363; 27 W. N. C. 317; 21 Atl. Rep. 31. So that in Pennsylvania the entire doctrine is repudiated.

³ *Carlisle v. Sheldon*, 38 Vt. 440; *Huntoon v. Trumbull*, 2 McCrary (U. S.), 314; *Gulf, &c. R. Co. v. Greenlee*, 62 Tex. 344; 23 Am. & Eng. R. Cas. 322. *Contra*, *Louisville, &c. R. Co. v. Creek* (Ind.), 29 N. E. Rep. 481. By §§ 162-164, 169, of Civil Code of California damages recovered for personal injuries to a wife are made community property of which the husband has control (§ 172). In an action by wife, held that the husband was a necessary party, and that his contributory negligence would bar recovery. *McFadden v. Santa Anna, &c. R. Co.*, 87 Cal. 464. See *Shaw v. Craft*, 37 Fed. Rep. 317 (husband's contributory negligence does not bar action by administrator of wife for damages for her death).

⁴ In the case of *Lake Shore, &c. R. Co. v. Miller*, 25 Mich. 274, it appeared that a female servant was riding with her master in a wagon which was wrecked by a railroad train. The master was guilty of con-

tributory negligence notwithstanding the warnings of his servant against it. It was held in an action by the servant for injuries sustained that the negligence of her master would bar her recovery. In *Kyne v. Wilmington, &c. R. Co.* (Del. 1888), 14 Atl. Rep. 922, it was held that a child of tender years, riding with her father, cannot recover for injuries sustained in consequence of a defect in the highway if her father in driving was negligent.

In the case of *Toledo, &c. R. Co. v. Miller*, 76 Ill. 278, the parents of a boy of nine years intrusted him to a neighbor, and the two latter, in the neighbor's wagon, while crossing a railroad track, were struck by a passing train, going at its ordinary speed, and the boy killed. The evidence showed that the train was in plain view for a considerable distance before reaching the crossing, and that a bell was rung as required by law. The court held that the parents had no right of action for the death of their son on the ground that no negligence on the part of the company was shown, and that the contributory negligence of the neighbor in charge of the child was a bar. See a similar doctrine applied in *Payne v. Chicago, &c. R. Co.*, 39 Iowa, 523; *Elkins v. Boston, &c. R. Co.*, 115 Mass. 190; *Robinson v. New York, &c. R. Co.*, 66 N. Y. 11.

causing plaintiff to sustain severe injuries. The court held that the driver's contributory negligence was no bar to plaintiff's right of action against the railroad company, and Mr. Justice FIELD, speaking for the court, laid down the better doctrine in a lengthy and able opinion.¹ This case, taken in connection with the distinct repudiation of *Thorogood v. Bryan* in a recent English case,² and in a large number of the various State courts,³ seems to indicate an entire

¹ *Little v. Hackett*, 116 U. S. 370. The court said: "Cases cited from the English courts, and numerous others decided in this country, show that the relation of master and servant does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger where no fault of omission or commission is chargeable to him is against all legal rules. If their negligence could be imputed to him, it would render him equally with them responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained; neither has the support of any adjudged cases entitled to consideration. The truth is, the decision in *Thorogood v. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world." See this case approved and followed in *Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 41 Fed. Rep. 316. See also *Gray v. Philadelphia, &c. R. Co.*, 23 Blatchf. (U. S.) 262. In the case of *Griffith v. Baltimore, &c. R. Co.*, 44 Fed. Rep. 574, the plaintiff, a young girl, was in a carriage with her mother, who was driving, when the accident (at a railway crossing) occurred. It was held that while the negligence of the mother could not be imputed to the girl, yet it was as much the

duty of the latter to suggest the necessary precautions, and to protest if they were not taken, as it was the mother's duty to take them. *s. p. Brannen v. Kokomo, &c. R. Co.*, 115 Ind. 115; 17 N. E. Rep. 202.

² *The Bernina*, 12 Prob. Div. 58, also reported in 57 Am. Rep. 494, *n.* The court said: "We are of the opinion that the proposition maintained in *Thorogood v. Bryan* is essentially unjust, and essentially inconsistent with other well recognized propositions of law." See also *The Milan*, 1 Lush. 388; 403; *Tuff v. Warman*, 5 C. B. N. s. 573; 94 E. C. L. 573.

³ *Elyton Land Co. v. Mingea*, 89 Ala. 521; 7 So. Rep. 666 (negligence of driver of fire company's hose-cart not imputable to fireman riding on such cart); *Tompkins v. Clay Street R. Co.*, 66 Cal. 163; 18 Am. & Eng. R. Cas. 144; *Wabash, &c. R. Co. v. Shacklett*, 105 Ill. 364; 44 Am. Rep. 791; *Louisville, &c. R. Co. v. Creek*, 180 Ind. 139; 29 N. E. Rep. 481; *Pittsburg, &c. R. Co. v. Spencer*, 98 Ind. 186; 21 Am. & Eng. R. Cas. 478; *Danville, &c. Tp. Co. v. Stewart*, 2 Met. (Ky.) 119; *Louisville, &c. R. Co. v. Case*, 9 Bush (Ky.), 728; *Holzap v. New Orleans, &c. R. Co.*, 38 La. An. 185; 58 Am. Rep. 177; *State v. Boston, &c. R. Co.*, 80 Me. 430; *Eyler v. County Com'rs*, 49 Md. 257; 33 Am. Rep. 249; *Philadelphia, &c. R. Co. v. Hogeland*, 66 Md. 149; 57 Am. Rep. 492; *Follman v. Mankato*, 35 Minn. 522; *Poor v. Sears*, 154 Mass. 539; 28 N. E. Rep. 1046; *Malmsten v. Marquette, &c. R. Co.*, 49 Mich. 94; 8 Am. & Eng. R. Cas. 291; *Cuddy v. Horn*, 46 Mich. 596; 41 Am. Rep. 178; *Lake Erie, &c. R. Co. v. Steinbrenner*, 47 N. J. L. 161, 171; 23 Am. & Eng. R. Cas. 330; *Robinson v. New York Cent. R. Co.*, 66 N. Y. 11; 23 Am. Rep. 1; *Cumming v. Brooklyn City R. Co.*, 104 N. Y. 669; *Masterson v.*

abandonment of the doctrine of imputable negligence as applied to passengers and their carriers. In fact the doctrine has been repudiated in every case of recent date, regardless of whether the passenger was in a private or public conveyance,¹ or whether he rode in a hired vehicle, or by invitation of the proprietor, his friend or relative.² In the case of passengers on street-railway cars there is less ground than in any other for an attempt to apply the doctrine; accordingly it has never been recognized in such cases.³

The only instance in which a traveller or passenger is chargeable with the contributory negligence of his driver is where the relation of master and servant actually exists and the servant at the time of the injury is acting under the immediate control and direction of the master. Thus where the master is seated on the driving-box

New York, &c. R. Co., 84 N. Y. 247; 38 Am. Rep. 510; 3 Am. & Eng. R. Cas. 408; *Chapman v. New Haven R. Co.*, 19 N. Y. 341; 75 Am. Dec. 344; *Webster v. Hudson River R. Co.*, 38 N. Y. 262; *Covington Transfer Co. v. Kelly*, 38 Ohio St. 86; 38 Am. Rep. 558 (passenger on street-car); *St. Clair St. R. Co. v. Eadie*, 43 Ohio St. 91; 23 Am. & Eng. R. Cas. 269; 54 Am. Rep. 802; *Davis v. Guarnieri*, 45 Ohio St. 470; *Galveston, &c. R. Co. v. Kutac*, 72 Tex. 643; *New York, &c. R. Co. v. Cooper*, 85 Va. 939; *Sheffield v. Central Un. Tel. Co.*, 36 Fed. Rep. 164. The rule is that where one travels in a vehicle over which he has no control, but at the invitation of the owner and driver, no relationship of principal and agent arises between them. He is not responsible for the negligence of the driver, where he himself is not chargeable with negligence, and where there is no claim that the driver was not competent to control and manage the team. *Dyer v. Erie R. Co.*, 71 N. Y. 228.

¹ *Randolph v. O'Riorden*, 155 Mass. 331; 29 N. E. Rep. 583; *Larkin v. Burlington, &c. R. Co.* (Iowa), 52 N. W. Rep. 480; *Becke v. Missouri Pac. R. Co.*, 102 Mo. 544. A passenger in a public hack is not bound to supervise the driver at a railroad crossing, nor to listen for approaching trains, unless she has reasonable cause to suspect the competence of the driver. *East Tenn., &c. R. Co. v. Markens*, 88 Ga. 60. "There is no dis-

inction in principle whether the passengers be on a public conveyance like a railroad train or an omnibus, or be on a hack hired from a public stand in the street for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route they wish to travel." *Little v. Hackett*, 116 U. S. 379.

² *Lapley v. Union Pac. R. Co.*, 50 Fed. Rep. 172 (girl riding with her brother); *McCaffrey v. President Delaware, &c. Canal Co.*, 62 Hun (N. Y.), 618; *Cahill v. Cincinnati, &c. R. Co.* (Ky.), 18 S. W. Rep. 2; *Dyer v. Erie R. Co.* 71 N. Y. 288 (riding by invitation); *Noyes v. Boscawen*, 64 N. H. 361; *Town of Knightstown v. Musgrove*, 116 Ind. 121; *Nesbet v. Garner*, 75 Iowa, 314. The negligence of one driving a private vehicle cannot be imputed to one riding therein, the latter having no right to control, in any way, the actions of the former. *Bennett v. New York Cent. R. Co.*, 61 Hun (N. Y.), 623; 133 N. Y. 563.

³ *Bennett v. New Jersey R. Co.*, 36 N. J. L. 225; 13 Am. Rep. 435; *Seaman v. Kochler*, 122 N. Y. 646 (negligence of driver not imputable to conductor); *Covington Transfer Co. v. Kelly*, 38 Ohio St. 86; 38 Am. Rep. 558; *Whelan v. New York, &c. R. Co.*, 38 Fed. Rep. 15; *Georgia Pac. R. Co. v. Hughes*, 87 Ala. 610.

with his servant who holds the reins, and an injury occurs while they are driving over a crossing, the master's action for damages will be barred if the negligence of his servant contributed to cause the injury.¹

Where the master has an action brought against him for the negligence of his servant, if the relation of master and servant actually existed at the time of the injury, the servant's negligence may be imputed to the master so as to make the latter liable; but such a case is nothing more than an application of settled rules as to the responsibility of the master for acts of his servant.²

SEC. 322 *b*. **Comparative Negligence.**—The doctrine of comparative negligence is defined to be "that doctrine in the law of negligence by which the negligence of the parties is compared in the degrees of 'slight,' 'ordinary,' and 'gross' negligence, and a recovery permitted, notwithstanding the contributory negligence of the plaintiff, when the negligence of the plaintiff is slight and the negligence of the defendant gross, but refused when the plaintiff has been guilty of a want of *ordinary* care contributing to his injury, or when the negligence of the defendant is not gross, but only ordinary or slight when compared, under the circumstances of the case, with the contributory negligence of the plaintiff."³ This doctrine originated with the courts of Illinois, being derived from the doctrine which has long existed in admiralty and in the law of bailments by which degrees of negligence were recognized.⁴ It is still applied in Illinois,⁵ but is repudiated in most of the States,⁶

¹ *Brickell v. New York Cent., &c. R. Co.*, 120 N. Y. 290.

² See *Georgia Pac. R. Co. v. Underwood*, 90 Ala. 49.

³ 3 Am. & Eng. Ency. of Law, p. 367. In this article, W. H. Russell, Esq., now of Harriman, Tenn., presents a very thorough and logical review of the doctrine. See also Beach on Cont. Neg. (1st ed.), p. 82-84.

⁴ *The Nautilus*, 1 Ware (U. S.), 529; *The Sapphire*, 18 Wall. (U. S.) 51; *The Atlas*, 93 U. S. 302; *Coggs v. Bernard*, 2 Ld. Ray. 909; 1 Smith's L. Cas. 82; 8 Minor's Insts. 252-257; Schouler on Bailments, 15; Jones on Bailments, 8; Story on Id. § 17.

⁵ *Galena, &c. R. Co. v. Jacobs*, 20 Ill. 478; *Chicago, &c. R. Co. v. Johnson*, 103 Ill. 512; 8 Am. & Eng. R. Cas. 225 (doc-

trine distinctly asserted and reviewed at length); *Chicago v. Stearns*, 105 Ill. 554; *Abend v. Terre Haute, &c. R. Co.*, 111 Ill. 203; 53 Am. Rep. 616; 20 Am. & Eng. R. Cas. 614.

⁶ *Carrington v. Louisville, &c. R. Co.*, 38 Ala. 472; 6 So. Rep. 910; *Prescott, &c. R. Co. v. Rees* (Ariz. 1892), 28 Pac. Rep. 1134; *Rowen v. New York, &c. R. Co.*, 56 Conn. 364; 21 Atl. Rep. 1073; *Chicago, &c. R. Co. v. Brown*, 44 Kan. 384; 24 Pac. Rep. 497; *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 169; 44 Am. Rep. 630; *Mason v. Missouri Pac. R. Co.*, 27 Kan. 83; 41 Am. Rep. 405; 6 Am. & Eng. R. Cas. 1; *Kansas, &c. R. Co. v. Fitzsimmons*, 18 Kan. 34; 22 Kan. 686; 31 Am. Rep. 203; *Fenneman v. Holdman* (Md. 1891), 22 Atl. Rep. 1049 (instruction is contradictory which states that plaintiff

though there are some other courts which adopt a modification of it.¹

The application of this doctrine must necessarily involve the nicest discriminations of fact, and while it was invented in order to soften the rule as to contributory negligence being a bar to plaintiff's action,² it may well admit of question whether it has not created more confusion than anything else.³ Where it prevails, the plaintiff,

may recover "if he used reasonable care, though he was guilty of some negligence"; *Long v. Tp. of Milford*, 137 Penn. St. 122; *Galveston, &c. R. Co. v. Thornsberry* (Tex. 1891), 17 S. W. Rep. 521. The doctrine in Oregon is set out in the case of *Hurst v. Burnside*, 12 Oreg. 520; 8 Pac. Rep. 894: "A person may be negligent in any affair and still recover on account of the negligence of another party, but not when his negligence is the proximate cause of the injury. The law does not enforce contribution between joint tort-feasors. However slight the negligence upon the part of the plaintiff may be, if it be such that but for that negligence the misfortune would not have occurred, he cannot recover; but if the injury would have happened if his want of care had not contributed thereto, there may be a liability." *Cassida v. Oregon, &c. R. Co.*, 14 Oreg. 551; 13 Pac. Rep. 441.

¹ The doctrine now prevails in *Kentucky* by virtue of a statute which provides that the defendant shall be liable for injuries caused by his gross neglect, notwithstanding plaintiff's contributory negligence. But it is held that this statute applies only to cases where death results from such gross negligence. *Illinois Cent. R. Co. v. Dick* (Ky. 1891), 15 S. W. Rep. 665. Prior to the statute the doctrine did not prevail. See *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 160; 42 Am. Rep. 208; 1 Am. & Eng. R. Cas. 79; *Adams v. Louisville, &c. R. Co.* (Ky.), 21 Am. & Eng. R. Cas. 380; 3 Am. & Eng. Ency. Law, 375. In *Tennessee*, the rule is that the plaintiff's contributory negligence will ordinarily bar his recovery, but that plaintiff, though negligent, may recover if he could have avoided the consequences of defendant's negligence by the exercise of ordinary care. His contributory negli-

gence however is to be considered in mitigation of damages. The rule as thus adopted does not admit of a recovery where the parties are equally blamable. *East Tenn., &c. R. Co. v. Fain*, 12 Lea (Tenn.), 35; 19 Am. & Eng. R. Cas. 105; *Louisville, &c. R. Co. v. Fleming*, 14 Lea (Tenn.), 128; 18 Am. & Eng. R. Cas. 347; *Jackson v. Nashville, &c. R. Co.*, 13 Lea (Tenn.), 491; 49 Am. Rep. 663; *East Tenn., &c. R. Co. v. Stewart*, 13 Lea (Tenn.), 618. See also *Whirley v. Whiteman*, 1 Head (Tenn.), 610; *Louisville, &c. R. Co. v. Burke*, 6 Coldw. (Tenn.) 645; *Smith v. Nashville, &c. R. Co.*, 6 Coldw. 589; 6 Heisk. 124; *Nashville, &c. R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347-367. See also *East Tenn., &c. R. Co. v. Aiken*, 89 Tenn. 245. And from the language used in the opinion in *Branham v. Central R. Co.*, 78 Ga. 35; 1 S. E. Rep. 274, and other cases, it seems that the Tennessee doctrine prevails in *Georgia*. See *Georgia R. Co. v. Pittman*, 78 Ga. 325; 26 Am. & Eng. R. Cas. 476; *Central R. Co. v. Gleason*, 69 Ga. 200; *Atlanta, &c. R. Co. v. Wyley*, 65 Ga. 120; *Atlanta, &c. R. Co. v. Ayers*, 53 Ga. 12; *Thompson v. Central R. Co.*, 54 Ga. 509.

² *Illinois, &c. R. Co. v. Evans*, 88 Ill. 65; *Chicago, &c. R. Co. v. Harwood*, 90 Ill. 427.

³ It would seem to an ordinary observer that the capacity of juries is already taxed to its limit in their being required to determine the proximity of causation and the fact as to whether or not plaintiff or defendant acted with the care which a man of ordinary prudence would use, etc. To ask them to make the delicate comparisons required by the doctrine of comparative negligence serves but to cloud the issues, and render a proper verdict more difficult than ever to be obtained.

if he has been guilty of any negligence at all which contributed as a proximate cause to the injury, must show that his own negligence was "slight" only, and that that of the defendant was "gross;" there must be an entire degree between his negligence and that of the defendant;¹ a mere preponderance of negligence on the part of defendant is not sufficient.² What constitutes "slight" or "gross" negligence on the part of either party cannot be determined from any fixed rules, but must always be left to the jury.³ But where the injury is wilful and not inadvertent, the plaintiff is entitled to recover, since contributory negligence, no matter of what degree, is no bar to an action for a wilful injury. A wilful injury cannot be classed as "gross negligence" and thus open the way for an application of the rule of comparison.⁴

It should be observed that in every case the plaintiff must show that he was in the exercise of ordinary care at the time of the injury; the doctrine of comparative negligence is never applicable unless this is established.⁵ But the plaintiff may have been guilty of slight

¹ Rockford, &c. R. Co. v. Delaney, 82 Ill. 196; 25 Am. Rep. 308; Indianapolis, &c. R. Co. v. Evans, 88 Ill. 63; Joliet v. Seward, 86 Ill. 402; Parmelee v. Farro, 22 Ill. App. 467; Chicago, &c. R. Co. v. Mason, 27 Ill. App. 450. It is no harm in instructing the jury to speak of "some" negligence on part of plaintiff when "slight" negligence is meant, though the latter term should be used. Willard v. Swanson, 22 Ill. App. 424, *affirmed*, 126 381.

² Chicago, &c. R. Co. v. Dimick, 96 Ill. 42; Illinois Cent. R. Co. v. Goddard, 72 Ill. 568; Chicago, &c. R. Co. v. Clark, 70 Ill. 278; Prescott, &c. R. Co. v. Rees (Ariz. 1892), 28 Pac. Rep. 1134. But in one case it is said that where plaintiff's negligence is slight, and that of defendant was *ordinary*, plaintiff may recover. City of Galesburg v. Benedict, 22 Ill. App. 111.

³ North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57; Illinois Cent. R. Co. v. Haskins, 115 Ill. 300; Pennsylvania Co. v. Frana, 112 Ill. 398. But if there is no evidence of ordinary care on the part of the plaintiff, or if it fails to appear that the defendant's negligence was gross, the court will hold as a matter of law that plaintiff's action cannot be sustained.

Chicago, &c. R. Co. v. Clark, 108 Ill. 114; 15 Am. & Eng. R. Cas. 261. See also Chicago, &c. R. Co. v. Johnson, 103 Ill. 512; 8 Am. & Eng. R. Cas. 235.

⁴ Illinois, &c. R. Co. v. Hetherington, 83 Ill. 510; St. Louis, &c. R. Co. v. Todd, 36 Ill. 414. See the subject of so-called "wilful negligence," and also the question of wilful injury discussed, Carrington v. Louisville, &c. R. Co., 88 Ala. 472; 6 So. Rep. 910; Louisville, &c. R. Co. v. Bryan, 107 Ind. 54; 16 Am. & Eng. Ency. Law, Article "*Negligence*," pp. 392-395.

⁵ Therefore an instruction that "in this case although the jury may believe from the evidence that plaintiff was not wholly without negligence, yet if you further believe from the evidence that defendant was guilty of gross negligence, while the plaintiff was guilty only of slight negligence, then such slight negligence will not prevent a recovery," is erroneous as assuming that plaintiff exercised ordinary care, since the doctrine of comparative negligence applies only where plaintiff was in the exercise of ordinary care. Toledo, &c. R. Co. v. Cline, 135 Ill. 41; 25 N. E. Rep. 846. See the same view held in Chicago, &c. R. Co. v. Warner, 22 Ill. App. 462, *affirmed*, 123 Ill. 38. But such an instruction is all right if the necessity of plaintiff's having been in

negligence and still have been in the exercise of ordinary care. At least such is the view of these cases. It seems, however, that the use of such expressions tends greatly to a confusion of principles.

The doctrine of comparative negligence is merely a modification of the general law in a single particular, and in all other respects the usual rules of the law of negligence prevail. There is no room for its application, therefore, where the plaintiff's negligence does not operate as a proximate cause of the injury,¹ nor where the plaintiff is so young as to be incapable of contributory negligence.²

Out of the application of the doctrine various rules have arisen in the courts of Illinois, a review of which is unnecessary in this connection.³

SEC. 323. Injuries at Highway-Crossings. — Every company owning and operating a railway is now generally required by statute to construct and maintain safe and proper crossings at all points where its road intersects a public highway; and it is liable for all injuries resulting from a neglect of this duty.⁴ The character and extent of this duty has already been considered;⁵ the important question in this section is as to liability for injuries resulting from the negligent operation of trains at highway-crossings.

the exercise of ordinary care is clearly laid down in other instructions. *Tomle v. Hampton*, 28 Ill. App. 142; *affirmed*, 129 Ill. 379.

¹ 3 Am. & Eng. Ency. Law, 370; *Beach on Cont. Neg.* (1st ed.), 87; *Chicago, &c. R. Co. v. Johnson*, 103 Ill. 512; 8 Am. & Eng. R. Cas. 225.

² *Chicago, &c. R. Co. v. Welsh*, 118 Ill. 572; *Chicago, &c. R. Co. v. Gregory*, 58 Ill. 226; *Chicago, &c. R. Co. v. Delaney*, 82 Ill. 198; 25 Am. Rep. 310; *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228; 15 Am. & Eng. R. Cas. 394.

³ See *Terre Haute v. Voelker*, 31 Ill. App. 314; *affirmed*, 129 Ill. 540; *City of Champagne v. Jones*, 32 Ill. App. 179; *affirmed*, 132 Ill. 304; *Lake Shore, &c. R. Co., v. Bodemer*, 33 Ill. App. 479 (trespasser on track allowed to recover); *Lake Shore, &c. R. Co. v. Johnson*, 135 Ill. 641; *North Chicago St. R. Co. v. Williams*, 140 Ill. 275. Evidence of a custom prevailing where plaintiff was employed is admissible to aid the jury in determining the degree of care exercised by the plaintiff as compared with that of the defendant. *Penn-*

sylvania Co. v. Stoelke, 104 Ill. 201. The intermediate appellate courts have authority to review the facts of the case as well as the law, though the Supreme Court reviews only matters of law. *Illinois Cent. R. Co. v. Haskins*, 115 Ill. 300; 22 Am. & Eng. R. Cas. 245.

⁴ See *Farley v. Chicago, &c. R. Co.*, 42 Iowa, 234; *Kelly v. Southern, &c. R. Co.*, 28 Minn. 98; 6 Am. & Eng. R. Cas. 264; *Pittsburgh, &c. R. Co. v. Dunn*, 56 Penn. St. 280; *Paducah, &c. R. Co. v. Com.*, 80 Ky. 147; 10 Am. & Eng. R. Cas. 318; *State v. Dayton, &c. R. Co.*, 36 Ohio St. 436; 5 Am. & Eng. R. Cas. 312; *Louisville, &c. R. Co. v. Smith*, 91 Ind. 119; 13 Am. & Eng. R. Cas. 608.

⁵ See *ante*, § 287 a; 4 Am. & Eng. Ency. Law, pp. 907-908. Whether the crossing has been constructed with proper care, and so as to render crossing at that point as little dangerous as possible to the public using the highway, is generally for the jury to say. *Roberts v. Chicago, &c. R. Co.*, 35 Wis. 679. See also *Ferguson v. Virginia, &c. R. Co.*, 13 Nev. 184.

As we have seen, its track and road-bed are the private and exclusive property of the railroad company upon which no one has a right to trespass, and if any one goes thereon he does so at his own peril; the company owes him no duty except to refrain from wilful injury.¹ But where the track crosses or is crossed by a highway, the rule is necessarily different; the company certainly retains the right to use that part of the track for the operation of its trains, but the public have an equal right to use that space for highway purposes. Neither party has the right to interfere with the proper use of the crossing by the other.² The situation then creates mutual rights and obligations; both parties must use ordinary care in the exercise of their own rights, they must have regard to the circumstances and to the danger incident to a careless use of such a right of passage.³

In a case before the Supreme Court of the United States,⁴ Mr. Justice BRADLEY, speaking for the court, said in regard to the company's duty: "From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and the right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. It cannot be such if the speed of the train is so great as to render it unavailing. The speed

¹ See *ante*, § 320; *Byrne v. N. Y. Central R. Co.*, 94 N. Y. 12 (private crossing); *Donnelly v. Brooklyn, &c. R. Co.*, 109 N. Y. 16; *Philadelphia, &c. R. Co. v. Hummell*, 44 Penn. St. 375; 84 Am. Dec. 457.

² "We think the [trial] judge was therefore perfectly right in holding that the obligations, rights, and duties of railroads and travellers upon intersecting highways are mutual and reciprocal, and that no greater degree of care is required of the one than of the other. . . . Both parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of

the case in endeavoring fairly to perform his duty." Mr. Justice BRADLEY, in *Continental Imp. Co. v. Stead*, 94 U. S. 165. See also *Chicago, &c. R. Co. v. Hillmer*, 72 Ill. 235; *Indianapolis, &c. R. Co. v. McLin*, 82 Ind. 435; *Louisville, &c. R. Co. v. Goetz*, 79 Ky. 442; 14 Am. & Eng. R. Cas. 627; *Baltimore, &c. R. Co. v. Owings*, 65 Md. 502; 28 Am. & Eng. R. Cas. 639; *Beisiegel v. N. Y. Central R. Co.*, 40 N. Y. 9; *Pennsylvania R. Co. v. Goodman*, 62 Penn. St. 329.

³ *Kay v. Pennsylvania R. Co.*, 65 Penn. St. 269; *Willoughby v. Chicago, &c. R. Co.*, 37 Iowa, 432; *Pennsylvania R. Co. v. Krick*, 47 Ind. 368.

⁴ *Continental Improvement Co. v. Stead*, 94 U. S. 164.

of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when their sound is obstructed by winds or other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the 'crossing.' This is a comprehensive statement of the company's duty, and although numerous other statements have been formulated by the courts they all amount to the same general requirement that the company must exercise ordinary care under the circumstances.¹ It is bound to use every reasonable precaution, but not every possible one.² Thus it must always, on approaching a crossing, give suitable warning of its approach by sounding the whistle, and this must be done in sufficient time to make it effectual as a warning.³ In most

¹ *Weber v. New York Central R. Co.*, 58 N. Y. 451; *Western R. Co. v. King*, 70 Ga. 261; 19 Am. & Eng. R. Cas. 255; *Baltimore, &c. R. Co. v. Breinig*, 25 Ind. 378; 90 Am. Dec. 49. Instructions that a railroad company, on its trains approaching a crossing, must exercise "a high degree of diligence and care," and "give sufficient and timely warning, and take such precautions as shall be efficient;" that "the law does not require that whatever warnings or precautions are taken shall be sufficient and effective," that the jury may consider "whether or not timely and efficient warning was given," and whether there were safer and surer signals of its approach to the crossing within its command," are erroneous in that they require too much of the company; it is bound only to exercise such care as an ordinarily prudent person would exercise under the same circumstances. *Chicago, &c. R. Co. v. Fisher (Kan.)*, 30 Pac. Rep. 462.

² *Weber v. N. Y. Central R. Co.*, 58 N. Y. 451; *Shaw v. Boston, &c. R. Co.*, 8 Gray (Mass.), 45. Thus the placing of a man as a guard on each car of a freight train, to give and repeat signals, cannot ordinarily be required. *Chicago, &c. R. Co. v. Stumps*, 55 Ill. 367. But the company must provide a proper head-light as an additional warning of its approach. *Alabama, &c. R. Co. v. Jones*, 71 Ala. 487.

³ *Continental Imp. Co. v. Stead*, 94 U. S. 161; *Reeves v. Delaware, &c. R. Co.*, 30 Penn. St. 454; *Hinkle v. Richmond, &c. R. Co.*, 109 N. C. 472; *Hermann v. N. Y. Central R. Co.*, 17 N. Y. Supp. 319. This duty to give some warning exists independently of any statute, though its requirements, when not prescribed by statute, are generally for the jury. *Philadelphia, &c. R. Co. v. Steizer*, 78 Penn. St. 219; *Cadell v. N. Y. Central R. Co.*, 64 N. Y. 535; 6 Hun (N. Y.), 461; *Black v. Burlington, &c. R. Co.*, 38 Iowa, 515; *Bauer v. Kansas Pacific R. Co.*, 69 Mo. 219; *Paducah, &c. R. Co. v. Hoehl*, 12 Bush (Ky.), 41; *Ellis v. Great Western Ry. Co.*, L. R. 9 C. P. 551. Compare *Brown v. Milwaukee, &c. R. Co.*, 22 Minn. 165, holding that the company is not necessarily bound to sound its whistle at a crossing unless required by statute. See also *Favor v. Boston, &c. R. Co.*, 114 Mass. 350; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Loucks v. Chicago, &c. R. Co.*, 31 Minn. 526. Where the alleged negligence consisted in a failure to ring the bell or sound the whistle, the testimony of passengers on the train, who were in a position to have heard, that they did not hear either of these signals, is competent, although it does not affirmatively appear that they were looking or listening therefor. *Greany v. Long Island R. Co.*, 101 N. Y. 419. But in *McKeever v. N. Y. Central R. Co.*, 88 N. Y. 667, the plain-

if not in all of them the duty as to signalling is prescribed by statute. A failure to discharge this statutory duty is evidence of the company's negligence, but it is erroneous to say that it conclusively establishes its liability.¹ It is also a part of the company's duty to indicate the existence of the crossing by conspicuous sign-boards;² this duty too is generally prescribed by statute, but as in the preceding case a neglect of it is only some evidence of negligence, and is not conclusive proof of liability.³ As to the rate of speed, it must be such that, together with the warning signals given, travellers near or on the crossing may have reasonable opportunity to avoid danger.⁴ This does not mean that there must be a material reduction in the rate of speed on approaching every highway-crossing, such a requirement would prove a most serious hindrance to the rapid transporta-

tiff, who was run over at a crossing, was non-suited on the authority of *Culhane v. N. Y. Central R. Co.*, 60 N. Y. 183. The court here agreed as to the rule laid down in that case, *i. e.*, that as against positive affirmative evidence by credible witnesses, to the ringing of a bell or sounding of a whistle, there must be something more than the testimony of one or more witnesses that they did not hear it, to authorize the submission of that question to the jury.

¹ *Sala v. Chicago, &c. R. Co.* (Iowa), 52 N. W. Rep. 664 (plaintiff must still prove himself free from negligence); *Barber v. Richmond, &c. R. Co.*, 34 S. C. 444 (failure to give signal immaterial, when traveller was aware of the approach of the train); *Briggs v. N. York Central R. Co.*, 72 N. Y. 26. Compare *Louisville, &c. R. Co. v. Howard*, 90 Tenn. 144. See this part of the subject examined further on in this section, *post*, pp. 1514-1516.

² *Baltimore, &c. R. Co. v. Whitacre*, 35 Ohio St. 627; *Shaber v. St. Paul, &c. R. Co.*, 28 Minn. 103; *Elkins v. Boston, &c. R. Co.*, 115 Mass. 190. The absence of the sign-board however is immaterial where the traveller is familiar with the crossing. *Haas v. Grand Rapids, &c. R. Co.*, 47 Mich. 401; 8 Am. & Eng. R. Cas. 268. Nor will its absence warrant a recovery where by the exercise of ordinary care the traveller might have known of the crossing without a sign-board. *Gulf, &c. R. Co. v. Greenlee*, 62 Tex. 344; 23 Am. & Eng. R. Cas. 322; *Payne v. Chicago, &c. R. Co.*, 39 Iowa, 523; 44 Iowa, 236.

³ *Lang v. Holliday Creek R. Co.*, 49 Iowa, 469; *Field v. Chicago, &c. R. Co.*, 4 McCrary (U. S.), 573; 14 Fed. Rep. 332; 8 Am. & Eng. R. Cas. 425; *Payne v. Chicago, &c. R. Co.*, 39 Iowa, 523; 44 Iowa, 236; *Heddes v. Chicago, &c. R. Co.*, 77 Wis. 228. The statute requiring sign-boards does not apply to a traveller not intending to use the crossing, but who is travelling on the public highway parallel to the railroad. *East Tennessee, &c. R. Co. v. Feathers*, 10 Lea (Tenn.), 103. In a suit against a railway company for injuries sustained by being run into at a highway-crossing, evidence that there was no sign-board at the crossing at the time of the accident is admissible on the issue of due care on the part of the plaintiff. *Elkins v. Boston, &c. R. Co.*, 115 Mass. 190. Evidence that the company had no sign over the crossing to warn persons approaching of its presence is proper, although there is no statute or ordinance requiring the company to have such a sign. It is for the jury to say whether the omission to have such a sign is negligence; and it is for them to say whether it contributed to the injury, even where it appears that the person injured was familiar with the crossing. *Shaber v. St. Paul, &c. R. Co.*, 28 Minn. 103; 2 Am. & Eng. R. Cas. 185; *Baltimore & Ohio R. Co. v. Whitacre*, 35 Ohio St. 627.

⁴ *Ellis v. Lake Shore, &c. R. Co.*, 138 Penn. St. 506; *Louisville, &c. R. Co. v. Stommel*, 126 Ind. 35; *Annacker v. Chicago, &c. R. Co.*, 81 Iowa, 267.

tion which is so much desired. But it does require that the speed shall not be so great as to render the precautionary signals unavailing, particularly where the view of the track is obstructed.¹ Trains should not pass each other at crossings if it is practicable to avoid it,² nor should one train follow too closely behind another while a crossing is being passed.³ And wherever the company, either by the management of its trains, or the peculiar mode in which its road is constructed, causes unusual danger to travellers on the highway, it must meet this danger by corresponding precautions; the care to be exercised by it must be commensurate with the degree of danger.⁴

It is further a part of the company's duty to provide its trains and engines with good and sufficient appliances for the proper control of the train; to provide a sufficient force of competent employes on every train, and to keep them free from influences liable to distract their attention from their duties.⁵ Thus the presence of visitors in

¹ Toledo, &c. R. Co. v. Miller, 76 Ill. 278 (not bound to slacken speed at crossing in open country); Zeigler v. Northeastern R. Co., 5 S. C. 222, 7 S. C. 402 (same); Continental Imp. Co. v. Stead, 95 U. S. 161; Ellis v. Lake Shore, &c. R. Co., 138 Penn. St. 506; Chicago, &c. R. Co. v. Florens, 32 Ill. App. 365. Forty-five miles an hour is not an excessive speed at which to approach a railroad crossing in the country where the engine has a bell and a whistle which can be heard for a mile at least. Griffith v. Baltimore, &c. R. Co., 44 Fed. Rep. 574. Nor is thirty-five miles per hour, Reading, &c. R. Co. v. Ritchie, 102 Penn. St. 425. Indeed no rate of speed can be said to be negligence *per se*, but the question as to whether the engineer was negligent in running the train at a particular speed is one of fact to be determined from the circumstances. Young v. Hannibal, &c. R. Co., 79 Mo. 336; Neier v. Missouri Pac. R. Co., 12 Mo. App. 25; Powell v. Railroad Co., 76 Mo. 80; Marcott v. Marquette, &c. R. Co., 47 Mich. 1; Reading, &c. R. Co. v. Ritchie, 102 Penn. St. 425; Burlington, &c. R. Co. v. Wendt, 12 Neb. 76; Chicago, &c. R. Co. v. Harwood, 80 Ill. 88.

² West v. New Jersey, &c. R. Co., 32 N. J. L. 91; Patterson's Ry. Acc. Law, 166. But where a highway crosses a

double-track railway, over which trains are liable to run frequently in opposite directions, it is contributory negligence for a traveller thereon, whose view of the second track is obscured by the presence of a passing train on the track nearest to him, to pass immediately upon the crossing as soon as the way is clear, without waiting to look or listen for the approach of a train in the opposite direction on the second track. Marty v. Chicago, &c. R. Co., 38 Minn. 108. And in Young v. New York, &c. R. Co., 107 N. Y. 500, plaintiff was held to be guilty of contributory negligence in crossing a double track without looking *both* ways. Also in Woodward v. New York, &c. R. Co., 106 N. Y. 369.

³ Chicago, &c. R. Co. v. Boggs, 101 Ind. 522; 23 Am. & Eng. R. Cas. 282.

⁴ Pierce on Railroads, pp. 342, 346; Klein v. Jewett, 26 N. J. Eq. 479; James v. Great Western Ry. Co., L. R. 2 C. P. 634.

⁵ Marcott v. Marquette, &c. R. Co., 47 Mich. 1; 4 Am. & Eng. R. Cas. 548; Smith v. New York, &c. R. Co., 19 N. Y. 127; Nashville, &c. R. Co. v. Smith, 6 Heisk. (Tenn.) 174 (failure to have headlight on engine); Smedis v. Brooklyn, &c. R. Co., 88 N. Y. 18; 8 Am. & Eng. R. Cas. 45.

the engine cab is evidence to be considered in determining whether the engineer was negligent in the lookout ahead.¹

In most of the States the duty of the company in regard to signals is prescribed by statutes, which generally require that the whistle shall be sounded some distance from the crossing and the bell continuously rung until the crossing is passed. These are but little more than an affirmation of the duty required by the common law. Any failure to observe these requirements is negligence, and proof of it is some evidence of the plaintiff's right to recover.² But as has already been observed, it by no means conclusively establishes the company's liability. To treat such a failure as actionable negligence *per se*, and to make it conclusive proof of defendant's liability, would be to relieve the plaintiff of the consequences of his own wrong-doing in many cases where his negligence contributed to injury, and would be a flagrant disregard in some cases of the maxim *causa proxima*, etc. The true rule is that except where the statute expressly provides otherwise, proof of the failure to give the statutory signals is merely proof of a want of care on the part of the defendant; the causal connection between this want of care and the injury remains to be proved, and the defence of contributory negligence is still open.³

¹ *Marcott v. Marquette, &c. R. Co.*, 47 Mich. 1; 4 Am. & Eng. R. Cas. 548.

² *Lewis v. New York, &c. R. Co.*, 123 N. Y. 496; *Clark v. Boston, &c. R. Co.*, 64 N. H. 323; 31 Am. & Eng. R. Cas. 548; *Augusta, &c. R. Co. v. McElmurry*, 24 Ga. 75; *Nash v. New York Central R. Co.*, 125 N. Y. 715; *Pennsylvania Co. v. Backes*, 35 Ill. App. 375; *affirmed*, 24 N. E. Rep. 563; *Galveston, &c. R. Co. v. Matula*, 79 Tex. 577; 15 S. W. Rep. 573; 19 S. W. Rep. 376; *Hinkle v. Richmond, &c. R. Co.*, 109 N. C. 472; *Hanlon v. South Boston R. Co.*, 129 Mass. 310; *Funston v. Chicago, &c. R. Co.*, 61 Iowa, 452; *Philadelphia, &c. R. Co. v. Kerr*, 25 Md. 521; *Atlanta, &c. R. Co. v. Wily*, 65 Ga. 120; 8 Am. & Eng. R. Cas. 262. "A failure, therefore, to ring the bell or sound the whistle, as required by statute, is, as a matter of law, negligence. But it should be remarked that a liability does not attach to every act of negligence *per se*; such liability only attaches when the injury results from the negligence." *Houston, &c. R. Co. v. Wilson*, 60 Tex. 144.

³ *Cincinnati, &c. R. Co. v. Butler*, 103 Ind. 35; 23 Am. & Eng. R. Cas. 262; *Daniels v. Staten Island R. Co.*, 125 N. Y. 407 (failure to have headlight required by statute is immaterial when train was plainly visible); *Baltimore, &c. R. Co. v. Walborn*, 127 Ind. 142; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *Evans v. Concord R. Co.* (N. H.), 21 Atl. Rep. 105; *Terre Haute, &c. R. Co. v. Barr*, 31 Ill. 57; *Louisville, &c. R. Co. v. Stommel*, 126 Ind. 35 (contributory negligence held a complete defence); *Saldana v. Texas, &c. R. Co.*, 43 Fed. Rep. 862 (signals required by Texas statute unnecessary where plaintiff was already aware of the approach of the train); *Ensley R. Co. v. Chewing*, 93 Ala. 24; *Andrews v. New York, &c. R. Co.*, 60 Conn. 259; *Barber v. Richmond, &c. R. Co.*, 34 S. C. 444; *Cumming v. Brooklyn City R. Co.*, 104 N. Y. 669; *Sala v. Chicago, &c. R. Co.* (Iowa), 52 N. W. Rep. 664 (plaintiff in addition to showing company's failure must prove his own freedom from contributory negligence); *Korrady v. Lake Shore, &c. R. Co.* (Ind.),

There may, of course, be causes where the conduct of the company's servants has been so culpable, and the causal connection so plain, that the court may hold, as a matter of law, that the defendant is liable,¹ but this is by no means the same thing as negligence *per se*.² "The ordinances of a municipal corporation," it has been observed, "regulating the speed of trains passing through the city, or the sounding of the whistle on the engine, are only police regulations, and do not have the effect of changing the general law upon the same subject, or change the duties and rights of the parties growing out of a failure, or doing what the ordinance commands or prohibits."³ The statutes merely represent the minimum degree of care to be observed by the company in certain particulars;⁴ they are merely cumulative and do not release the company from the observance of such additional precautions as peculiar circumstances may demand.⁵ There are some cases, however, which repudiate the

29 N. E. Rep. 1069; Philadelphia, &c. R. Co. v. Stebbing, 62 Md. 504, 19 Am. & Eng. R. Cas. 36; Central R., &c. Co. v. Smith, 78 Ga. 694; 34 Am. & Eng. R. Cas. 1; 1 Shear. & Red. on Neg. (14th ed.), § 13. See also, as affirming the same principle, Knuffle v. Knickerbocker Ice Co., 84 N. Y. 488, reversing 23 Hun (N. Y.), 359; Cook v. Johnson, 58 Mich. 437; 55 Am. Rep. 703; Pennsylvania R. Co. v. Hensil, 70 Ind. 569; 36 Am. Rep. 188; 6 Am. & Eng. R. Cas. 79; Hayes v. Michigan Central R. Co., 111 U. S. 288; 15 Am. & Eng. R. Cas. 394; Pike v. Chicago, &c. R. Co., 39 Fed. Rep. 354; Lyons v. Childs, 61 N. H. 72; Heedles v. Chicago, &c. R. Co., 74 Wis. 239; 39 Am. & Eng. R. Cas. 645; Atehison, &c. R. Co. v. Walz, 40 Kan. 433; Cordell v. New York, &c. R. Co., 70 N. Y. 119. In the case of Philadelphia, &c. R. Co. v. Stebbing, 62 Md. 516, the court, after stating the rule substantially as laid down in the text in a case involving a failure by the company to comply with an ordinance regulating the rate of speed, went on to say: "In other words, it must appear that the negligent breach of the duty imposed by the ordinance was the direct and proximate cause of the injury complained of, and that such injury would not have occurred but for the violation of that duty. Hayes v. Michigan Central R. Co., 111 U. S. 228, 240; Cooley on Torts, 657,

658; Pennsylvania R. Co. v. Hensil, 70 Ind. 569."

¹ Houston, &c. R. Co. v. Wilson, 60 Tex. 144; Terre Haute, &c. R. Co. v. Voelker, 31 Ill. App. 314; affirmed, 129 Ill. 540; 39 Am. & Eng. R. Cas. 615; Salisbury v. Herschenroder, 106 Mass. 458. See also Baltimore, &c. R. Co. v. Walborn, 127 Md. 142.

² Hayes v. Michigan Central R. Co., 111 U. S. 241; 15 Am. & Eng. R. Cas. 394; Chicago, &c. R. Co. v. Boggs, 101 Ind. 522; 23 Am. & Eng. R. Cas. 282; 51 Am. Rep. 561. See also New York, &c. R. Co. v. Kellam, 83 Va. 851.

³ Wheelan v. New York, &c. R. Co., 38 Fed. Rep. 15, 17.

⁴ Richardson v. N. Y. Central R. Co., 45 N. Y. 846; Barry v. N. Y. Central R. Co., 92 N. Y. 289; 13 Am. & Eng. R. Cas. 615; Bradley v. Boston, &c. R. Co., 2 Cush. (Mass.) 539. For a violation of such statutes the company is generally liable to indictment. Com. v. Boston, &c. R. Co., 133 Mass. 383; 8 Am. & Eng. R. Cas. 297, n.

⁵ Chicago, &c. R. Co. v. Boggs, 101 Ind. 522; 23 Am. & Eng. R. Cas. 282 (in this case the company was held liable, it appearing that one train followed another so closely that the traveller, watching only the first train, was run over by the second, though the statutory signals were properly given). In the case of Richardson v.

foregoing views. In Tennessee, it is the recognized doctrine that, upon proof a failure to give the signals and adopt the precautions required by statute, the plaintiff's right to damages is conclusively established; that it is no defence to prove the contributory negligence of the injured party, or that a compliance with the statute would not have prevented the injury.¹ So also, on the same principle, the court holds that proof on the part of the company of a compliance with the statute exempts it from all liability.² And in Missouri a somewhat similar doctrine obtains, except that the company may be allowed to prove affirmatively that its neglect was not the proximate cause of the injury.³ It is believed, however, that the views of these courts have no foundation in principle or authority. It is impossible to prescribe by statute exactly and precisely what should be done or omitted under all the various combinations of circumstances which occur; and this being true, it is not reasonable to make the question of liability or non-liability absolutely dependent upon the observance of fixed rules. The construction of the statutes as given by these latter courts has the effect to make them highly penal and unjust.

N. Y. Central R. Co., 45 N. Y. 486, a deep cut through which the road ran prevented trains from being seen until they were very near the crossing; the noise of falling water at the crossing, and the peculiar construction of the road, made it difficult for signals to be heard from any distance. It appeared that the road could easily have been constructed under or over the highway instead of crossing it at grade. In an action by a person injured at the crossing, the court held that there being other evidence of negligence on the company's part, it was not released from liability by the mere fact that it had given the statutory signals. The court remarked: "The legislature has never enacted that a railroad shall not be liable for any injury at a crossing where it rings the bell or sounds its whistle. No legislative impunity is given to the railroads for the damages they may wrongfully cause." See also *Thompson v. N. Y. Central R. Co.*, 110 N. Y. 636. Thus, where ordinary care in passing a crossing in a city requires a lower rate of speed than that allowed by ordinance, the company may be held guilty of negligence in

not adopting it. *Shaber v. St. Paul, & Co. R. Co.*, 28 Minn. 103.

¹ *Tennessee, & Co. R. Co. v. Walker*, 11 Heisk. (Tenn.) 383; *Louisville, & Co. R. Co. v. Howard*, 90 Tenn. 144; 19 S. W. Rep. 116; *Hill v. Louisville, & Co. R. Co.*, 9 Heisk. (Tenn.) 823; *Nashville, & Co. R. Co. v. Thomas*, 5 Heisk. (Tenn.) 262. The second of the above cases well illustrates the hardship of this unusual rule.

² If these statutes are obeyed, it has been said, "these [railroad] companies have an absolute impunity not always vouchsafed to them at the common law. Upon the construction of these statutes there has been no variableness or shadow of turning in the adjudicated cases." *SNEED, J.*, in *Hill v. Louisville, & Co. R. Co.*, 9 Heisk. (Tenn.) 823. But see *Louisville, & Co. R. Co. v. Connor*, 9 Heisk. (Tenn.) 20, 26. But that this is not the better rule, see *Thompson v. N. Y. Central R. Co.*, 110 N. Y. 636.

³ *Crumpley v. Hannibal, & Co. R. Co.* (Mo.), 19 S. W. Rep. 820; same case on previous hearing, 98 Mo. 34; 11 S. W. Rep. 244. See also *Kenney v. Hannibal, & Co. R. Co.*, 105 Mo. 270; 16 S. W. Rep. 837.

It is not necessarily negligence on the part of a railroad company to back and switch cars over a highway crossing, nor to make "flying switches" there; it has a perfect right to make such a use of that part of the track, provided proper precautions are taken for the safety of travellers using the crossing.¹ But as a matter of common knowledge such a practice is peculiarly dangerous, and therefore creates a duty of unusual care on the part of the company. There should be abundant warning, not only by the usual signals of bell and whistle, but there should be a flagman near the track, or a watchman on the nearest approaching car to warn travellers who are near.² In this as in other cases the exact measure of the company's duty, and the question as to whether it has been discharged, is for the jury;³ though where a "flying switch" is made over a

¹ Alabama, &c. R. Co. v. Summers, 68 Miss. 566; Woodward v. New York, &c. R. Co., 106 N. Y. 369; Bohan v. Milwaukee, &c. R. Co., 58 Wis. 30; 15 Am. & Eng. R. Cas. 374; 61 Wis. 391; 19 Am. & Eng. R. Cas. 276; Hogan v. Chicago, &c. R. Co., 59 Wis. 139; 15 Am. & Eng. R. Cas. 439.

² East Tennessee, &c. R. Co. v. King, 81 Ala. 177; South, &c. R. Co. v. Shearer, 58 Ala. 672; Robinson v. Western, &c. R. Co., 48 Cal. 409; Kansas Pac. R. Co. v. Ward, 4 Col. 30; Illinois, &c. R. Co. v. Hammer, 72 Ill. 347; Chicago, &c. R. Co. v. Taylor, 69 Ill. 461; Hathaway v. Toledo, &c. R. Co., 46 Ind. 25; Louisville, &c. R. Co. v. Schmidt, 126 Ind. 290; Kansas, &c. R. Co. v. Pointer, 14 Kan. 37; Linfield v. Old Colony, &c. R. Co., 10 Cush. (Mass.) 564; Hinckley v. Cape Cod R. Co., 120 Mass. 257; Pennsylvania R. Co. v. State, 61 Md. 108; 19 Am. & Eng. R. Cas. 326; Kennedy v. North Missouri R. Co., 36 Mo. 351; McWilliams v. Detroit, &c. R. Co., 31 Mich. 247; Schindler v. Milwaukee, &c. R. Co., 87 Mich. 400; Cooper v. Lake Shore, &c. R. Co., 66 Mich. 261; Chicago, &c. R. Co. v. Garvey, 58 Ill. 83; Hutchinson v. St. Paul, &c. R. Co., 32 Minn. 398; 19 Am. & Eng. R. Cas. 280; Bolinger v. St. Paul, &c. R. Co., 36 Minn. 418; 29 Am. & Eng. R. Cas. 408; Johnson v. St. Paul, &c. R. Co., 31 Minn. 283; 15 Am. & Eng. R. Cas. 467; Maginnis v. N. Y. Central R. Co., 52 N. Y. 215; Kissinger v. New York, &c. R. Co., 56 N. Y. 538; Barry v.

N. Y. Central R. Co., 92 N. Y. 289; Brown v. New York, &c. R. Co., 32 N. Y. 600; 87 Am. Dec. 353; Sutton v. New York, &c. R. Co., 66 N. Y. 243; Kay v. Pennsylvania R. Co., 65 Penn. St. 269; Butler v. Milwaukee, &c. R. Co., 28 Wis. 487; Bohan v. Milwaukee, &c. R. Co., 58 Wis. 30; 61 Wis. 391; 15 Am. & Eng. R. Cas. 374; Levoy v. Midland Ry. Co., 3 Ont. Rep. 623; 15 Am. & Eng. R. Cas. 478. The mere sounding of the whistle on an engine attached to a long train of freight cars moving backwards is not sufficient warning. Eaton v. Erie R. Co., 51 N. Y. 544; McGovern v. New York, &c. R. Co., 67 N. Y. 417; Chicago, &c. R. Co. v. Garvey, 58 Ill. 85; Illinois, &c. R. Co. v. Ebert, 74 Ill. 399.

³ Howard v. St. Paul, &c. R. Co., 32 Minn. 214; 19 Am. & Eng. R. Cas. 283; Bohan v. Milwaukee, &c. R. Co., 58 Wis. 30; 15 Am. & Eng. R. Cas. 374; Ferguson v. Wisconsin, &c. R. Co., 63 Wis. 145; 19 Am. & Eng. R. Cas. 285. Where a train is backed over a crossing without any signal but the bell, and with a brakeman so placed that he could not see the crossing, the question of negligence is one for the jury; the mere ringing of the bell does not necessarily relieve the company of responsibility. Barry v. New York, &c. R. Co., 92 N. Y. 289; 13 Am. & Eng. R. Cas. 615.

In this class of cases, as in all others, the contributory negligence of the plaintiff is a complete defence. Clark v. Boston,

crossing without any notice being given, and no watchman or flagman posted to give warning, it may be held as a matter of law that the company was negligent.¹

But the obligation to exercise care in such cases does not rest on the railroad company alone. A traveller approaching a railroad track crossing a highway is bound to exercise ordinary prudence, — such prudence as is fairly commensurate with the nature of the risk. If he can see for a long distance up and down the track, he is bound to look to see whether a train is approaching; and if the track can only be seen for a short distance, he is bound to *look and listen* for an approaching train; and where by the exercise of these senses he might have avoided the injury, no recovery can be had. No man has a right to depend entirely upon the care and prudence of others; he is bound himself to exercise due care to prevent injury to himself from the lack of proper caution in others. But if, after having looked and listened without seeing or hearing an approaching train, within a reasonable distance of the crossing, he is, by reason of a neglect of the defendant to blow the whistle or ring the bell at a reasonable distance from the crossing, run upon and injured, liability attaches therefor.² A person approaching a railway crossing is bound to

&c. R. Co., 128 Mass. 1; *Grethen v. Chicago, &c. R. Co.*, 22 Fed. Rep. 609; 19 Am. & Eng. R. Cas. 242 (person's trespassing on the track). The question of contributory negligence is for the jury. *French v. Taunton, &c. R. Co.*, 116 Mass. 537; *Mahar v. Grand Trunk R. Co.*, 26 Hun, 32. But it is not negligent for a person to start across the track behind a train standing still, at or near a crossing, and he has a right to presume that the train will not be started back without some signal or warning being given. *Robinson v. Western, &c. R. Co.*, 48 Cal. 409; *McWilliams v. Detroit, &c. Co.*, 31 Mich. 274; *Solen v. Virginia City, &c. R. Co.*, 13 Nev. 106. Compare *Ferguson v. Wisconsin, &c. R. Co.*, 63 Wis. 145; 19 Am. & Eng. R. Cas. 285 (question left to the jury).

¹ *Delaware, &c. R. Co. v. Converse*, 139 U. S. 469; *French v. Taunton, &c. R. Co.*, 116 Mass. 537; *Hinckley v. Cape Cod, &c. R. Co.*, 120 Mass. 257; *Robinson v. Western, &c. R. Co.*, 48 Cal. 409.

² *Ernst v. Hudson River R. Co.*, 39 N. Y. 61; *Wabash, &c. R. Co. v. Wallace*, 110

Ill. 114; 19 Am. & Eng. R. Cas. 359; *Illinois, &c. R. Co. v. Buches*, 55 Ill. 379; *Chicago, &c. R. Co. v. Still*, 19 Ill. 499; *Artz v. Chicago, &c. R. Co.*, 34 Iowa, 153; *Bieseigel v. N. Y. Central R. Co.*, 40 N. Y. 9; *Haight v. N. Y. Central R. Co.*, 7 Lans. (N. Y.) 11; *Richardson v. N. Y. Central R. Co.*, 45 N. Y. 846; *Hanover R. Co. v. Coyle*, 55 Penn. St. 396; *Sweeney v. Old Colony R. Co.*, 10 Allen (Mass.), 368; *Butterfield v. Western R. Co.*, 10 Allen (Mass.), 532; *Chaffee v. Boston, &c. R. Co.*, 104 Mass. 108; *Eaton v. Erie R. Co.*, 51 N. Y. 545; *Cleveland, &c. R. Co. v. Terry*, 8 Ohio St. 570; *Cleveland, &c. R. Co. v. Elliott*, 28 Ohio St. 340; *Penn. R. Co. v. Rathget*, 23 Ohio St. 66.

In a case in Indiana, Cincinnati, &c. R. Co. v. Butler, 103 Ind. 35; 23 Am. & Eng. R. Cas. 262, the jury found that the train in approaching was running at a rate of speed prohibited by law, and that the statutory signals were not given; they therefore brought in a verdict for the plaintiff, although he had not disproved the charge of contributory negligence, the burden of which proof was, according to the

know that he stands in the presence of a serious danger if he at-

Indiana rule, upon him. The court reversed the case because the defence of contributory negligence had not been allowed. MITCHELL, C. J., said: "That it is difficult, or requires extraordinary effort, at a particular place, to ascertain whether or not it is safe to attempt to cross, does not excuse one who is familiar with the locality, and the danger surrounding it, from exercising care proportioned to the probable danger. Manifestly, where obstacles interpose which obstruct sight and sound, it is the plain dictate of ordinary prudence that the traveller on the highway should approach the crossing with a degree of caution much above that which would be required at a point where no obstacles intervened. While it is imperatively required of those in charge of the train that they give the statutory signals when approaching crossings, and while it may be sufficient to establish negligence against a railroad company to show that a train was run at a rate of speed prohibited by an ordinance, yet, inasmuch as signals given may, under the circumstances supposed, not be heard, or because through neglect or otherwise those in charge of the train fail to give them, the traveller who sustains an injury by coming into collision with the train will not be exonerated from the presumption of contributory negligence, if it appears that by the exercise of any degree of diligence which was, under the circumstances, reasonably practicable and available he might have avoided the injury." *Cincinnati, &c. R. Co. v. Butler*, 103 Ind. 33; 23 Am. & Eng. R. Cas. 262, citing *Bellefontaine, &c. R. Co. v. Hunter*, 33 Ind. 335; 5 Am. Rep. 201; *Toledo, &c. R. Co. v. Shuckman*, 50 Ind. 42; *St. Louis, &c. R. Co., v. Mathias*, 50 Ind. 65. See also *Terre Haute, &c. R. Co. v. Clark*, 73 Ind. 168; *Terre Haute, &c. R. Co. v. Graham*, 46 Ind. 239; 95 Ind. 291; *Indianapolis, &c. R. Co. v. Hamilton*, 44 Ind. 76; *Indianapolis, &c. R. Co. v. Carr*, 35 Ind. 510; *Baltimore, &c. R. Co. v. Walborn*, 127 Ind. 142; *Louisville, &c. R. Co. v. Stommell*, 126 Ind. 35. In the case of *Pannell v. Nashville, &c. R. Co. (Ala.)*, 12 So. Rep. 236, the plaintiff was injured while attempting to cross the track by

passing between two cars not far apart. It appeared that if he had looked, he could easily have seen the engine with steam up and that couplings of cars were being made. The court held that there was a clear case of contributory negligence.

See also as upholding and applying the rule of the text: *Lyman v. Philadelphia, &c. R. Co.*, 4 Houst. (Del.) 583; *Patterson v. Philadelphia, &c. R. Co.*, 4 Houst. (Del.) 103; *Central R. Co. v. Dixon*, 42 Ga. 327; *Chicago, &c. R. Co. v. Dimick*, 96 Ill. 42; *Chicago, &c. R. Co. v. Robinson*, 8 Brad. (Ill. App.) 140; *Chicago, &c. R. Co. v. Hatch*, 79 Ill. 137; *Rockford, &c. R. Co. v. Byam*, 80 Ill. 528; *St. Louis, &c. R. Co. v. Dunn*, 78 Ill. 197; *Illinois, &c. R. Co. v. Ebert*, 74 Ill. 399; *Illinois, &c. R. Co. v. Goddard*, 72 Ill. 567; *Illinois, &c. R. Co. v. Cragin*, 71 Ill. 177; *Chicago, &c. R. Co. v. Ryan*, 70 Ill. 102; *Haines v. Illinois Central R. Co.*, 41 Iowa, 227; *Benton v. Central R. Co.*, 42 Iowa, 192; *Spencer v. Illinois, &c. R. Co.*, 29 Iowa, 55; *Carlin v. Chicago, &c. R. Co.*, 37 Iowa, 316; *Lang v. Holiday Creek R. Co.*, 49 Iowa, 469; *Dodge v. Burlington, &c. R. Co.*, 34 Iowa, 279; *Johnson v. Canal, &c. R. Co.*, 27 La. An. 53; *Murray v. Pontchartrain R. Co.*, 31 La. An. 490; *Graws v. Maine, &c. R. Co.*, 67 Me. 100; *Baltimore, &c. R. Co. v. Breinig*, 25 Md. 378; *Baltimore, &c. R. Co. v. Boteler*, 38 Md. 568; *Lewis v. Baltimore, &c. R. Co.*, 38 Md. 588; *Mayor, &c. of Baltimore v. Holmes*, 39 Md. 243; *Pittsburgh, &c. R. Co. v. Andrews*, 39 Md. 329; *McMahon v. Northern, &c. R. Co.*, 39 Md. 438; *Frech v. Philadelphia, &c. R. Co.*, 39 Md. 574; *Warren v. Fitchburg R. Co.*, 8 Allen (Mass.), 227; *Wheeler v. Boston, &c. R. Co.*, 105 Mass. 203; *Craig v. New York, &c. R. Co.*, 118 Mass. 431; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *Wright v. Boston, &c. R. Co.*, 129 Mass. 440; *Carney v. Chicago, &c. R. Co.*, 46 Minn. 220; *Hutchinson v. St. Paul, &c. R. Co.*, 32 Minn. 368; *Smith v. Minneapolis, &c. R. Co.*, 26 Minn. 419; *Donaldson v. Milwaukee, &c. R. Co.*, 21 Minn. 293; *Brown v. Milwaukee, &c. R. Co.*, 22 Minn. 165; *Abbott v. Milwaukee, &c. R. Co.*, 30 Minn. 482; *New Orleans,*

tempts to cross it without the exercise of proper caution.¹ He has no right to rely entirely upon the presumption that the company's agents who are operating a train will notify him of its approach. He is, as a prudent man, bound to "look and listen" and take such measures as common prudence in view of the danger and consequences of a neglect to do so suggests. The fact that he knows the time when regular trains are due at the crossing does not absolve

&c. R. Co. v. Mitchell, 52 Miss. 808; *Lenix v. Missouri Pacific R. Co.*, 76 Mo. 86; *Kelley v. Hannibal, &c. R. Co.*, 75 Mo. 138; *Zimmerman v. Hannibal, &c. R. Co.*, 71 Mo. 476; *Henze v. St. Louis, &c. R. Co.*, 71 Mo. 636; *Burham v. St. Louis, &c. R. Co.*, 56 Mo. 338; *Maker v. Atlantic, &c. R. Co.*, 64 Mo. 267; *Hicks v. Pacific R. Co.*, 64 Mo. 430; *Harlan v. St. Louis, &c. R. Co.*, 64 Mo. 480; *Fletcher v. Atlantic, &c. R. Co.*, 64 Mo. 484; *Morris, &c. R. Co. v. Haslam*, 33 N. J. L. 147; *Blaker v. Receivers of N. J. Midland R. Co.*, 30 N. J. Eq. 240; *Palys v. Receiver of Erie R. Co.*, 30 N. J. Eq. 604; *Penn. R. Co. v. Righter*, 42 N. J. L. 180; *Havens v. Erie R. Co.*, 41 N. Y. 296; *Baxter v. Troy, &c. R. Co.*, 41 N. Y. 502; *Nicholson v. Erie R. Co.*, 41 N. Y. 525; *Van Schaick v. Hudson River R. Co.*, 43 N. Y. 527; *Gorton v. Erie R. Co.*, 45 N. Y. 660; *Davis v. New York, &c. R. Co.*, 47 N. Y. 400; *Hackford v. New York, &c. R. Co.*, 53 N. Y. 654; *McCall v. New York, &c. R. Co.*, 54 N. Y. 642; *Weber v. N. Y. Central R. Co.*, 58 N. Y. 451; *Wilcox v. Rome, &c. R. Co.*, 39 N. Y. 358; *Mackey v. N. Y. Central R. Co.*, 35 N. Y. 75; *Becht v. Cobin*, 92 N. Y. 658; *Massoth v. Delaware, &c. Canal Co.*, 64 N. Y. 524; *Brooks v. Buffalo, &c. R. Co.*, 1 Abb. App. Dec. 211; *Montz v. Second Ave. R. Co.*, 3 Abb. App. Dec. 274; *Mitchell v. New York, &c. R. Co.*, 5 T. & C. (N. Y.) 122; 2 Hun, 535; *Ingersoll v. New York, &c. R. Co.*, 4 Hun (N. Y.), 277; *Morse v. Erie R. Co.*, 65 Barb. 491; *Bunn v. Delaware, &c. R. Co.*, 6 Hun (N. Y.), 303; *Bronck v. New York, &c. R. Co.*, 5 Daly (N. Y.), 454; *Stackus v. New York, &c. R. Co.*, 7 Hun (N. Y.), 559; *Gonzales v. New York, &c. R. Co.*, 6 Robt. (N. Y.) 93; 38 N. Y. 440; *Sutherland v. New York, &c. R. Co.*, 41 N. Y. Superior Ct. 17; *Leonard v. New York, &c. R. Co.*, 42 N. Y. Superior Ct. 225; *McGuire v. Hudson River R. Co.*, 2 Daly (N. Y.), 76; *Wylde v. Northern R. Co.*, 14 Abb. Pr. (N. Y.) n. s. 213; *Poole v. North Carolina R. Co.*, 8 Jones (N. C.) L. 340; *Murphy v. Wilmington, &c. R. Co.*, 70 N. C. 437; *Pittsburgh, &c. R. Co. v. Krichbaum*, 24 Ohio St. 119; *Cleveland, &c. R. Co. v. Crawford*, 24 Ohio St. 631; *Baltimore, &c. R. Co. v. Whittaker*, 24 Ohio St. 642; *Bellefontaine, &c. R. Co. v. Snyder*, 24 Ohio St. 670; *Penn. R. Co. v. Beale*, 73 Penn. St. 504; *Penn. R. Co. v. Ackerman*, 74 Penn. St. 266; *Penn. R. Co. v. Weber*, 76 Penn. St. 157; *Weiss v. Penn. R. Co.*, 79 Penn. St. 387; *Gentz v. Philadelphia, &c. R. Co.*, 81 Penn. St. 274; *Zeigler v. Railroad*, 5 S. C. 221; *Nashville, &c. R. Co. v. Smith*, 6 Heisk. (Tenn.) 174; *Langhoff v. Milwaukee, &c. R. Co.*, 23 Wis. 43; *Duffy v. Chicago, &c. R. Co.*, 32 Wis. 269; *Delaney v. Milwaukee, &c. R. Co.*, 33 Wis. 67; *Stringham v. Milwaukee, &c. R. Co.*, 33 Wis. 471; *Haas v. Chicago, &c. R. Co.*, 41 Wis. 44; *Roth v. Milwaukee*, 21 Wis. 256; *Davey v. London, &c. Ry. Co.*, 122 B. Div. 70; *Holland v. Chicago, &c. R. Co.*, 18 Fed. Rep. 243.

¹ "A traveller should always approach a railway crossing under the apprehension that a train is liable to come at any moment, and while he may presume that those in charge of the train will obey the law, by giving the statutory signals, the law nevertheless requires that he obey the instincts of self-preservation and not thrust himself into a situation of danger which, notwithstanding the failure of the railroad, he might have avoided by the careful use of his senses." *Cincinnati, &c. R. Co. v. Butler*, 103 Ind. 35; 23 Am. & Eng. R. Cas. 262. See also *Chicago, &c. R. Co. v. Still*, 19 Ill. 499; 71 Am. Dec. 236; *Railroad Co. v. Houston*, 95 U. S. 702.

him from this duty, as he is bound to know that these trains may be delayed, or that the company has a right to run special or extra trains, etc. This is a rule of law, and it is only in exceptional instances that the question as to whether his neglect to take such precaution is excusable, is for the jury.¹

¹ In *Salter v. Utica, &c. R. Co.*, 75 N. Y. 273, on second hearing 88 N. Y. 42, the court went on to say that while great speed in running a railway train is not in itself necessarily negligence, it may be an element giving force to other facts tending to prove it, and explaining in a given instance the operation and effect of such other facts. It always bears more or less upon the question of contributory negligence, and is an element of the entire transaction proper to be proved, and when established may be considered upon any issue which it tends to prove or explain. *Powell v. N. Y. Central R. Co.*, 109 N. Y. 613; *Cordee v. New York Central R. Co.*, 70 N. Y. 124; *McGrath v. Del. & Hud. C. Co.*, 64 N. Y. 531. The court below, in *Salter v. Utica, &c. R. Co.*, 13 Hun, 187; 88 N. Y. 42, charged that if the course pursued by the deceased was one which persons of prudence would adopt under the same circumstances, he was not negligent in so doing, and that the standard by which his conduct was to be judged was that of an ordinarily careful, prudent man. It was held that this was the correct rule. *Kellogg v. New York Central R. Co.*, 79 N. Y. 76; *Stackus v. New York Central R. Co.*, 79 N. Y. 468. In *Loucks v. Chicago, &c. R. Co.*, 31 Minn. 526; 18 N. W. Rep. 651, the plaintiff driving across a railroad track was struck by a train of cars, the approach of which he did not discover until immediately before he drove his horses across the track. *DICKINSON, J.*, said: "The view of the track in both directions was partially obstructed, the evidence going to show that the plaintiff was mindful of the danger and watchful, according to his reasonable judgment, to avoid it; that at the time when he might first have seen or heard the train he had reason to suppose that no train was coming from that direction, while his attention to the track in the opposite direction was more apparently

necessary; that the cars were even close at hand, running at a high rate of speed, and he in a place where he could not safely turn his horses, nor hold them before the passing train, — it is considered negligence was not conclusively imputable to the plaintiff by the law, but that it was for the jury to determine whether the plaintiff was negligent. We cannot, as an imputation of the law, pronounce his conduct to have been negligence. *Kellogg v. N. Y. Central R. Co.*, 79 N. Y. 72; *Continental Imp. Co. v. Stead*, 95 U. S. 161. To run a locomotive and train of cars, which cannot be readily stopped, at a high rate of speed, and without any signal by bell, whistle, or otherwise, across a much-travelled public street in a village, where the crossing is dangerous to travelers by reason of obstructions concealing the approach of trains, no excuse appearing for the omission to give signal of its approach, is negligence, although there exists no statutory requirement respecting the giving of such signals. *Phila., &c. R. Co. v. Stinger*, 78 Penn. St. 219, 225, 227; *Louisville, &c. R. Co. v. Com.*, 13 Bush (Ky.), 388; *Phila., &c. R. Co. v. Hagan*, 47 Penn. St. 244; *Roberts v. Chicago, &c. R. Co.*, 35 Wis. 680. It was not error for the court to charge that one who is called upon to exercise care to avoid danger from the acts of others may, in regulating his own conduct, have regard to the probable or apprehended conduct of such other persons, and to the presumption that they will act with reasonable caution and not with culpable negligence. *Ernst v. Hudson R. Co.*, 35 N. Y. 9; *Reeves v. Delaware, &c. R. Co.*, 30 Penn. St. 454; *Langhoff v. Milwaukee, &c. R. Co.*, 19 Wis. 489; *Kennayde v. Pacific R. Co.*, 45 Mo. 255. The court instructed the jury to disregard the opinions of expert witnesses, based upon hypothetical statements of facts, if the jury should find the hypothesis to be not in

It is erroneous to charge the jury that a traveller is bound to exercise only such care as would protect him from injury if the railroad company be free from fault.¹ While he has a right to expect that the company will discharge its duties,² it does not release him from his obligation to exercise ordinary care to protect himself against a possible breach of its duty on the part of the company.³ A traveller is negligent in approaching and going upon a crossing in a wagon with his horses at a trot or at any rate of speed too great for him to stop his team readily should the circumstances necessitate it.⁴

The instances in which the question whether an omission to look and listen for an approaching train constitutes negligence is for the jury, are well stated by STINESS, J., in a Rhode Island case,⁵ as fol-

accordance with the facts. It was held no error. The plaintiff, having been a farmer for many years, and engaged in carrying on a farm, was competent to testify as to the value of his own labor. It was a proper subject for the opinion of witnesses." See this case distinguished in *Rhenier v. Chicago, &c. R. Co.*, 36 Minn. 172. See also *State v. Maine Central R. Co.*, 76 Me. 357, where the rule stated in the text was held.

¹ *Toledo, &c. R. Co. v. Shuckman*, 50 Ind. 42. See also *Wabash, &c. R. Co. v. Wallace*, 110 Ill. 114; 19 Am. & Eng. R. Cas. 359; *Pennsylvania R. Co. v. Ogier*, 35 Penn. St. 60; 78 Am. Dec. 322.

² *Kennayde v. Missouri Pac. R. Co.*, 45 Mo. 255; *Donohue v. St. Louis, &c. R. Co. (Mo.)*, 28 Am. & Eng. R. Cas. 673; *Newson v. N. Y. Central R. Co.*, 29 N. Y. 390, *Wabash, &c. R. Co. v. Central Trust Co.*, 23 Fed. Rep. 758.

³ *Railroad Co. v. Houston*, 95 U. S. 397; *Cincinnati, &c. R. Co. v. Butler*, 103 Ind. 35; 23 Am. & Eng. R. Cas. 262; *Shaw v. Jewett*, 86 N. Y. 616; *Schofield v. Chicago, &c. R. Co.*, 2 McCrary (U. S.), 268; 114 U. S. 618; *Chicago, &c. R. Co. v. Natzki*, 66 Ill. 455; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *Ormsbee v. Boston, &c. R. Co.*, 14 R. I. 102; *Marty v. Chicago, &c. R. Co.*, 38 Minn. 108. See also *Weyl v. Chicago, &c. R. Co.*, 40 Minn. 350. A traveller has no right to omit proper precautions, upon the assumption that a railway company will comply precisely with a city

ordinance in the running of its trains. *Calligan v. N. Y. Central R. Co.*, 59 N. Y. 651.

⁴ *Mantel v. Chicago, &c. R. Co.*, 33 Minn. 62; 19 Am. & Eng. R. Cas. 362; *Grippen v. New York, &c. R. Co.*, 40 N. Y. 34; *Connelly v. N. Y. Central R. Co.*, 88 N. Y. 346; *Snows v. Maine, &c. R. Co.*, 67 Me. 100; *Salter v. Utica, &c. R. Co.*, 75 N. Y. 281. "There is no rule," said the court in this last case, "which authorizes a person who crosses a railroad track with a team of horses to dash on recklessly or even carelessly into danger without using all the means at his command to avoid the catastrophe; and no careful man will place himself in a position where, by want of vigilance, or by indiscretion, his team is not under his control." But in *Cosgrove v. New York Cent. R. Co.*, 87 N. Y. 88, it was held that if a traveller upon a highway crossing a railroad is himself free from fault, and does not hear an approaching train and, the railroad company is guilty of negligence in not giving the proper signals, it cannot escape responsibility because the traveller's horse, frightened by the sudden approach of the engine, suddenly starts forward, and getting beyond control, draws the wagon on the track, and so exposes the traveller to injury. It is not a legal inference that the traveller heard the approach of the train because the horse did.

⁵ *Ormsbee v. Boston, &c. R. Co.*, 14 R. I. 102. In this case a deaf mute was

lows: "We have been referred to numerous cases which, it is claimed, show that this is not a rule of law, but a matter of fact, the propriety or necessity of which is to be determined by the jury. An examination of these cases, however, shows that most of them are not in conflict with such a rule, but may be classed as exceptions to it, on the following grounds: 1. *Where the view of the track is obstructed, and hence where the injured party, not being able to see, is obliged to act upon his judgment at the time; in other words, where compliance with the rule would be impracticable or unavailing.*¹ In

struck and killed by a train of cars which was making a flying switch across a highway. The engine had passed by, and the plaintiff walked in the highway on to the track, "bent forward, as an old man would walk, with his head bowed down, looking towards the engine." *There was an unobstructed view of the track for a long distance in both directions; a gate was closed across the highway on the farther side of the track; but there was no stationary bell or whistle sounded as required by the statute.* In an action against the railroad company for causing the death, it was held that the deceased's negligence precluded a recovery.

¹ *Commonwealth v. Fitchburg R. Co.*, 10 Allen (Mass.), 189; *Craig v. New York, &c. R. Co.*, 118 Mass. 431; *Webb v. Portland, &c. R. Co.*, 57 Me. 117; *Johnson v. Hudson River R. Co.*, 20 N. Y. 66; *Contineptal Improvement Co. v. Stead*, 95 U. S. 161; *Pennsylvania R. Co. v. Ogier*, 35 Penn. 60; *Fordham v. London, &c. Ry. Co.*, L. R. 3 C. P. 368; *Stubley v. London, &c. Ry. Co.*, L. R. 1 Exch. 13; *Dublin, &c. Ry. Co. v. Slaterry*, L. R. 3 App. Cas. 1155. In *Kelly v. St. Paul, &c. R. Co.*, 29 Minn. 1, there was evidence tending to show that the statutory requirements as to ringing a bell, etc., were omitted on a train approaching a highway-crossing; it was held that the neglect of a person approaching the crossing with a team, who did not stop his team and did not get out of his wagon and go forward and look for the train (freight cars intervening), could not be said to be contributory negligence on the part of the traveller, defeating his right of recovery for injury by collision with the train. *DICKINSON, J.*, said: "The

law required the ringing of a bell 80 rods distant from the crossing, and the conduct of the plaintiff might be properly regulated to some extent with regard to this duty imposed upon the defendant by law, and which he had a right to expect would be performed. He was not required to use every precaution which might have contributed to his safety, but only such as common prudence dictated. We cannot say, as a matter of law, that it was negligence not to have entirely stopped his team, — *Kellogg v. N. Y. Central R. Co.*, 79 Y. Y. 72; *Eilert v. Green Bay R. Co.*, 48 Wis. 606, — or that common prudence required him to get down from his wagon, and go forward on foot to look along the line of the track. *Duffy v. Chicago, &c. R. Co.*, 32 Wis. 269; *Davis v. N. Y. Cent. R. Co.*, 47 N. Y. 400. Such precaution is believed to be extraordinary, and to exceed the strict measure of common prudence; nor is it clear that the course of greater prudence, after the plaintiff had passed in between the freight-cars standing on both sides of his way, and saw the coming train, was not to endeavor to turn back with a spirited span of horses." But see *Plummer v. Eastern R. Co.*, 73 Me. 591; although in this case the plaintiff did look and listen, and no signals were given, and in that view the decision is correct. In *Parker v. Wilmington, &c. R. Co.*, 86 N. C. 224, while crossing a railroad track the plaintiff's intestate was killed by a train which had left a station on schedule time and attained a speed of twenty miles an hour; the deceased was working at a steam-mill located near the track; when first seen by the engineer he

this last case Lord Chancellor CAIRNS remarks: 'If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were in broad daylight, and without anything either in the structure of the line or otherwise to obstruct his view, to cross in front of the advancing train and to be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company which caused his death.'¹ 2. *Where the injured person*

was about 100 feet from the engine, and making no effort to get out of the way; the engineer put on breaks and shut off steam, but gave no signal by bell or whistle. It was held that the contributory negligence of the deceased relieves the company of responsibility. One crossing a railroad track must be on the alert to avoid injury from trains that may happen to be passing; and the omission of the engineer to give the precautionary signals of the approach of a train, when it in no way contributed to an alleged injury, does not impose a liability upon the company. See *New Jersey Ex. Co. v. Nichols*, 3 N. J. L. 439; *Railroad Co. v. Houston*, 95 U. S. 697. In the case of *Hutchinson v. St. Paul, &c. R. Co.*, 32 Minn. 368, in an action to recover damages for injuries from a collision at a railway crossing with the wagon in which plaintiff was riding, her evidence tended to show that the team was driven with care, and that the plaintiff and the driver were watching the road, and looking and listening for indications of danger as they approached the crossing; that they heard no signal, and had no warning of the approach of an engine from the west, but were unexpectedly overtaken by a switch engine from that direction, running backward down grade at a high rate of speed, with steam shut off, and without signals of its approach, which they did not discover till too late to avoid a collision. They were going east, the railroad being on their left, and approaching the street at a sharp angle, and above there was a cut which partially obscured the vision, terminating about 200 feet from the crossing. The evidence also shows that they had previously looked several times up the road in that direction, the last time when at a point from 50 to

70 feet from the crossing, and in the interval of about ten seconds they were listening for signals or indications of a coming train, their attention being also arrested by the presence of another switch engine standing below the crossing apparently ready to move. It was held that whether the plaintiff was in the exercise of that degree of care which persons of ordinary prudence and intelligence would exercise in a similar situation depends upon the consideration of a variety of circumstances and inferences of fact which were proper for the judgment of a jury. *VANDENBURGH, J.*, said: "And for substantially the same reasons that controlled the decision of this court in *Loucks v. Chicago, &c. R. Co.*, 31 Minn. 530, we think this case was properly submitted to the jury. *French v. Taunton Branch R. Co.*, 116 Mass. 540; *Chaffee v. Boston, &c. R. Co.*, 104 Mass. 116; *Stackus v. N. Y. Central R. Co.*, 79 N. Y. 467; *Ochsenbein v. Shapley*, 85 N. Y. 224; *Baldwin v. St. Louis, &c. R. Co.*, 63 Iowa, 210; 18 N. W. Rep. 884; *Butler v. Milwaukee, &c. R. Co.*, 28 Wis. 504; *Gaynor v. Old Colony, &c. R. Co.*, 100 Mass. 212." See also *Loucks v. Chicago, &c. R. Co.*, 31 Minn. 530; *Continental Co. v. Stead*, 95 U. S. 161; *Wylde v. Northern R. Co.*, 53 N. Y. 161; *Eppendorf v. Brooklyn City, &c. R. Co.*, 69 N. Y. 197; *Owen v. Hudson River R. Co.*, 35 N. Y. 518.

¹ This view of the case seems eminently reasonable, and has an added force from the high source from which it emanates. In Iowa, however, the rule is laid down that "the plaintiff cannot be deemed to be necessarily guilty of contributory negligence if the danger might have been seen, and avoided if seen. Somewhat depends upon the duty which the injured

*was a passenger going to or alighting from a train, and hence under an implied invitation and assurance by the company to cross the track in safety.*¹ 3. *Where the direct act of some agent of the company had put the person off his guard and induced him to cross the track without precaution."*²

The measure of care to be observed in the running of trains is a question for the court, but the place and method of giving signals is a question for the legislature. The court can neither add to or detract from the requirements of the law. Its provisions must be strictly and fully observed, and any failure, however slight, that results in injury to others, is actionable. The duty of the company in that respect is fixed, and its duty is discharged when strictly complied with. The common law imposes no burden so far as the giving of signals is concerned; it simply imposes the duty of operating the road with due regard to the rights and safety of the public.³ A

person was discharging, and somewhat upon the obviousness of the danger. The fact inquired about was not, then, necessarily, of a determinative character. It was nevertheless a very important fact. It should properly have a large influence." *Baldwin v. St. Louis, &c. R. Co.*, 61 Iowa, 210; 19 N. W. Rep. 884, *following Greenleaf v. Dubuque, &c. R. Co.*, 33 Iowa, 59.

¹ *Brossell v. N. Y. Central R. Co.*, 84 N. Y. 241; *Gaynor v. Old Colony, &c. R. Co.*, 100 Mass. 208; *Chaffee v. Boston, &c. R. Co.*, 104 Mass. 108; *Mayo v. Boston, &c. R. Co.*, 104 Mass. 157; *Wheelock v. Boston, &c. R. Co.*, 105 Mass. 203; *Stapley v. London, &c. Ry. Co.*, 1 L. R. 1 Exchq. 21.

² *Warren v. Fitchburg R. Co.*, 8 Allen (Mass.), 227. In the case of *Connelly v. N. Y. Central R. Co.*, 88 N. Y. 346, the plaintiff's intestate was killed while crossing the defendant's track with his team at a highway-crossing. At the place of the accident four tracks crossed the highway. The train was approaching from the west, intestate from the north. At a point in the highway more than 250 feet north of the crossing *the train was visible for half a mile*, and at a point fifty feet north for more than a mile. When witnesses for the plaintiff, who were north of the track, first saw the train, the intestate was sitting on his load facing partly east at a distance from the track variously

estimated, but the shortest distance named was fifteen feet. The train was on the south track. The deceased continued to drive on until he got upon the north track. Then, observing apparently for the first time the approaching train, he partly rose, and commenced whipping his horses. The horses got over the south track, but the wagon was intercepted by the train and the intestate killed. If he had stopped on the north track he would have been safe. The horses were not unmanageable, and he might have stopped them at this point, so far as appeared. The approach to the track from the north was on a rising grade of about one foot rise to eleven feet horizontal. It was held that the intestate was guilty of contributory negligence, precluding a recovery for his death. Even though his misjudgment in attempting to cross in front of the train was not sufficient to charge him with negligence, on the ground that when he discovered the train he was called upon to decide instantly what he should do, *he was negligent in not stopping his horses before he went on to the track.*

³ *Grippen v. N. Y. Central R. Co.*, 40 N. Y. 34; *Beiseigel v. Same*, 40 N. Y. 9; *Penn. R. Co. v. Barnett*, 59 Penn. St. 259; *Brown v. Milwaukee, &c. R. Co.*, 22 Minn. 165. Where a person seeks to charge a railway company with negligence in not seasonably removing a car which encumbered a highway-crossing, and in

traveller must use his eyes and ears as a prudent man, and cannot

consequence of which an accident occurred to the plaintiff, an instruction by the court that if the jury should find that the servants of the company honestly believed they could not move the car without help, and that they exercised ordinary care and prudence in that judgment, they are not guilty, was held to be sufficiently favorable to the defendant. *Paine v. Grand Trunk R. Co.*, 58 N. H. 611. An engine-driver in charge of a moving train has a right to assume that persons past the age of childhood will heed the usual alarm signals. If, after giving such signals without effect, he uses such means as in his judgment are, in the emergency, most advisable to prevent collision with a person standing on the track, he is not chargeable with negligence, and the company cannot be held liable for the consequences of a collision, although he failed to use other means which were at hand, provided he is competent and experienced in his business. In this instance he applied the air-brakes to the train, but did not attempt to reverse the engine. *Bell v. Hannibal, &c. R. Co.*, 72 Mo. 50. The fact that the defendant has been guilty of negligence, followed by an accident, does not make him liable for the resulting injury, unless that was occasioned by the negligence. *Harlan v. St. Louis, &c. R. Co.*, 65 Mo. 22. Evidence that the company, immediately after an accident at a street-crossing, adopted certain precautions to prevent similar accidents, is admissible to prove that such precautions would have been proper at and prior to the accident, and that the omission of them was negligence. *Shaber v. St. Paul, &c. R. Co.*, 28 Minn. 108. Where a person driving a team in a city on a very cold and blustering day, being muffled up to protect himself from the severity of the cold, while driving across a track near a public elevator was struck by a car being propelled by an engine in the rear, and severely injured, and there was no one stationed on the car or on the ground to give warning, and it appeared, if there had been, the injury might have been avoided, it was held that, as the injury was the result of negligence on the part of the

company, it was liable in damages to the injured party. *Illinois Central R. Co. v. Ebert*, 74 Ill. 399. In an action against a railway company for injuries caused by a train colliding, at a highway-crossing, with a carriage in which the plaintiff was driving in the daytime, it appeared that the plaintiff in attempting to cross was struck by a freight-car which had been separated from the rest of the train for the purpose of making a running switch. The plaintiff's testimony tended to show that she was driving with care, and saw the train pass, but saw no flagman and received no warning that another car was coming. At a point forty-six feet from the crossing she could have seen along the track forty-six feet in the direction from which the car came; at thirty feet from the crossing she could have seen the track for more than half a mile, but she did not look in that direction from those points, and gave as a reason therefor that she did not suppose that one train would follow another so closely. It was held that the question whether the plaintiff was in the exercise of due care was for the jury. *French v. Taunton Branch R. Co.*, 116 Mass. 537. In another case the plaintiff's evidence showed that he was employed by a corporation other than the defendant to watch the track at a crossing and give notice when any cars or engines of either company were about to pass over the highway; that he saw the smoke of the engine when it first came in sight, went to the crossing and gave the usual signal; that after the engine passed he looked up and down the track and saw nothing, and started to recross the track and was struck by a train of cars which was making a flying switch, and which came upon him from behind; that the usual signal for cars making a flying switch was not given, but one was given indicating that only an engine or a train was coming, and there was no brakeman on the cars; that a person could see up the track from where he stood nearly seven hundred feet; that he could not tell whether any smoke prevented him from seeing the cars coming, but if it did, he should have waited until it passed

recover for injuries resulting from a failure to do so.¹ But if the company has made erections, or left cars in such a position as to obstruct the view of the track in one direction, the traveller will be excused from looking in that direction. He is only bound to look where to do so would aid him in determining whether a train is approaching; in all other respects he has a right to rely upon his ears.²

away. It was held that the action could not be maintained. *Clark v. Boston, &c. R. Co.*, 128 Mass. 1. If the statute requires gates to be erected and closed at the approach of a train, if this duty is not performed, and a passenger along the highway in attempting to cross the line of railway is injured, the leaving of the gates open is, in an action brought by him, evidence of negligence to go to the jury. It is so, even though, with care and circumspection, he might have been able to see at a distance the approach of the train which occasioned the injury. The gates of the railway, at a place where it crossed the highway at a level, being open, amounted to a statement and a notice to the public that the line at that time was safe for crossing. *Northeastern Ry. Co. v. Wanless*, L. R. 7 Eng. & Ir. App. 12; *Wanless v. Northeastern Ry. Co.*, L. R. 6 Q. B. 481. The lookout upon an engine must be as efficient as circumstances require, and especially so when the chances of access to the track are greater than usual. *Marcott v. Marquette, &c. R. Co.*, 47 Mich. 1; *East Tenn., &c. R. Co. v. White*, 5 Lea (Tenn.), 540. Where a train of cars was moving backwards, within the limits of an incorporated town, while the deceased was walking on the track in the direction in which the train was moving, and no person was stationed to keep a lookout, and the cars ran over and killed the deceased, the company is guilty of negligence. *Savannah, &c. R. Co. v. Shearer*, 58 Ala. 672.

¹ *Baxter v. Troy, &c. R. Co.*, 41 N. Y. 502; *Nicholson v. Erie R. Co.*, id. 525.

² *McGuire v. Hudson River R. Co.*, 2 Daly (N. Y.), 76; *Shaw v. Jewett*, 86 N. Y. 616. While a person about to cross is bound to look and listen, it is only where it appears from the evidence that he might have seen had he looked, or might have heard had he listened, that the

jury, in the absence of other evidence, is authorized to find that his failure to look and listen was necessarily negligence. *Smedis v. Brooklyn, &c. R. Co.*, 88 N. Y. 13. Where a person, when approaching a railroad crossing, looks and listens for an approaching train before passing a cornfield which obstructed the view, and after passing the same again looks and listens, and no warning is given him by bell or whistle, he will not be guilty of negligence in going upon the track; and the fact that he is told to stop, that the cars are coming, which he does not hear, will not change the rule. *Dimick v. Chicago, &c. R. Co.*, 80 Ill. 338. It appearing that the plaintiff, before going through the opening in the train and upon the track where the accident occurred, brought his horses to a walk, but did not stop them nor leave his wagon and go forward where he could see an approaching train; that he looked and listened for a train, but could not see or hear any signal of its approach, — it was held that the evidence did not show, as a matter of law, contributory negligence on the part of the plaintiff. *Kelly v. St. Paul, &c. R. Co.*, 29 Minn. 1. In Pennsylvania, it is held that if the traveller cannot see the track by looking out from his carriage, he should get out and lead his horse. *Penn. R. Co. v. Beale*, 73 Penn. St. 504. Thus F. approached a crossing with which he was perfectly familiar, and with a manageable team. He drove by an open space, through which he had an extended view of the track, and stopped directly in front of a railway watch-house, which intercepted his view in the same direction. In this position he stood still for an instant, turning his head around as if looking for the train, and then whipped up his team as if to cross the track, and collided with a passing train and was killed. He was partially deaf, but did not leave the wagon to look

The rule is that the party who is at fault in creating the obstructions must use such care that, notwithstanding the obstructions, the other party by the use of ordinary care would avoid either sustaining or inflicting any injury.¹ But even in such cases it is the traveller's

beyond the watch-house. It was held that he was guilty of contributory negligence, and the court should have instructed the jury that there could be no recovery. *Central R. Co. v. Feller*, 84 Penn. St. 226. In a Michigan case, an old man, who was somewhat deaf, while driving a team of colts towards a railway, down a narrow road, from which the track was concealed on one side by a high embankment, stopped to listen, but hearing nothing drove on, and when close by the track a train appeared within a few rods. Fearing that he could not control his horses where they were, he whipped them up and tried to cross the track, and the rear of the buggy was struck by the engine. It was held that in an action for the resulting injury, the question whether the plaintiff was guilty of contributory negligence was for the jury. *Chicago, &c. R. Co. v. Miller*, 46 Mich. 532. In another case a team collided with a train at a crossing, and the driver was killed. The track and the highway were both below the general surface of the ground, and an approaching train could only be seen occasionally by one driving towards the crossing. The driver was familiar with the crossing, but, except that he checked his team for a moment some four rods from the crossing, he did not appear to have taken any precaution. The whistle was sounded when the crossing was approached. It was held that the team-driver was chargeable with negligence, and that no action would lie for the injury. *Haas v. Grand Rapids, &c. R. Co.*, 47 Mich. 401. The plaintiff was driving his wagon upon the street at a slow trot towards the railroad crossing, and upon approaching the track his horses were frightened by the passage of the locomotive, and ran away, throwing him from the wagon and seriously injuring him. It appeared from the evidence of the plaintiff that the street was built up on each side, and lined with piles of lumber in such a manner that a train could not be seen until the plaintiff approached very near to

it; and also, that the engine-bell was not rung, as required by statute. It was held that the evidence failed to show contributory negligence. *Strong v. Sacramento, &c. R. Co.*, 61 Cal. 326. In another case, plaintiff and his companions, being strangers in E., were ignorant of the existence of the defendant's railroad. At the close of the plaintiff's case there was no evidence to show that plaintiff could have seen the train, as it approached the crossing, in season to avoid the accident, except that other people in different localities, near where the collision occurred, heard and saw the approaching train in time to have avoided the accident. It was held that a non-suit was properly refused. The fact that plaintiff and his companions were strangers in Eureka, and did not know they were approaching a railroad crossing, was an important fact to be considered by the jury. *Cohen v. Eureka, &c. R. Co.*, 14 Nev. 376. The caution-board is for the purposes of notifying those who are passing; and where a party is familiar with the crossing, and has frequently been over it, and had it in mind on the occasion in question as he approached it, he cannot be said to have been injured by the failure to set up the sign-board. *Haas v. Grand Rapids, &c. R. Co.*, 47 Mich. 401. While it is the duty of persons crossing or attempting to cross a railway to exercise proper care and caution, it is also the duty of the railway employes, or those in charge of the train, to exercise such care and caution at such places as to prevent injury to those travelling on public highways. The duty in this regard is reciprocal. *Louisville, &c. R. Co. v. Goetz*, 79 Ky. 442; *Penn. Co. v. Krick*, 47 Ind. 368.

¹ *Thomas v. Delaware, &c. R. Co.*, 19 Blatch. (U. S.) 583; 8 Fed. Rep. 729; *Mackey v. New York, &c. R. Co.*, 35 N. Y. 75; *Kissenger v. N. Y. Central R. Co.*, 56 N. Y. 538 (empty cars left on the track so as to obstruct the view). And where the company obstructs the crossing

duty to use care proportioned to the circumstances. Thus, where his entire view of the track is obstructed until within six feet of the crossing it is his duty to stop at that limit and look and listen, if he does not his negligence is a bar to his action.¹ And when the proper signals are given, if a traveller ventures upon the track, and miscalculates as to the chances of crossing, the risk is his, unless some negligence can be imputed to the company which has directly caused the injury,² — as, if the rate of speed is fixed by a city ordinance, if the company is running at a higher rate;³ or, if the train is being run at much more than its usual speed at the point in question.⁴ The duty of the company extends to all travellers on the highway alike, — to the pedestrian as well as to those riding or driving.⁵ But as has been observed in a leading case, it is within the personal experience of every one that as a rule the exercise of ordinary care will always enable a foot passenger to cross in safety, particularly in the daytime, and under such circumstances it requires a very strong case to authorize a recovery;⁶ and unless such a case is made out the court may direct a verdict for the defendant.

The rule that the traveller about to cross a railroad track should

with its trains, it must use special care towards those who, in order to pass, are compelled to go around the end of the train and over a private crossing. *Brown v. Hannibal, &c. R. Co.*, 50 Mo. 461; 11 Am. Rep. 420.

¹ *Clark v. Northern Pac. R. Co.*, 47 Minn. 380. See also *Beaustrom v. Northern Pac. R. Co.*, 46 Minn. 193.

² *Chicago, &c. R. Co. v. Fears*, 53 Ill. 115; *Van Schaick v. Hudson River R. Co.*, 43 N. Y. 527; *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335.

³ *Madison, &c. R. Co. v. Taffe*, 37 Ind. 364; *Cincinnati, &c. R. Co. v. Butler*, 103 Ind. 35.

⁴ *Richardson v. N. Y. Central R. Co.*, 45 N. Y. 84; *Wabash, &c. R. Co. v. Henks*, 91 Ill. 406.

⁵ *Cheney v. New York Central R. Co.*, 16 Hun (N. Y.), 415.

⁶ *Cordell v. N. Y. Central R. Co.*, 70 N. Y. 119, 125. A traveller approaching a railroad crossing guarded by gates is not required to exercise the same vigilance in looking and listening as when the approaches are not so guarded. *Palmer v. Railroad Co.*, 112 N. Y. 234; *Rodrian v.*

Railroad Co., 125 N. Y. 526; *Oldenburg v. Railroad Co.*, 124 N. Y. 414. Thus, in an action to recover damages for injuries alleged to have been received by the plaintiff through the defendant's negligence, these facts appeared. The plaintiff was driving along a highway, which crossed the defendant's tracks, in an open wagon; the crossing was protected by gates on each side of the railroad; as the plaintiff approached the tracks he found the gates closed; a train passed, the gates were opened and he started on, but after he had passed the first gate, both were again closed so that escape was impossible; he was struck by another train and was injured. It was dark at the time of the accident, and the train which had passed obstructed the view of the approaching train, the plaintiff and his witnesses testified that they neither heard or saw the latter until a moment before the collision. It was held that the question as to the plaintiff's contributory negligence was properly submitted to the jury. *Kape v. New York, &c. R. Co.*, 132 N. Y. 160. See also, as to the statement of the text, *State v. Baltimore, &c. R. Co. (Md.)*, 21 Atl. Rep. 62.

stop, look, and listen before crossing is applied with much strictness by the Pennsylvania courts, which hold that the omission of any one of these precautions will constitute negligence which will bar an action for injuries sustained in the collision which the precaution would have averted.¹ If such precautions were always adopted it is manifest such accidents, now so common, would be of rare occurrence, and their universal adoption is surely a desirable end. But the whole responsibility cannot thus be shifted on the traveller, and the company allowed an unrestrained use of the highway at the crossing; the mutuality of the rights and duties of the parties is always to be kept in mind. It has been well observed that "the stop, look, and listen rule cannot be correctly treated as an arbitrary standard of care to be inflexibly applied by the courts in all cases, but is rather a useful legal measure of ordinary care in cases where to have stopped, looked, or listened would have been to effectually guard against injury."² If the company defends on the ground of the contributory negligence of the traveller, it has the burden of showing the fact of such negligence, and that the observance of the neglected precautions would have prevented the injury; for the law does not presume a want of care in such cases.³

The mere fact that the company did not ring the bell or blow the whistle will not excuse a traveller from looking and listening.⁴ Nor

¹ See *Pennsylvania R. Co. v. Beale*, 73 Penn. St. 504; 13 Am. Rep. 753; *Pennsylvania R. Co. v. Fortney*, 90 Penn. St. 323; *Philadelphia, &c. R. Co. v. Boyer*, 97 Penn. St. 91; *Reading, &c. R. Co. v. Ritchie*, 102 Penn. St. 425. The rule is so stringent that it is held that "if the traveller cannot see the track by looking out, whether from fog or other cause, he should get out, and, if necessary, lead his horse and wagon." *Pennsylvania R. Co. v. Beale*, 73 Penn. St. 504; 13 Am. Rep. 753. In the same case, SMARSWOOD, J., speaking for the court, went on to say: "There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court." And see *Pennsylvania R. Co. v. Weber*, 76 Penn. St. 157; 18 Am. Rep. 407. See the doctrine of the Beale case opposed in *Huckshold v. St. Louis, &c. R. Co.* (Mo.), 28 Am. & Eng. R. Cas. 659.

² 4 Am. & Eng. Ency. Law, p. 946. See also *Fletcher v. Boston, &c. R. Co.*, 1 Allen (Mass.), 9; 79 Am. Dec. 695. The failure to stop, look, and listen cannot be considered where the proximate cause of the injury was a defect in the crossing which it was the company's duty to repair; as where the traveller was run over by a train, when he could easily have crossed in safety had his horse's foot not been caught in a hole in the crossing. *Baughman v. Shenango, &c. R. Co.*, 92 Penn. St. 335.

³ See *post*, this chapter, section on "Presumption of Negligence;" *Hough v. Railroad Co.*, 100 U. S. 216; *Mobile, &c. R. Co. v. Crenshaw*, 65 Ala. 569; *Louisville, &c. R. Co. v. Goetz*, 79 Ky. 442; 42 Am. Rep. 227; *Bacon v. Baltimore, &c. R. Co.*, 58 Md. 482; *Cleveland, &c. R. Co. v. Crawford*, 24 Ohio St. 681; 15 Am. Rep. 633; *Cassidy v. Angell*, 12 R. I. 447; 34 Am. Rep. 690.

⁴ *Gorton v. Erie R. Co.*, 45 N. Y. 660; *Havens v. Erie R. Co.*, 41 N. Y. 296.

does the fact that they did ring the bell or blow the whistle excuse from liability where, in other respects, — as, in the rate of speed at which the train was being run in view of the particular crossing, — they were chargeable with blame.¹ But a traveller may assume that the company will comply with the law.² But if the company is bound to, or usually does, keep a flagman at the crossing to warn persons of approaching trains, its neglect to do so, or a false signal given by the flagman, whereby an injury happens to a person attempting to cross, will render it liable for injuries resulting, although the train was in plain sight.³

A railway company is not, as a rule, in the absence of a statute requiring it, or of an ordinance of a municipal corporation, bound to maintain gates at a crossing, or to keep a flagman there to warn travellers of the approach of trains.⁴ But under the maxim *sic utere tuo*, etc., instances may arise where this duty is cast upon them, or of providing some other equally safe mode, by reason of the location of the crossing and the large number of people crossing it, or where the mode of crossing adopted by the company is exceptionally dangerous;⁵ and although it is held by some of the cases that the question as to the duty to keep a flagman, or to adopt some other equally effectual mode of warning travellers of the approach of a train, is not a matter for the caprice of jurors,⁶ yet it is difficult to understand how, or under what authority, the court can withdraw the question from the jury, and usurp to itself the power to determine a question which is one of fact; and it is believed that the question is a mixed question of law and fact which the jury

¹ Richardson v. N. Y. C. R. R. Co., 45 N. Y. 846.

² Kennayde v. Pacific R. R. Co., 45 Mo. 255.

³ Sweeney v. Old Colony R. R. Co., 10 Allen (Mass.), 368; Newson v. N. Y. C. R. R. Co., 29 N. Y. 383; Spencer v. Illinois Central R. R. Co., 29 Iowa, 55.

⁴ Ernst v. Hudson River R. R. Co., 35 N. Y. 9; Sutherland v. New York Central R. R. Co., 41 N. Y. Sup. Ct. 17; Culhane v. N. Y. Central R. R. Co., 60 N. Y. 133; Pakalinsky v. N. Y. Central R. R. Co., 11 N. Y. Weekly Dig. 73; Grippen v. N. Y. Central R. R. Co., 40 N. Y. 34; Slate v. Philadelphia, &c. R. R. Co., 47 Md. 76; McGrath v. N. Y. Central, &c. R. R. Co., 63 N. Y. 522;

Delaware, &c. R. R. Co. v. Toffey, 39 N. J. L. 525; Com. v. Boston, &c. R. R. Co., 101 Mass. 201; Shaw v. Boston, &c. R. R. Co., 8 Gray (Mass.), 45; Phila., &c. R. R. Co. v. Kellips, 88 Penn. St. 405; Stuble v. London, &c. Ry. Co., L. R. 1 Echq. 13; Stapley v. London, &c. Ry. Co., 4 H. & C. 93; Cliff v. Midland Ry. Co., L. R. 5 Q. B. 258.

⁵ Penn. R. R. Co. v. Matthews, 37 N. J. L. 531; Pollock v. Eastern R. R. Co., 124 Mass. 158.

⁶ Beiseigel v. N. Y. Central R. R. Co., 40 N. Y. 9; Dyer v. Erie R. R. Co., 71 N. Y. 228; Weber v. N. Y. Central R. R. Co., 58 N. Y. 451; State v. Phila., &c. R. R. Co., 47 Md. 76.

must pass upon.¹ And those cases which hold that the question as to the necessity of maintaining a flagman, etc., at a particular crossing is not for the jury, really nullify the rule, by holding that while the jury may not determine whether or not there is such a necessity, yet they may consider the circumstance that such precautions are not taken, as a part of the *res gestæ*, and bearing upon the question of the company's care or negligence in the management of its trains;² which is a direct repudiation of the rule itself, and involves the court in an absurd position; which always results when courts attempt to exercise legislative functions, rather than those which pertain to the judiciary. As a railway company is liable to a party whom it leads into danger, where it has voluntarily placed and kept a flagman at a crossing, it amounts to an admission that one is necessary there; and if it withdraws him, persons knowing that one has formerly been stationed there have a right to expect that he will not be withdrawn; and if, relying upon such expectation, they are induced to attempt to cross, and are injured, the company is liable therefor, if they were in the exercise of due care in attempting to cross.³ It will be understood that while a railway company keeps a flagman, or maintains a gate or other precautions at a crossing, the traveller is not thereby relieved from all duty to look out for his own safety. He may not be called upon to use so high a degree of care as he would be except for such precautions on the part of the company, but he is nevertheless bound to use his senses, and do all which a prudent man, under the circumstances, would do to avoid the danger.⁴

If a person in crossing a railroad track, in the exercise of due care as to approaching trains, through no fault of his, gets the wheels of his vehicle caught in the track, so that he cannot extricate them in season to avoid injury from an approaching train, he is not chargeable with such negligence as will preclude a recovery for an injury

¹ *Bailey v. New Haven, &c. R. R. Co.*, 107 Mass. 496.

² *Ernst v. Hudson River R. R. Co.*, 39 N. Y. 61; *Casey v. N. Y. Central R. R. Co.*, 78 N. Y. 518. See also, involving the court in a still greater absurdity, *Dyer v. Erie R. R. Co.*, 71 N. Y. 228.

³ *Warner v. N. Y. Central R. R. Co.*, 44 N. Y. 465; *Dolan v. Del. & Hud. C. Co.*, 71 N. Y. 285; *McGovern v. N. Y. Central R. R. Co.*, 67 N. Y. 417; *Kissenger v. New York, &c. R. R. Co.*, 56 N. Y.

588; *Philadelphia, &c. R. R. Co. v. Kelips*, 88 Penn. St. 405; *St. Louis, &c. R. R. Co. v. Dunn*, 78 Ill. 197.

⁴ *Lake Shore, &c. R. R. Co. v. Sunderland*, 2 Brad. (Ill.) 307; *Warren v. Fitchburg R. R. Co.*, 8 Allen (Mass.), 227; *Wheclock v. Boston, &c. R. R. Co.*, 105 Mass. 203; *Borst v. Lake Shore, &c. R. R. Co.*, 4 Hun (N. Y.), 346; *Dela-ware, &c. R. R. Co. v. Toffey*, 39 N. J. L. 525.

to his team, if he properly endeavors to cause the train to be stopped.¹ The mere fact that a person sees or hears an approaching train does not necessarily preclude him from a recovery, if he had ample time to pass except for the fact that the train was being run at a much higher rate of speed than usual. The simple question is, whether, knowing the usual length of time it took the train to reach the crossing, as a prudent man he was justified in making the attempt.²

¹ Pittsburgh, &c. R. R. Co. v. Dunn, 56 Penn. St. 280; Milwaukee, &c. R. R. Co. v. Hunter, 11 Wis. 160.

² Detroit, &c. R. R. Co. v. Van Steinburg, 17 Mich. 99. Where a person familiar with a dangerous railway crossing, in passing over the same, neglects the exercise of any care to ascertain if a passing train is near, and in consequence of such neglect is injured by a collision with the train, he is guilty of negligence, and the mere fact that he had forgotten that he was in the vicinity of the crossing will not excuse such neglect. Baltimore & Ohio R. R. Co. v. Whitacre, 35 Ohio St. 627. The general rule is, that a person approaching a railroad crossing is required to look up and down the track in either direction and watch for the approach of trains before attempting to cross, and if such precaution is neglected and injury to the party ensues, he cannot recover; but this rule cannot be applied to an infant of tender years. Chicago & Alton R. R. Co. v. Becker, 84 Ill. 483. But it cannot be declared as a matter of law that a footman is bound, before crossing a railway track to stop, in order to look and listen for trains. That rule is applicable only to persons travelling in wagons or other vehicles which make a noise that would necessarily interfere with their hearing. Zimmerman v. Hannibal & St. Joseph R. R. Co., 71 Mo. 476. The fact that one in attempting to cross a railway does not, at the instant of stopping on it, look to ascertain if a train is approaching, is not conclusive evidence of a want of care on his part. Plummer v. Eastern R. R. Co., 73 Me. 591. An instruction that it is not necessarily the duty of a traveller approaching a railroad-crossing to stop and listen before stepping upon the track, and that whether it is necessary and proper for him to stop depends on the

circumstances of the case, is not erroneous. Shaber v. St. Paul, &c. R. R. Co., 28 Minn. 103; Garland v. Chicago, &c. R. R. Co., 8 Brad. (Ill.) 571. The plaintiff made out a *prima facie* case of negligence without proving affirmatively that the deceased had "stopped and looked and listened." It was held that the presumption in law was that he had stopped, looked, and listened, and the burden of proving contributory negligence was on the defendant. Weiss v. Penn. R. R. Co., 79 Penn. St. 387. While a traveller on approaching a railway-crossing is bound to look and listen for an approaching train before undertaking to cross, *it is only where it appears from the evidence that he might have seen had he looked, or might have heard had he listened*, that a jury, in the absence of evidence upon the question, is authorized to find that he did not look and did not listen. Snedis v. Brooklyn, &c. R. R. Co., 88 N. Y. 13. The rule requiring persons, before crossing a railroad track, to look to see whether trains are approaching is not applied inflexibly in all cases without regard to age or other circumstances. McGovern v. New York Central, &c. R. R. Co., 67 N. Y. 417. But in Pennsylvania the failure to stop immediately before crossing a railroad track is negligence *per se*, and the rule is unbending. Penn. R. R. Co. v. Beale, 73 Penn. St. 504. Where a traveller, about to cross a four-track railway, looked and listened before starting across the track, it was held that a failure to stop and look and listen before crossing the fourth track was not negligence as a matter of law. Weber v. N. Y. Central & Hudson River R. R. Co., 67 N. Y. 587. In an action for damages against a railway company for injuries received by a collision at a crossing, the following instruction was given: "If you believe from

A person is not bound to stop his team, and listen or look for an approaching train before attempting to pass; *he is merely bound to do that which is dictated by common prudence, in view of the peril to which he may be exposed.* If he hears the signal, but cannot see the train, and does not know the distance at which it is from the crossing, as a prudent man he would be bound to wait until it passed, but if he is induced to cross by reason of a false signal given by a flagman, he cannot be charged with negligence; nor can he be charged with negligence if he knows the distance at which the law requires the signal to be given by the train before it reaches the crossing, and is injured in attempting to cross, by reason of an increased rate of speed on the part of the train, or in consequence of a neglect to give the signal as early as it should have been given.¹

the evidence that the plaintiff neither stopped his team nor made any effort to see or hear the train before he drove on the railroad track, and you further believe that if he had stopped and looked he could have seen the train, or if he had listened he could have heard it, then he cannot recover." This instruction was held to embody the correct rule of law. *Benton v. Central R. R. Co. of Iowa*, 42 Iowa, 192. A person in crossing a railroad track should look and see if a train is coming; if he does not he cannot recover for an injury received, although the train that injured him was behind time about thirty minutes, and he was crossing the track to get on another train. *Anderson v. Railroad Co.*, 12 Phila. (Penn.) 369. The plaintiff's intestate was killed by a locomotive on the defendant's track while crossing its track on a village sidewalk. It was shown that upwards of twenty-six feet before reaching the track the deceased could, by turning her head, have seen the approaching locomotive for a long distance, and that there were no other trains or engines passing at the time. It was held that the intestate was guilty of contributory negligence such as to avoid a recovery for her death. *Mitchell v. N. Y. Central R. R. Co.*, 64 N. Y. 655. The crossing where the injury complained of in this action occurred was one with which the plaintiff was familiar, and one which he had often passed. Above it was the usual sign, "Look out

for the cars," printed in large letters, and at that place the highway and railroad were nearly on a level. Away from it at a distance of twenty rods in the direction from which the train in question came, was the depot nearest it in that direction. This stretch of track was in full view of the plaintiff while still six hundred feet from the crossing, and at thirty-three feet from such crossing one could see a distance of some twenty rods beyond the depot. If at any time after the train passed the depot the plaintiff had looked in that direction he would have seen it; and if not then too near the train for escape by stopping his horse, he could have avoided the accident. On a motion to nonsuit, it was held that these facts show contributory negligence on the part of the plaintiff, though the train was not a regular one, and no train was due at the time; though it was moving at an unusual and dangerous rate of speed; though it did not stop at the depot as trains usually but not always do; and though no warning was given of its approach by blowing the whistle or ringing the bell after such depot was passed. *Schofield v. Chicago, Milwaukee, & St. Paul R. R. Co.*, 8 Fed Rep. 488.

¹ *Spencer v. Ill. Cent. R. R. Co.*, 27 Iowa, 55; *Havens v. Erie R. R. Co.*, 53 Barb. (N. Y.) 328. A person who approaches the crossing with due care, and looks for the train as soon as looking could be of service, will not be deemed guilty of

And when two trains are approaching, one of which can, and the other of which cannot be seen by the traveller, and there is plenty

negligence in not stopping his team to ascertain if a train might be approaching. *Mackay v. N. Y. Central R. Co.*, 35 N. Y. 75; *Brooks v. Buffalo, &c. R. Co.*, 25 N. Y. 600; *Brendell v. Buffalo, &c. R. Co.*, 27 N. Y. 534; *Salter v. Utica, &c. R. Co.*, 75 N. Y. 273. In Pennsylvania, it is held to be the duty of one attempting to cross a railway, to stop and look both ways and listen for approaching trains. If a traveller goes upon a track without negligence, and by a defect in the crossing, he is stopped on it, it is his duty to look out for a train, and use all his efforts to give notice to one coming, and to extricate himself as speedily as possible. *Lehigh Valley R. Co. v. Hall*, 61 Penn. St. 361; *Pittsburgh, Fort W., &c. R. Co. v. Dunn*, 56 Penn. St. 280. But the general rule is that a traveller approaching a railway should do so cautiously and should observe the approach of trains, and the company should give timely warning of the approach of the train. *Pennsylvania R. R. Co. v. Goodman*, 62 Penn. St. 329; *North Pennsylvania R. R. Co. v. Heilmann*, 49 id. 60; *Haight v. N. Y. Central R. R. Co.*, 7 Lans. (N. Y.), 11; *Hewett v. N. Y. Central R. R. Co.*, 3 id. 83; *Morse v. Erie R. R. Co.*, 65 Barb. (N. Y.) 490; *Gonzales v. New York, &c. R. R. Co.*, 39 How. Pr. (N. Y.), 407, 38 N. Y. 440, reversing 6 Robt. (N. Y.) 93; *Wilds v. Hudson River R. R. Co.*, 24 N. Y. 430; *McCall v. N. Y. Central R. R. Co.*, 54 N. Y. 642; *Toledo, Peoria, & Warsaw R. R. Co. v. Riley*, 47 Ill. 514; *St. Louis, Alton, & Terre Haute R. R. Co. v. Manly*, 58 id. 300. Where a person, on approaching such a crossing with a team, does not avail himself of his senses of sight and hearing, *when by the proper exercise of these, he could have avoided a collision*, he will be regarded as unusually negligent, though the bell was not continuously rung or the whistle sounded. *Chicago & Rock Island R. R. Co. v. McKean*, 40 Ill. 218. If it appears that the deceased would have seen the approaching cars in season to have avoided them, had he first looked before attempting to cross, *it will be presumed that he did not look*; and he will be deemed to have been guilty of

contributory negligence. *Wilcox v. Rome, Watertown, & Ogdensburg R. R. Co.*, 39 N. Y. 358. At the intersection of a railway with a common road, there are concurrent rights; neither the traveller on the highway nor the company has the exclusive right of passage. *North Pennsylvania R. R. Co. v. Heilmann*, 49 Penn. St. 60; *Pittsburgh, Fort Wayne, & Chicago R. R. Co. v. Dunn*, 56 id. 280; *Warner v. New York Central R. R. Co.*, 45 Barb. (N. Y.) 299; *Galena & Chicago Union R. R. Co. v. Dill*, 22 Ill. 264; *Toledo & Wabash R. R. Co. v. Goddard*, 25 Ind. 185. A traveller upon a highway who knows that he is near a railway-crossing and yet does not look up to see if a train is coming, simply because there is a storm and the travelling is bad, is guilty of such negligence as to preclude a recovery for an injury sustained by him from a collision with a passing train. *Butterfield v. Western R. R. Co.*, 10 Allen (Mass.), 532. One who approached a railroad at a point in a town where he had often crossed, muffled in his coat within the covered top of his wagon, taking no notice of the railroad, and drove slowly upon the track without stopping or looking out, was guilty of negligence. *Hanover R. R. Co. v. Coyle*, 55 Penn. St. 396. It is not necessary to prove affirmatively that a person injured when crossing a railroad on a public highway had stopped and looked up and down the railroad; whether he used the proper precautions is to be determined by all the circumstances of the case. *Penn. R. R. Co. v. Weber*, 72 Penn. St. 27. Where a person crosses a railway with a team, in ignorance of the approach of the cars, when the danger may be easily seen by looking for it, he is fairly chargeable with negligence; much more so, if he drives on to the track and there stops, looking in an opposite direction from an approaching train, until the engine comes in contact with him, and throws him off. *Brooks v. Buffalo, &c. R. R. Co.*, 25 Barb. (N. Y.) 600. A person driving a heavy team, on a foggy morning, over a railroad, without waiting to ascertain whether an approaching train was near, having been struck by the engine and killed, was held

of time for him to cross the track before the train in sight can reach the crossing, the fact that he might have seen the other train before he reached the track, except that he was watching the other train with a view to protecting himself from it, will not debar him from a recovery for an injury received from the train not seen by him. The very fact that two trains are permitted to cross a highway from opposite directions, both not being in plain sight for such a distance away that a traveller cannot see and avoid both, is negligence on the

to have contributed to the act by his own negligence. *Haslan v. Morris & Essex R. R. Co.*, 34 N. J. L. 147. In an action brought against a railroad company for negligently running over a passer-by at a crossing, it is error to grant a nonsuit, refusing to submit the question of concurring negligence on his part to the jury, merely because he did not look to see whether a train was approaching; if it appear that from the circumstances at the time, — for example, the state of the weather, — he could not have seen the train in time to avoid it. *Hackford v. N. Y. Central R. R. Co.*, 13 Abb. Pr. N. S. (N. Y.) 18. Where a person, knowingly about to cross a track, approaches it from a point where he may have an unobstructed view of the railroad, and know of the approach of a train a sufficient time to clearly avoid an injury from it, he cannot, as a matter of law, recover, although the company may also have been negligent in omitting to perform a statutory requirement, or otherwise. But if the view was obstructed, or if there were circumstances calculated to throw a person off his guard, then, whether it was negligence on the part of the person undertaking to cross, is a question of fact for the jury. *Artz v. Chicago, &c. R. R. Co.*, 34 Iowa, 153. *No neglect of duty on the part of a railway company will excuse any person, approaching on a highway a railway-crossing, from using the senses of sight and hearing, when these may be available.* *Bellefontaine R. R. Co. v. Hunter*, 33 Ind. 335. A person is not, as a matter of law, bound to stop his team and look and listen before attempting to cross the track. He may have satisfactory and sufficient evidence to justify him in attempting to cross without this. *Spencer v. Illinois Central R. R. Co.*, 29 Iowa, 55. Nor is a traveller

required to stop, or if he is with a team, to go out and leave his vehicle and go to the track, or to stand up, and go upon the track in that position in order to obtain a better view. *Davis v. N. Y. Central, &c. R. R. Co.*, 47 N. Y. 400; *Duffy v. Chicago & Northwestern R. R. Co.*, 32 Wis. 269. A plaintiff, approaching a crossing, and stopping from four to six rods therefrom to look and listen, and neither seeing nor hearing a signal of an approaching train, is not to be deemed guilty of such negligence as to justify a nonsuit. *Renwick v. N. Y. Central R. R. Co.*, 36 N. Y. 132. Where a person, standing in a cart, and driving the horse which drew it, and at the same time leading by a strap in his hand another horse drawing another cart, attempted (after taking precautions by looking and listening to ascertain if a train was approaching) to pass over the track of a railroad at a place where it crossed at grade the street on which he was travelling, and the rear horse, becoming restive, rushed forward, so that both of the horses and carts were on the track, and in this position they were struck and injured by a train, — it was held that the question whether the traveller was in the exercise of due care at the time of the collision, was for the jury. *Eagan v. Fitchburg R. R. Co.*, 101 Mass. 315. A man was found dead on a railroad where it crossed a street, having been killed by a train of cars. It was held that whether he was lawfully on the railroad, and whether his own negligence contributed to his death, were for the jury. Where there is evidence of negligence upon the part of the company, the law will not presume, in the absence of proof, that the negligence of the deceased contributed to his death. *Lahigh Valley R. R. Co. v. Hall*, 61 Penn. St. 361.

part of the company.¹ Where the statute makes it the duty of a railroad company to give certain signals,—as, to ring the bell or blow the whistle on a train approaching a crossing, within a certain distance,—it is negligence *per se* for it not to do so; and a traveller has a right to expect that the company will discharge its duty in this respect. As a prudent man, he will not be relieved of the duty of looking or listening; the negligence of one party cannot be set up by the other as an excuse for the want of care on the part of the latter.²

¹ New Jersey R. R. Co., &c. v. West, 33 N. J. L. 91.

² Beiseigel v. N. Y. Central R. R. Co., 34 N. Y. 633; Pollock v. Eastern R. R. Co., 124 Mass. 158; Renwick v. N. Y. Central R. R. Co., 36 N. Y. 132; Gorton v. Erie R. R. Co., 45 N. Y. 660; O'Mara v. Hudson River R. R. Co., 38 N. Y. 445; Condell v. N. Y. Central R. R. Co., 64 N. Y. 535; Hill v. Louisville, &c. R. R. Co., 9 Heisk. (Tenn.) 823; Chicago, &c. R. R. Co. v. Triplett, 38 Ill. 482; Peoria, &c. R. R. Co. v. Siltman, 38 Ill. 529; Dimick v. Chicago, &c. R. R. Co., 80 Ill. 338; Chicago, &c. R. R. Co. v. Van Patten, 74 Ill. 91; Memphis, &c. R. R. Co. v. Copeland, 61 Ala. 376; St. Louis, &c. R. R. Co. v. Mathias, 50 Ind. 65; Karle v. Kansas City, &c. R. R. Co., 55 Mo. 476; Kennayde v. Pacific R. R. Co., 45 id. 255; Com. v. Fitchburg R. R. Co., 10 Allen (Mass.), 189. But to render the company liable in such a case, the injury must be shown to have occurred by reason of the omission. Houston, &c. R. R. Co. v. Nixon, 52 Tex. 19; Barringer v. N. Y. Central R. R. Co., 18 Hun (N. Y.), 398. In Cosgrove v. N. Y. Central R. R. Co., 13 Hun (N. Y.), 329, which grew out of the same accident as the previous case, it appeared that one Barringer was driving, plaintiff's intestate and himself being in a one-horse wagon, on a highway crossing defendant's railroad. While at a safe distance therefrom they became aware of the approach of an engine, and Barringer at once endeavored to stop the horse and succeeded in checking him; he started again and was again brought under control, but started a third time and ran into the engine. The bell of the engine was not rung as required by law. In an action to recover damages for

the killing of plaintiff's intestate, it was held that, although negligence on the part of Barringer could not be imputed to the deceased, yet as defendant's neglect to ring the bell did not contribute to, or cause the accident, the plaintiff could not recover. It becomes important in this class of cases to ascertain whether the plaintiff knew that the train was approaching, or could have known if he had used due diligence to ascertain. Lake Shore, &c. R. R. Co. v. Clemens, 5 Brad. (Ill.) 77; Ohio, &c. R. R. Co. v. Eaves, 42 Ill. 288; Stevenson v. Atlantic, &c. R. R. Co., 58 Mo. 503; Halman v. Chicago, &c. R. R. Co., 62 Mo. 562; Chicago, &c. R. R. Co. v. Harward, 90 Ill. 425; Briggs v. N. Y. Central R. R. Co., 72 N. Y. 26; North-Eastern Ry. Co. v. Wanless, L. R. 7 H. L. 12; Galena, &c. R. R. Co. v. Loomis, 13 Ill. 548; Stevens v. Oswego, &c. R. R. Co., 18 N. Y. 422. And if he has neglected to use his senses and is injured, he cannot recover, if by want of such due care on his part he contributed to the injury. Com. v. Fitchburgh R. R. Co., 10 Allen (Mass.), 189; Stevens v. Oswego, &c. R. R. Co., *ante*; Parker v. Adams, 12 Met. (Mass.) 415; Eaton v. Erie R. R. Co., 51 N. Y. 544; Sheffield v. Rochester, &c. R. R. Co., 21 Barb. (N. Y.) 339; Haslan v. St. Louis, &c. R. R. Co., 64 Mo. 480; Toledo, &c. R. R. Co. v. Jones, 76 Ill. 311; Ill. Central R. R. Co. v. Hetherington, 83 Ill. 510; Lake Shore, &c. R. R. Co. v. Sunderland, 2 Brad. (Ill.) 307; Fletcher v. Atlantic, &c. R. R. Co., 64 Mo. 484; Leduke v. St. Louis, &c. R. R. Co., 4 Mo. App. 485; Chicago, &c. R. R. Co. v. Houston, 95 U. S. 697; Payne v. Chicago, &c. R. R. Co., 44 Iowa, 236; Artz v. Chicago, &c. R. R. Co., 44 Iowa, 234.

If a traveller approaching a crossing neglects to look and listen for the approach of a train, when by looking in season he could have seen, or by listening he could have heard it, he is at least *prima facie* guilty of negligence which precludes a recovery; and the same rule prevails where, seeing or hearing an approaching train, he nevertheless thinks he has time to cross ahead of it, but misjudging in this respect, is run upon and injured.¹ A rule which

¹ Penn. R. R. Co. v. Beale, 73 Penn. St. 504. In *Wilcox v. Railroad Co.*, 39 N. Y. 358, the court held that when one is killed in attempting to cross a railroad track within the limits of a public highway, and at a public crossing, if it appear that the deceased would have seen the approaching cars in season to have avoided them, had he first looked before attempting to cross, it is to be presumed that he did not look; and that by omitting so plain and imperative a duty, he will be deemed to have been guilty of negligence which precludes a recovery; that in crossing a railroad track ordinary sense, prudence, and capacity require a traveller to use his ears and eyes so far as he has an opportunity to do so, and a failure to do so is negligence sufficient to preclude a recovery for any injury he may receive, in case of accident; and that the negligence of the company in not ringing the bell or sounding the whistle is no excuse for the traveller's neglect. After citing many authorities, MILLER, J., said: "The effect of the cases cited is to sustain the principle, that where the negligence of the party injured or killed contributes to produce the result, he cannot recover; and that the omission of the company to ring the bell or sound the whistle near the crossing of a highway does not relieve the person who is about to pass over the highway from the obligation of employing his sense of hearing and seeing, to ascertain whether a train is approaching." In *Railroad Co. v. Houston*, 95 U. S. 697, it was held that the omission of the engineer in charge of a railroad train to sound its whistle or ring its bell does not relieve a traveller from the necessity of ascertaining by other means whether or not a train is approaching; that negligence of the employés of the company is no excuse for negligence of the traveller; that the

traveller upon the highway is bound to listen and to look, before attempting to cross a railroad track, in order to avoid an approaching train, and not to go carelessly into a place of possible danger; that if he omits to look and listen, and walks thoughtlessly upon the track, or if looking and listening, he ascertains that a train is approaching, and instead of waiting for it to pass, undertakes to cross the track, and in either case receives an injury, he so far contributes to it, as to deprive him of all remedy against the railroad company; that if one chooses to take risks he must suffer the consequences. In *Railroad Co. v. Crawford*, 24 Ohio St. 631, it is said that unquestionably ordinary prudence requires a person in the full enjoyment of his faculties, before attempting to pass over a known railroad-crossing, to use his faculties of hearing and seeing for the purpose of discovering and avoiding danger from an approaching train; and that the omission to do so, without a reasonable excuse therefor, is negligence, and will defeat an action to recover for an injury to which such negligence contributed. In *Dascomb v. Buffalo, &c. R. R. Co.*, 27 Barb. (N. Y.) 221, it is said that when negligence is the issue, it must be a case of unmixed negligence; that this rule is important, salutary in its effects, and should be maintained in its purity; that the careless are thereby taught that if they sustain an injury to which their own negligence has contributed, the law will afford them no redress. But contributory negligence is not presumed against one who suddenly acts wildly when peril comes upon him unwarned; and in the absence of any evidence throwing light on the matter, he will be presumed to have used that care and precaution which the law requires, and to which instinct would prompt him in saving his life. *Cook v.*

would make a railway company responsible for an injury which a person brings upon himself by his own folly, would be not only

Central R. R., &c. Co., 67 Ala. 533. Generally, contributory negligence of the injured party will defeat a recovery. Thus, where, by reason of an error in his own clock, the deceased was led to attempt a crossing at the time when a train was due at the crossing, it was held that there could be no recovery. *Murray v. Pontchartrain R. R. Co.*, 31 La. An. 490. So, where the plaintiff's declaration showed that he received a personal injury in attempting to pass between the cars of a freight train, to which was attached an engine, with steam up, and which was liable to start at any moment, and without permission or notice to any one in charge of the freight train or having authority over it, to reach a passenger train standing on the other side, it was held that it showed such negligence on the part of the plaintiff as would preclude a recovery. *Chicago, &c. R. R. Co. v. Coss*, 73 Ill. 394. But where a passage-way is open between the cars of a standing freight train, and a traveller passing between them is injured by the sudden "kicking" of a car, the better opinion seems to be that the question of contributory negligence is for the jury. *Mahar v. Grand Trunk R. R. Co.*, 19 Hun (N. Y.), 32. So it is proper to submit to the jury the question as to whether or not persons in the street were in the habit of crossing between the cars, in the presence of the railway company's employés. It was the duty of the railway company, before moving a train in a street, to give some warning. So held, where the plaintiff got caught between the cars in passing through a train. *Grant v. Baltimore, &c. R. R. Co.*, 2 MacArthur (D. C.), 277. But where the plaintiff attempted to cross defendant's tracks at what was claimed to be a public crossing, and found the crossing blocked by a long freight train which had been standing there for some time, owing to a curve in the road the front of the train could not be seen; the end of the train was some two hundred feet from the crossing. The plaintiff climbed upon the bumper of one of the cars and attempted to cross the tracks. While so doing the train

was moved, without any signal being given, his foot was caught, and the injury occasioned to recover damages for which an action was brought. It was held that the plaintiff was properly nonsuited, as he was guilty of contributory negligence. *O'Mara v. Del. & Hud. Canal Co.*, 18 Hun (N. Y.), 192. Where a person going to a station to take passage on a passenger train finds a freight train across the sidewalk, and is told by the freight conductor to pass under the end of a freight-car, — that he has plenty of time, — and while passing under is injured, he cannot as a matter of law be said to be guilty of contributory negligence. Where a conductor has control over his train as to its starting or stopping, a person will have the right to act on his invitation to pass under a freight-car when the train is obstructing a passway, unless he has reason to suppose it hazardous. The person in such case has the right to suppose the train will not be started until he can pass through, and that the conductor has the power to control the train, and will do so, knowing the dangerous position in which the person is placed by his direction. *Chicago, &c. R. R. Co. v. Sykes*, 96 Ill. 162. In a suit by the personal representative of a person killed upon a railroad-crossing, on the alleged ground of negligence of the company, it appeared that the country was level at the place of the accident, and that the deceased could readily have seen the approaching train, by the use of ordinary care, but drove upon the crossing without looking for a train; and there was no proof that he was seen by the company's servants until it was too late to check the speed of the train. It was held that a verdict in favor of the plaintiff could not be sustained, owing to the gross negligence on the part of the deceased, although the signal required by law was not given. *Chicago, &c. R. R. Co. v. Lee*, 68 Ill. 576. The neglect of the railway employés, in not making the proper signals on approaching a crossing, will not render the company liable for damages, where the undisputed facts show that by the exercise of proper care the injured party

harsh, but exceedingly unjust. The circumstance that a railway crosses a highway necessarily imposes a mutual burden both upon

might have avoided the injury. *Cleveland, &c. R. R. Co. v. Elliott*, 28 Ohio St. 340; *Shaw v. Jewett*, 86 N. Y. 616. Even where the statute provides that a locomotive-bell must be rung when the engine is approaching a crossing, under a penalty for failing so to do, and declares that the railroad corporation shall be liable for all damages sustained by any person, and caused by its locomotives, trains, or cars, when the bell is not rung,—it is held that a failure to ring the bell does abrogate the doctrine of contributory negligence. *Meeks v. Southern Pacific R. R. Co.*, 52 Cal. 602. If the injured person had notice of the approach of the train, the failure to ring the bell would become an immaterial matter. *Houston, &c. R. R. Co. v. Nixon*, 52 Tex. 19. A stranger, in stepping out from behind a train of cars standing upon a side track of a railroad, to cross another track, seven feet removed, was run over by a “pony” engine and killed. The engineer failed to ring the bell, *but the locomotive could have been heard, while moving, at a distance of from one to two hundred yards.* The engineer did not see the deceased, but, had he done so, could not have stopped the engine soon enough to prevent the accident; whereas the other might have both seen and heard the engine in time. It was held that although the failure to ring the bell was negligence in law, yet, since the casualty was directly caused by the negligence of the deceased, and after he stepped from behind the train could not have been prevented by the engineer, the company was not liable. *Harlan v. St. Louis, &c. R. R. Co.*, 64 Mo. 480. See also *Fletcher v. Atlantic & Pacific R. R. Co.*, 64 id. 484. An instruction that it is the duty of a railway company to give “due warning” of the approach of its trains to a highway-crossing is erroneous, being too general. *Chicago, &c. R. R. Co. v. Robinson*, 106 Ill. 142. The question whether the proper signals were given, or the necessary precautions used by the company at the time the accident occurred to prevent injury, is one of fact for the jury. *Paducah & Memphis R. R. Co. v. Hoebl*, 12 Bush (Ky.), 41. In a New York case, the court charged in substance that from a point the proper distance from the crossing until the engine reached the crossing, it was the defendant’s duty to ring a bell or blow a whistle, and do it continuously so as to give warning. To this portion of the charge the defendant’s counsel excepted generally. It was held that the exception was untenable; that the charge was substantially correct, but even if the court erred in using the word “continuously,” a portion of the charge being correct, a general exception could not be sustained; that if any qualification was proper and desired, it should have been suggested. *Smedis v. Brooklyn, &c. R. R. Co.*, 88 N. Y. 13. When the employes in charge of a railway train have given all the usual and proper signals to warn persons of their approach, they are not required to stop the train on discovering a person on the track, unless they have reason to believe that he is laboring under some disability, or that he does not hear or comprehend the signals. *Frech v. Philadelphia, &c. R. R. Co.*, 39 Md. 574. Indeed, a railway company is entitled to precedence at highway crossings, on condition that it shall give reasonable and timely warning of the approach of its trains, and a failure to give such warning is negligence. *Indianapolis, &c. R. R. Co. v. McLin*, 82 Ind. 435. But the obligations of railway companies and travellers on highways at crossings are mutual, the same degree of care being required of each; and the right of precedence belonging to the railway company does not relieve it of the duty to give proper warning of its approaching trains, and to use reasonable care to avoid collision. *Rockford, &c. R. R. Co. v. Hillmer*, 72 Ill. 235. In a Tennessee case, the court charged the jury that it was the duty of the railroad company to blow the whistle at short intervals all the way from the depot to a crossing; and it was held no error. *Louisville, &c. R. R. Co. v. Gardner*, 1 Lea (Tenn.), 688. Where there is extensive travel upon a highway-crossing it is the duty of the company to give timely

the railway company and upon travellers upon the highway, at all crossings, — upon the railway company to give the statutory signals, and upon the traveller to listen and to look for an approaching train, where by looking or listening he could see or hear the train. And he is bound to look and listen, although he knows that no train is due at the crossing by schedule time, as the company has a right to

and sufficient notice of the approach of trains to such crossing. *Phila.; &c. R. R. Co. v. Killips*, 88 Penn. St. 405. The plaintiff's deceased husband went, with some companions, to the defendant's railway station to see an intending passenger off by the train, and he crossed the rails by a level pathway used by the public without objection by the defendant, to the rear of an ordinary train then standing at the station; his companions, from where they stood, could see an express train approaching from the opposite direction, but he, from his position behind the stationary train, could not see it, and, upon his attempting to recross the rails to his companions, he was killed by the express train; the engine-driver of the express train admitted that it was his duty to whistle on approaching that station, and he and other servants of the defendants deposed that he had done so upon that occasion; but the deceased's companions deposed that they did not hear it. It was held that there was evidence of negligence by the defendant proper to be submitted to the jury. *Slattery v. Dublin, &c. Ry. Co.*, 8 Ir. Rep. C. L. 531; 10 Ir. Rep. C. L., 256. The evidence being conflicting as to the giving of a signal, the question is one of fact for the jury. *Roach v. Flushing, &c. R. R. Co.*, 58 N. Y. 626; *McKeever v. N. Y. Central, &c. R. R. Co.*, 88 id. 667; *Bayley v. Eastern R. R. Co.*, 125 Mass. 62. Where, in an action against a railroad company for negligence in not ringing a bell or blowing a whistle upon a train approaching a crossing, the plaintiff's witnesses, whose attention was called to the subject at the time, swear that they did not hear the bell, while the defendant's witnesses swear positively that it was rung, the question is one of fact for a jury. *Salter v. Utica, &c. R. R. Co.*, 59 N. Y. 631. So, where upon the question whether the

defendant rung its bell or blew its whistle there were several witnesses upon the part of the plaintiffs who testified that they were in a position where they could have heard the signals had they been given, and that the signals were not given, it was held that this negative testimony raised a conflict of evidence against the affirmative testimony of defendant's witnesses, that the bell was rung and the whistle blown. *Bunting v. Central Pacific R. R. Co.*, 16 Nev. 277. Where the plaintiff testified that as he approached a crossing with his wagon and team, on a public street in the city of Topeka, adjoining the passenger-depot, he looked to the west (the direction from which the train came), and all he saw was a large pile of lumber, and he didn't hear any bell or whistle; and a witness stated that he was ten or fifteen feet from the depot, but heard no signals until the collision, and would have heard them if any had been given; and four other witnesses who were present testified that they did not hear the whistle sounded or the bell rung until the instant of the collision; and a passenger on the train, and in a car next to the rear one, stated that he didn't hear any alarm; and on the part of the defence, the fireman and engineer testified that they whistled above the tank, three or four hundred yards west of the crossing, and rang the bell continuously from the tank until the train stopped; and five other witnesses stated that they heard the whistle sounded three or four hundred yards west of the crossing, and the ringing of the bell as the train came in, — it was held that there was evidence sufficient to sustain the finding of the jury that proper signals of the approach of the train to the crossing were not given. *Kansas Pacific R. R. Co. v. Richardson*, 25 Kan. 391.

run extra trains and is liable to do so.¹ The trains are liable to be detained by various causes, without any fault of the company,

¹ Toledo, &c. R. R. Co. v. Jones, 76 Ill. 311; Wilcox v. Rome, &c. R. R. Co., 39 N. Y. 358; Salter v. Utica, &c. R. R. Co., 75 N. Y. 273. The plaintiff in his declaration averred that he, being in a narrow, fenced lane leading to the crossing over the defendant's railway, and distant about two and a half rods from the track, and seeing the defendant's train forty rods from; but approaching the crossing, he being distant seven rods therefrom, attempted to pass before the train should reach the crossing; that his attempt was unsuccessful, and that he was injured. It was held, on demurrer, that on the plaintiff's statement of facts he was not in law entitled to recover. Grows v. Maine Central R. R. Co., 67 Me. 100. If a person while crossing the track on a public highway is injured by a passing train, his negligence, if it contributes at all to the injury, contributes directly and proximately. Hearne v. Southern Pacific R. R. Co., 50 Cal. 482. In a North Carolina case, while crossing a railway track the plaintiff's intestate was killed by a train which had left a station on schedule time and attained a speed of twenty miles an hour; the deceased was working at a steam-mill located near the track; when first seen by the engine-driver he was about one hundred feet distant, and making no effort to get out of the way; the engine-driver put on brakes and shut off steam, but gave no signal by bell or whistle. It was held that the contributory negligence of the deceased was sufficient to prevent a recovery against the company. Parker v. Wilmington, &c. R. R. Co., 86 N. C. 221. And it is not sufficient to exonerate a party from a charge of contributory negligence in attempting to cross a railway track in the face of an approaching locomotive, to show that he might reasonably have supposed that if the locomotive ran at its usual and lawful rate of speed for that place, he could cross without harm. He has no more right to presume that the men in charge of the locomotive will obey the requirements of the law than they have that he will obey the instinct of self-

preservation. Kelley v. Hannibal, &c. R. R. Co., 75 Mo. 138. But where a person, as he approaches a crossing with a single track and infrequent trains, sees a train with the rear towards him, going apparently in an opposite direction, and is deceived by appearances, and his attention distracted by the actions of persons at a distance attempting to warn him of his danger from the train which is backing rapidly and quietly towards him, and a wagon has crossed just before him, it will be left with the jury to say whether he was guilty of a want of proper care. Bonnell v. Delaware, &c. R. R. Co., 39 N. J. L. 189. So where one knows a train to be approaching, which may injure him if he attempts to cross the track before it, the slightest care for his own safety requires him to wait for it to pass. So, where it appears that the deceased was acquainted with the way in which the trains were run, and saw or might have seen the whole situation precisely as it was, but in her eagerness to secure a passage on the train attempted to cross the track and was struck, there was gross negligence on her part. In such case the absence of the flagman from his post, or the failure to give warning of the approaching train by bell or whistle, is not such wilful or wanton negligence on the part of the railroad company as to charge it with responsibility for the accident. Lake Shore, &c. R. R. Co. v. Sunderland, 2 Brad. (Ill.) 307. The mere fact that a party, from the nature of his employment, is authorized to cross the tracks of a railroad, will not warrant him in crossing at a place other than is provided by the railroad. Morgan v. Penn. R. R. Co., 7 Fed. Rep. 78. On a track, where cars frequently pass, every one is bound to be vigilant in his own protection according to the common experience of men of ordinary prudence under like circumstances; but the want of such vigilance is a matter of defence in an action against the railroad company to recover damages for injuries sustained because of its negligence. Kansas Pacific R. R. Co. v. Twombly, 3 Col. 125. Where a person

and negligence cannot be imputed to it from the fact that a train may be behind the usual time. The fact of the train being be-

crossed a railway track, and was met in a hurried manner by a friend on the adjacent parallel track of another road, thence turned back to defendant's track, and held there in conversation during the passage of a long train running at the speed of five or six miles an hour on the adjacent road, and having separated, the deceased was then killed by a switch-engine backing up on defendant's track in a direction opposite that of the passing train, the survivor having got twenty feet away before being apprised of the accident, and not having seen the switch-engine nor heard it because of the noise of the passing train,—it was held that the turning back of deceased was not an act of negligence which the law will recognize as such; but that it was properly left to the consideration of the jury; and that it was properly left to the jury to determine whether or not the deceased was guilty of negligence under the circumstances in not observing the approaching engine. *Kansas Pacific R. R. Co. v. Twombly*, 3 Col. 125; affirmed on writ of error, R. R. Co. v. Twombly, 100 U. S. 78. The plaintiff's intestate, who, with his horses and wagon, was approaching a railroad crossing, was prevented from seeing a coming train by some freight cars which stood upon a switch track near the crossing, until it was too late for him to avoid a collision with such train, whereby he was killed. A moment previously a freight train had passed, and was not out of hearing. It was held that the intestate was not guilty of contributory negligence in not seeing or hearing the coming train. *Ingersoll v. New York Central, &c. R. R. Co.*, 66 N. Y. 612. It is deemed culpable negligence to attempt to drive a team across the track of a railroad in full view of an approaching engine. *Chicago, &c. R. R. Co. v. Bell*, 70 Ill. 102; *Gothard v. Alabama, &c. R. R. Co.*, 67 Ala. 114. The court cannot say, as matter of law, that ordinary care required plaintiff to stop his team and listen for the train, or that trotting his team to within a rod of the track was negligence, even though he knew that the train usually passed the crossing at about that

time in the day; but these questions are for the jury. *Eilert v. Green Bay, &c. R. R. Co.*, 48 Wis. 606. While, where the severity of the weather requires a traveller upon the highway to protect himself from it, if the means taken materially impair his ability to perceive coming danger and he is injured at a railroad crossing, he is not to be freed from a charge of contributory negligence, yet, unless it is certain that the means used did have that effect, it is a question for the jury, not the court. *Salter v. Utica, &c. R. R. Co.*, 59 N. Y. 631. Upon the whole it may be said that a person approaching a railway at a road-crossing is bound to use such precautions as a prudent man would resort to under like circumstances; but any attempt by the court to prescribe the precise thing he should do in exercising such caution would be an invasion of the province of the jury, by charging on the weight of evidence. *Texas, &c. R. R. Co. v. Chapman*, 57 Tex. 75; *Houston, &c. R. R. Co. v. Waller*, 56 Tex. 331; *Phila., &c. R. R. Co. v. Carr*, 99 Penn. St. 505. Thus, A. was walking upon the street of a city which was intersected at an angle by several parallel lines of railway. On nearing the intersection, A. saw a train approaching on one of the tracks, and stopped until it had passed. When the last car had gone by she looked both ways and also listened, but neither saw nor heard anything to alarm her, and accordingly, when the rear of the train was about a car's length off, attempted to cross. While doing so she tripped and fell upon the track next beyond that upon which the train had just passed, and after lying there prostrate about fifteen seconds was run over and injured by a train running upon that track in the opposite direction from the train which had just passed. A.'s view of the train by which she was injured was totally cut off by the train which had just passed. The rear car of the last train passed the engine of the first train about three hundred feet from the place of the accident. In an action brought by A. against the company to recover damages for her injuries,

hind time may have a bearing upon the question of contributory negligence;¹ *but it does not relieve the traveller of this duty of care.*

the defendant requested the court to charge that the plaintiff had been guilty of contributory negligence in attempting to cross while the train which had just passed prevented her seeing the train by which she was injured. The court declined to so charge, but left the question of the plaintiff's contributory negligence to the jury. It was held under the circumstances that this was not error. *Philadelphia, &c. R. R. Co. v. Carr*, 99 Penn. St. 505. A traveller is bound to look out and listen for engines and trains; *but he is not bound to make inquiry as to the schedules or the time when the trains are expected to pass.* *South & North Ala. R. R. Co. v. Thompson*, 62 Ala. 494. To instruct the jury that the "plaintiff's testimony shows that the deceased was familiarly acquainted with the crossing and the time of the passing of trains, and it was his duty to have avoided being run against by the train by keeping off the track at crossing-time, and if he failed so to avoid the train," etc., is error. *Louisville, &c., R. R. Co. v. Goetz*, 79 Ky. 442. So it was held to be error to instruct the jury that it was the duty of the deceased "to make such use of his eyes and ears, and all his faculties, as would enable him to avoid danger, provided the managers of the train were doing their duty." If he did that he was free from blame. *Toledo, Wabash, &c. R. R. Co. v. Shuckman*, 50 Ind. 42. One cannot recover for an injury received while crossing a railroad track if he failed to look and listen, unless the circumstances were such that it would have been of no avail to do so; and this though the defendant neglected to take the statutory precautions and was otherwise negligent in the management of its cars. *Drain v. St. Louis, &c. R. R. Co.*, 10 Mo. App. 531. The mere fact that a person jumps from a vehicle in which he is travelling, where there is imminent danger of collision with an approaching train at a crossing, does not bar a recovery against the railroad company, although it appears that he

made a mistake and would have escaped injury had he remained quiet. *Dyer v. Erie R. R. Co.*, 71 N. Y. 228. In an action for an injury at a crossing, the evidence as to how far the view of the track towards the south (the direction from which the train came which caused the accident) was obstructed by buildings and fences was conflicting. The plaintiff's evidence tended to show that, before crossing, he looked up the track towards the south; that the track was obscured by the smoke of a train which had just passed the crossing going south; that he listened for the whistle of any train going north, and could hear no whistle or other signal of its approach. It was held that the question whether the plaintiff used due care in crossing the track was for the jury. *Randall v. Connecticut River R. R. Co.*, 132 Mass. 269. When the plaintiff came near to the sign-board warning travellers to look out for the cars, he stopped his team and looked east and west for trains; he could see about fifty rods east; seeing no train, he started on to cross the track, looking and listening both ways as well as he could without getting out or off from his seat, but he neither heard nor saw anything. A train from the east struck his buggy, and he was injured. The plaintiff was nonsuited on the ground of contributory negligence. It was held error; that the failure of the plaintiff to let down his buggy-top when he started up was not, as matter of law, negligence. *Stackus v. New York, &c. R. R. Co.*, 79 N. Y. 464; *Glendening v. Sharp*, 22 Hun (N. Y.), 78. In an action against a railway company to recover for injuries caused by an engine colliding at a crossing with a wagon in which the plaintiff was driving, at about half-past five in the morning, in December, it appeared that there were six tracks across the highway; that the plaintiff was prevented by the buildings on either side from seeing the approaching engine until he had driven upon the first track; that he then saw the engine on the

¹ *State v. Philadelphia, &c. R. R. Co.*, 47 Md. 76.

Railroad companies have the right to run trains at all times, and persons having occasion to cross their tracks are entitled to no exemption from care and vigilance because trains are irregular, or because extra trains are run.¹ The requirement of the statute that the bell shall be rung or the whistle sounded at the approach of a railroad train to the crossing of a public highway, is for the benefit of persons on the highway at or approaching the crossing; and a failure to comply with the statute furnishes no ground of complaint to a person injured on the track at a distance from the highway. An engineer in charge of a moving train has a right to assume that persons past the age of childhood will heed the usual alarm signals. If, after giving such signals without effect, he uses such means as in his judgment are, in the emergency, most advisable to prevent collision with a person standing on the track, he is not chargeable with negligence, and the company cannot be held liable for the consequences of a collision, although he failed to use other means which were at hand, provided he is competent and experienced in his business. The mere fact that a train was moving at a dangerous rate of speed will not make the company liable for injuries to a person run over by the engine, if he was himself guilty of contributory negligence.² In the case last cited, A. was killed while standing on the railroad track in front of an approaching train. The engineer gave the usual signals, and finding that A. did not get off the track, put

further track; that the place was one across and near which engines and cars of all kinds were constantly moving; that the gates, which were arranged to swing across the highway when a train was passing, and across the railway when the highway was safe for travel, were in the nighttime swung back, so as to leave both the highway and the railway open; that there was no flag or lantern at the crossing as had been customary when an engine was about to pass while the gates were not so shut; that the plaintiff's horse was gentle; that the plaintiff did not on seeing the engine stop or whip up his horse, which was walking; and that he thought he could have stopped the horse on seeing the engine if he had tried. It was held that the question whether the plaintiff was in the exercise of due care was for the jury. *Craig v. New York, &c. R. R. Co.*, 118 Mass. 431. A person driving a horse and light wagon over a crossing of a county

road was killed by a locomotive. There was no express testimony as to whether he stopped and looked and listened before going on the railroad. It was held that the question of his negligence was for the jury, and that although from the contradicted testimony it might have been inferred that if the traveller had stopped and looked and listened he would have seen the approaching train, it was for the jury to determine the fact, and that the presumption in the absence of other evidence is that the traveller stops and looks and listens before crossing a railroad. *Penn. R. R. Co. v. Weber*, 76 Penn. St. 157. *Hasseney v. Michigan Central R. R. Co.*, 48 Mich. 205.

¹ *Salter v. Utica, &c. R. R. Co.*, 75 N. Y. 273; reversing 13 Hun (N. Y.), 187.

² *Bell v. Hannibal, &c. R. R. Co.*, 72 Md. 52.

on the air-brakes, but did not reverse the engine. It was held that, assuming the engineer to have been competent and careful, the defendant was entitled to an instruction that if the engineer acted upon his judgment, and did what he judged was most likely to save A. in applying the air-brakes and sounding the danger signal, then his omission to reverse the engine was not negligence.

Where a person is ignorant of the location of a crossing, or where the circumstances are such as to mislead him as to the necessity for looking or listening for the approach of a train, he cannot as a matter of law be said to be guilty of negligence *per se* for neglecting to do so. Thus, where, as is the case in some localities, the company maintains gates at certain crossings, which are closed at the approach of a train, he has, if they are open when he is near the crossing, a right to rely upon it that it is safe for him to cross, and if the company neglects its usual duty, and does not close them, or otherwise notify travellers of the approach of a train, it cannot relieve itself from liability simply because the traveller neglected to look or listen for himself; and especially would this be the case if the statutory signals were not given.¹

It is gross negligence for a deaf person or one who is blind to walk upon or very near a railway track. Employés have the right to presume that a person walking on the railway will hear the whistle.² Even a deaf man has a right to travel; but, being bereft of the sense of hearing, he is bound to the exercise of greater vigilance in looking for approaching trains. And if by any neglect in that respect upon his part, he is injured, he is without remedy. Thus, the plaintiff, a deaf man, being about to cross a railroad in a buggy, saw the smoke of what he took to be a moving train east of him. He crossed, drove eastward a distance of two hundred and fifty feet

¹ *Brown v. N. Y. Central R. R. Co.*, 82 N. Y. 597; *Chicago, &c. R. R. Co. v. Whitton*, 13 Wall. (U. S.) 270; *Cohen v. Eureka, &c. R. R. Co.*, 14 Nev. 376; *Bunting v. Central Pacific R. R. Co.*, 14 Nev. 351; *Strong v. Sacramento, &c. R. R. Co.*, 61 Cal. 326; *Faher v. St. Paul, &c. R. R. Co.*, 29 Minn. 465; *Abbott v. Chicago, &c. R. R. Co.*, 30 Minn. 482; *Kelly v. St. Paul, &c. R. R. Co.*, 29 Minn. 1; *Chaffee v. Boston, &c. R. R. Co.*, 104 Mass. 108; *Jewett v. Kline*, 27 N. J. Eq. 474; *Bonnell v. Delaware, &c. R. R. Co.*, 40 N. J. L. 189; *Ellert v. Green Bay, &c. R. R. Co.*, 48 Wis. 606; *Hinckley v. Cape Cod R. R. Co.*, 120 Mass. 257; *French v. Taunton Branch R. R. Co.*, 115 Mass. 190; *Casey v. N. Y. Central R. R. Co.*, 78 N. Y. 518; *Kellogg v. N. Y. Central R. R. Co.*, 79 N. Y. 72; *Chicago, &c. R. R. Co. v. Lee*, 87 Ill. 401; *Marietta, &c. R. R. Co. v. Picksley*, 24 Ohio St. 654; *Bellefontaine R. R. Co. v. Snyder*, 24 id. 670; *Duffey v. Chicago, &c. R. R. Co.*, 32 Wis. 269.

² *Coggsell v. Oregon, &c. R. R. Co.*, 6 Oreg. 417; *Laicher v. New Orleans, &c. R. R. Co.*, 28 La. An. 320; *Louisville, &c. R. R. Co. v. Cooper*, 6 Am. & Eng. R. R. Cas. (Ky.) 5.

along a road which was parallel with the railway and within a few feet of it, turned and drove back the same way he had come, attempting to recross the track at the same place. He never looked to the east to ascertain the direction in which the train was moving, and assumed that it was moving away from him. The view to the east was unobstructed for more than half a mile. When in the act of recrossing the track, he was looking back over his shoulder to the southward. In this position he was struck and injured by the train coming from the east. It was held that the accident was the result of his own negligence, and the company was, therefore, not liable; his deafness should have added to his vigilance; although plaintiff was in full view of those operating the train for a long distance, yet they were not chargeable with negligence, owing to the fact that the road forked just at the crossing, and they could not anticipate that plaintiff intended to take that branch which crossed the track; also, that under the circumstances it was immaterial whether the proper signals for the crossing were given or not.¹

The fact that the view of the track may have been obscured by other cars left standing on the side track does not lessen the caution required of a person attempting to cross, but imposes upon him the duty of exercising a higher degree of diligence.² A person crossing the track at a private crossing, at a place where the view is obstructed by standing cars, has the right to presume that the company at such crossing will use more care than ordinarily.³ And evidence that, by reason of excavations, the formation of the land in the vicinity, and the presence of timber near the crossing, it was somewhat difficult for persons near it on the highway to see an approaching train, would support a finding that a failure to signal the approach of the train was negligence, although such signals were not then required by statute.⁴ So, where a railroad company permits brush and other obstructions on its right of way so as to prevent the view of approaching trains by travellers on the highway crossing its track, and neglects to give any signal of danger by a train approaching a crossing, either by ringing a bell or sounding a

¹ *Purl v. St. Louis, Kansas City, & Northern R. R. Co.*, 72 Mo. 168.

² *Garland v. Chicago, &c. R. R. Co.*, 8 Brad. (Ill.), 571; *Haas v. Grand Rapids, &c. R. R. Co.*, 47 Mich. 401; *Cordell v. New York Central, &c. R. R. Co.*, 70 N. Y. 119.

³ *Thomas v. Delaware, &c. R. R. Co.*, 19 Blatchf. (U. S. C. C.) 533.

⁴ *Eilert v. Green Bay, &c. R. R. Co.*, 48 Wis. 606; *Roberts v. Chicago, &c. R. R. Co.*, 35 id. 679.

whistle, whereby a party, in attempting to cross the track on the public road, is killed, the company will be guilty of negligence.¹ It cannot be said, judicially, that a person about to drive across a railroad at a point where the line of the track could not be seen before reaching the crossing, should go on foot to look for approaching trains before driving upon the crossing with a team.²

A railway company is not, as a matter of law, required to station a flagman at a road-crossing in the country, because of the approach to it being partially concealed by embankments or otherwise.³ But under such circumstances the company is bound to exercise proper caution. Thus, the plaintiff was injured by a backing engine while crossing defendant's track. In an action to recover for the injury, it appeared that there were some empty cars standing on another track between the track upon which was the engine, and plaintiff as he approached the track. The defendant's counsel asked the court to charge that there was no negligence on the part of the defendant in using that particular engine; also, that leaving the empty cars standing on the track was not negligence. The court refused so to charge. It was held not erroneous.⁴ And it is for the jury to say whether it was negligent or not. Thus, a railway crossed on a level a public carriage and foot way at a spot which,—from the fact of there being a considerable curve in the line, and a bridge near, so that trains coming in one direction were not seen until very close,—was peculiarly dangerous. There were gates across the carriage-way which were kept locked; but the foot-way was protected only by a swing-gate on either side, no person being there to caution people passing. The plaintiff, while using the foot-way, was knocked down by a passing train and injured. It was held that it was properly left to the jury to say whether or not the company had been guilty of negligence.⁵

While unusual speed of railway trains does not of itself constitute negligence, yet it may be considered with other circumstances in determining the degree of care exercised.⁶ The law does not require

¹ *Dimick v. Chicago, &c. R. R. Co.*, 80 Ill. 338.

² *Pittsburgh, &c. R. R. Co. v. Wright*, 80 Ind. 236.

³ *Haas v. Grand Rapids, &c. R. R. Co.*, 47 Mich. 401.

⁴ *Kissenger v. New York, &c. R. R. Co.*, 56 N. Y. 538.

⁵ *Bilbee v. London, Brighton & South Coast Ry. Co.*, 18 C. B. (N. S.) 584.

⁶ *Artz v. Chicago, &c. R. R. Co.*, 44 Iowa, 284; *Terre Haute, &c. R. R. Co. v. Clark*, 73 Ind. 168. It is sometimes said that the running of trains at any conceivable rate of speed is negligence *per se*. *Cohen v. Eureka R. R. Co.*, 14 Nev.

the speed of trains to be slackened on approaching the crossing of a public highway in the country when a team is seen approaching it.¹ But it is held in some of the cases that the running of a train at a street-crossing, where many are constantly passing, *at a greater speed than is allowed by law*, is not only carelessness, but the act is also wilful. *At such places, the engine-driver, as well as persons crossing the railroad, must exercise more care than at other places, of less peril.*² But while a traveller may reasonably assume that an approaching train is running at a lawful speed,³ yet, because of the statutory duty cast upon the company, he is not relieved from using his own senses and exercising due care in crossing.⁴ The company is liable for injuries resulting from the running of its trains at an unlawful speed, but only to those who were in the exercise of due care themselves.⁵ A miner was run over and killed by a passing engine while he was using a level crossing, on a dark morning in November. His view of the line in the direction from which the engine came was obscured by a fence, a signal-man's box, and a shunted train. The

376; Bemis v. Conn. & Pass. R. R. Co., 42 Vt. 375; Grand Rapids, &c. R. R. Co. v. Huntley, 38 Mich. 537; Grows v. Maine Central R. R. Co., 67 Me. 100; Maher v. Atlantic, &c. R. R. Co., 64 Mo. 267; Chicago, &c. R. R. Co. v. Lee, 68 Ill. 576; Telper v. Northern R. R. Co., 30 N. J. L. 188; McKonkey v. Chicago, &c. R. R. Co., 40 Iowa, 205; Zeigler v. Northeastern R. R. Co., 5 S. C. 221. But whether this is so or not, it is always proper evidence to be considered by the jury in determining whether the company was in the exercise of due care or not. Pryor v. St. Louis, &c. R. R. Co., 69 Mo. 215; Buxton v. Philadelphia, &c. R. R. Co., 4 Harr. (Del.) 252; Indianapolis, &c. R. R. Co. v. Stables, 62 Ill. 313. And the jury are to consider whether or not the rate of speed was unreasonable. Continental Improvement Co. v. Stead, 95 U. S. 161; South, &c. R. R. Co. v. Thompson, 62 Ala. 494; Massoth v. Del. & Hud. C. Co., 64 N. Y. 524; Rockford, &c. R. R. Co. v. Hillmer, 72 Ill. 235; Toledo, &c. R. R. Co. v. Foster, 43 Ill. 415; Wabash, &c. R. R. Co. v. Henks, 41 Ill. 406; Penn. R. R. Co. v. Lewis, 79 Penn. St. 33; Salter v. Utica, &c. R. R. Co., 88 N. Y. 42.

¹ Chicago, &c. R. Co. v. Robinson, 9 Brad. (Ill. App.) 89; Toledo, &c. R. Co. v. Miller, 76 Ill. 278. The court instructed the jury that it is the duty of the employés of a railroad company "to approach a crossing at such rate of speed as would enable them to check the train if necessary." It was held erroneous. Cohen v. Eureka, &c. R. Co., 14 Nev. 376.

² Wabash R. R. Co. v. Henks, 91 Ill. 406.

³ Langhoff v. Milwaukee, &c. R. R. Co., 19 Wis. 489; Schmidt v. Chicago, &c. R. R. Co., 83 Ill. 405; Correll v. Burlington, &c. R. R. Co., 38 Iowa, 120.

⁴ Ill. Central R. R. Co. v. Hetherington, 83 Ill. 510.

⁵ Toledo, &c. R. R. Co. v. O'Connor, 77 Ill. 391; Baltimore, &c. R. R. Co. v. McDonnell, 43 Md. 534; Haas v. Chicago, &c. R. R. Co., 41 Wis. 44; Chicago, &c. R. R. Co. v. Becker, 84 Ill. 483; Liddy v. St. Louis R. R. Co., 40 Mo. 506; Madison, &c. R. R. Co. v. Taffe, 37 Ind. 361; Pittsburgh, &c. R. R. Co. v. Kuntson, 62 Ill. 103; Lake Shore, &c. R. R. Co. v. Berlink, 2 Brad. (Ill.) 427; Jetter v. N. Y. Central, &c. R. R. Co., 2 Keyes (N. Y.), 154; Wasmer v. Delaware, &c. R. R. Co., 10 N. Y. Weekly Dig. 106.

engine of the shunted train was blowing off steam, which served to drown the noise of the approaching engine. The engine-driver, if he had whistled at all, had not given an "alarm" whistle. It was held that the railway company's servants were in fault, and that there was no contributory negligence on the part of the miner.¹

SEC. 324. Frightening Teams.—For an injury resulting from the frightening of a horse *in the proper operation of a railway*, no damages are recoverable;² but where an engine is managed in such a reckless and negligent manner as to frighten horses, and cause them to run away, the company is liable for the consequences,³—as, where the engineer suddenly discharges a jet of steam near a passing team,⁴ or allows the steam to escape at a highway-crossing, or near a highway, making a great noise, when teams are approaching,⁵ especially when it is necessary.⁶ The company in the absence of statutory regulations is limited to a reasonable use of signals,⁷ and the blowing of a whistle near a crossing, or while running along a high-

¹ *Ritchie v. Caledonian Ry. Co.*, 7 Sc. Sess. Cas. (4th Series), 148.

² *North Side St. R. Co. v. Tippins* (Tex.), 14 S. W. Rep. 1067; *Duvall v. Baltimore, &c. R. Co.*, 73 Md. 516; 21 Atl. Rep. 496 (escape of steam by the operation of the self-acting valve); *Chapman v. Zanesville St. R. Co.* (Ohio C. P.), 27 Week. L. Bull. 70; *Douglas v. East Tennessee, &c. R. Co.*, 88 Ga. 282; *Whitney v. Maine Central R. Co.*, 69 Me. 208; *Hudson v. Louisville, &c. R. Co.*, 14 Bush (Ky.), 303; *Philadelphia, &c. R. Co. v. Stinger*, 73 Penn. St. 219; *Keeley v. Shanley*, 140 Penn. St. 213; 21 Atl. Rep. 305, 306; *Howard v. Union Freight R. Co.*, 156 Mass. 159; 30 N. E. Rep. 479; *Flint v. Norwich, &c. R. Co.*, 110 Mass. 222.

³ *Billman v. Indianapolis, &c. R. Co.*, 76 Ind. 166; *Whitney v. Maine Central R. Co.*, 69 Me. 208. Thus, if it neglected to give the signals required by statute, and thereby the traveller with his horse was brought into close proximity to the train, and the horse was frightened, it is liable for the resulting damages. *Norton v. Eastern R. Co.*, 113 Mass. 366; *Prescott v. Eastern R. Co.*, 113 Mass. 370; *Pennsylvania, &c. R. Co. v. Barnett*, 59 Penn. St. 259; *Hart v. Chicago, &c. R. Co.*, 56 Iowa, 166. *Contra*, *Williams v. Chicago,*

&c. R. Co., 135 Ill. 491, where a farmer, whose horse with which he was ploughing was frightened by the sudden and un-signalled approach of the train, was not allowed to recover although the statute required signals to be made at that point.

⁴ *Stamm v. Southern R. Co.*, 1 Abb. New Cases (N. Y.), 438; *Presby v. Grand Trunk R. Co.* (N. H.), 22 Atl. Rep. 554.

⁵ *Louisville, &c. R. Co. v. Schmidt*, 81 Ind. 264; *Statt v. Grand Trunk Ry. Co.*, 24 U. C. C. P. 347; *Gibson v. St. Louis, &c. R. Co.*, 8 Mo. App. 488; *Indianapolis, &c. R. Co. v. Boettcher*, 131 Ind. 82; 28 N. E. Rep. 551. See also *Paine v. City of Rochester*, 59 Hun (N. Y.), 627; 14 N. Y. Supp. 180; *Keech v. Rome, &c. R. Co.*, 59 Hun (N. Y.), 617. *Harrell v. Albemarle, &c. R. Co.*, 110 N. C. 215. In these last three cases the horse was frightened by an unusual structure left in or near the street.

⁶ *Culp v. Atchison, &c. R. Co.*, 17 Kan. 475; *Wabash R. Co. v. Speer*, 39 Ill. App. 599 (unnecessary use of whistle); *Albee v. Chappaqua Mfg. Co.*, 62 Hun (N. Y.), 223 (same); *Gulf, &c. R. Co. v. Box*, 81 Tex. 670; 17 S. W. Rep. 375.

⁷ What is a reasonable use is generally a question for the jury. *Philadelphia, &c. R. Co. v. Stinger*, 73 Penn. St. 219; *Hill v. Portland, &c. R. Co.*, 55 Me. 438.

way, unnecessarily frightening teams and causing them to run away, is actionable negligence;¹ and especially is this so when, as is often the case, the engineer, seeing a team passing, suddenly lets off steam or blows the whistle with the purpose of frightening it.² In such cases, however, as in others, the contributory negligence of the plaintiff is a bar to an action by him. He is bound to use ordinary care to prevent harmful results flowing from the defendant's wrongful act, or to render the injury as light as possible.³

Because of the absolute necessity for more stringent rules in the protection of life and property against the perils of the steam-engine with its capacity for mischief, the common-law rule, that the master is not liable for the tortious acts of his servant committed without the scope of his employment, does not apply to railway companies.⁴

SEC. 325. Liability for Injuries while running Trains on Road of another Company. — A railway company is responsible for an injury sustained by a passenger in their cars, which are being run by them over another road, by reason of a misplaced switch, or other negligent act of the servants of the owners of the road over which the cars are being run.⁵ "It was the duty of the company," said SHAW, C. J.,

¹ Philadelphia, &c. R. Co. v. Killips, 88 Penn. St. 405; Pennsylvania R. Co. v. Barnett, 59 Penn. St. 259.

² Chicago, &c. R. Co. v. Dickson, 63 Ill. 151; Billman v. Indianapolis, &c. R. Co., 76 Ind. 168; Philadelphia, &c. R. Co. v. Killips, 88 Penn. St. 405.

³ Cornell v. Detroit, &c. R. Co., 82 Mich. 495 (plaintiff took his horse, unused to the cars, near them in order to test him); New Brunswick Ry. Co. v. Vanwart, 17 Can. S. C. Rep. 35. Where a horse is frightened at the noise of steam escaping from an engine, and the owner of the horse, instead of leading him away, leads him towards the engine, and he becomes unmanageable, and rears and falls backward and breaks his neck, the owner is guilty of contributory negligence. Louisville, &c. R. Co. v. Schmidt, 81 Ind. 264. A. sued B. for injuries sustained by reason of his horses running away, frightened by a steam-engine placed in the street by B. The jury gave a general verdict for plaintiff. It was held that this was not inconsistent with special findings that A.'s horses had run away before; that the engine was likely to frighten horses not

easily frightened, and that plaintiff saw the engine in time to avoid danger, but apprehended none, — none of these facts showing contributory negligence. Turner v. Buchanan, 82 Ind. 147; 42 Am. Rep. 485.

⁴ Nashville, &c. R. Co. v. Starnes, 9 Heisk. (Tenn.) 52. If the alarm-whistle of a locomotive is needlessly sounded in the rear of a team while travelling in a narrow lane near the railroad track, and is continued while the horses are running away with the plaintiff and his conveyance, the engineer having full knowledge that they are running away, and until the train comes abreast of the team, whereby the conveyance is overturned and the plaintiff injured, such sounding of the whistle is wanton, wilful, and reckless, if not malicious. Chicago, &c. R. Co. v. Dickson, 63 Ill. 431; Georgia R. Co. v. Newsom, 60 Ga. 492.

⁵ McElroy v. Nashua, &c. R. Co., 4 Cush. (Mass.) 400. A railroad company is responsible for defects in the cars of another company, which it receives from such company and runs over its road as a part of its train, precisely the same as it

"to see that the switch was rightly constructed, attended, and managed before they were justified in carrying passengers over it."¹ So

is for defects in its own cars. *Richardson v. Great Eastern Ry. Co.*, L. R. 10 C. P. 486. Where a railway company uses for the running of its trains a track belonging to another person, it is liable for injuries to its employes resulting from the unfitness of the track for such use. If the defendant's use of the track alleged to have been insufficient was only occasional, and for special purposes, and under special instructions to those in charge of trains as to the manner of running thereon, it is liable only in case it was negligence to use the track in that manner and for those purposes. The injury having been received in Illinois, the court erred in taking from the jury the question whether the injury was caused by negligence of the defendant company or by that of plaintiff's co-employé, the conductor of the train, there being evidence for the jury on that question. Under the laws of Illinois, defendant was compelled to operate the track. If, however, the injury was caused by neglect of the defendant, a recovery will not be defeated by the merely contributory negligence of a co-employé, but only by that of plaintiff himself, or of some person for whose acts he is responsible. *Stetler v. Chicago, &c. R. Co.*, 49 Wis. 609. It was afterwards held in the same case that it is not the duty of a railway company to run its cars upon spur tracks owned by other persons, for the purpose of receiving or delivering any other merchandise than wheat; and if such duty were imposed, it would still not be the duty of the company to run upon any such track that was not reasonably safe. Where the owners of a private railway track occasionally employed by a railway company for a special use have negligently suffered it to remain in a dangerous condition for such use, though trains are run upon it slowly and carefully, the company voluntarily running its trains thereon is liable for an injury to one of its own employes caused proximately by such negligence. Railroad companies are liable for an injury to passengers, received while travelling upon the

track of another company, even when such injury is occasioned by the negligence of the company owning the track, or its employes. *Great Western Ry. Co. v. Blake*, 7 H. & N. 987; *Buxton v. Northeastern Ry. Co.*, L. R. 8 Q. B. 349; *Thomas v. Rhymney Ry. Co.*, L. R. 5 Q. B. 226; *John v. Bacon*, L. R. 5 C. P. 437; *Champion v. Bostwick*, 11 Wend. 571; s. c. 18 Wend. (N. Y.) 175; *McLean v. Burbank*, 11 Minn. 277. In *Murch v. Concord R. Co.*, 29 N. H. 9, the court said: By using the railroad of another corporation as a part of their track, whether by contract or mere permission, they would ordinarily, for many purposes, make it their own, and would assume towards those whom they had agreed to receive as passengers all the duties resulting from that relation as to the road; and if accident resulted to such passengers from any failure of duty of the owners of the road, for which they would be responsible if the road was their own, their remedy would be over against the owners." See *Peters v. Rylands*, 20 Penn. St. 497. The same doctrine applies where a complete train is run over the track of another company by virtue of an agreement, and an accident is occasioned by the negligence of the employes of the company owning the track. *Keep v. Indianapolis, &c. R. Co.*, 10 Fed. Rep. 454. And the same rule prevails where one railroad company uses the station of another, and a passenger of the first company slips and falls upon pieces of ice which have been negligently left in the station by the company owning the same; the passenger is entitled to recover damages from the first company. *Seymour v. Chicago, &c. R. Co.*, 3 Biss. (U. S.) 43. So where an injury to a passenger is occasioned by a defect in a bridge maintained by another upon the company's grounds. *Chance v. St. Louis, &c. R. Co.*, 10 Mo. App. 351. In *Sprague v. Smith*, 29 Vt. 421, an accident occurred to the car of the defendant company while standing upon another company's road, solely in conse-

¹ *Murch v. Concord R. Co.*, 29 N. H. 9; 61 Am. Dec. 631.

it has been held, that a railway company running its cars over a railway owned by the State is liable for an injury to a passenger,

quence of the negligence of the agents and servants of such other company. Under the circumstances, the court held the defendant not liable. "The carrier," said REDFIELD, J., "cannot be regarded as liable, we think, for all the acts of all the operatives of the companies over whose roads he carries the plaintiff, unless some connection between the roads, of a character similar to that of general partnership, or the consolidation of their interests in the carrying business is shown, which was not done in the present case." A railroad company which grants the use of its road to another company, is responsible for accidents caused to passengers which it itself carries, by the negligence of the trains of the other company thus running by its permission. *Railroad Co. v. Barron*, 5 Wall. (U. S.) 90; *Chicago, &c. R. R. Co. v. McCarthy*, 20 Ill. 385; *Ohio, &c. R. R. Co. v. Dunbar*, 20 Ill. 623; *Chicago & R. I. R. R. Co. v. Whipple*, 22 Ill. 105; *Nelson v. Vermont, &c. R. R. Co.*, 26 Vt. 717; *McElroy v. Nashua, &c. R. R. Co.*, 4 Cush. (Mass.) 400; *Clymer v. Central R. R. Co.*, 5 Blatch. (U. S. C. C.) 317; *Schopman v. Boston, &c. R. Co.*, 9 Cush. (Mass.) 24; *Nashville, &c. R. R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347; *Sawyer v. Rutland, &c. R. R. Co.*, 27 Vt. 370. So it is liable to the owner of stock killed by the train of another company, which it has permitted to use its road. *Toledo, &c. R. R. Co. v. Rumbold*, 40 Ill. 143. Or to persons not passengers, inflicted by the train of another company under the charge of its servants. *Fletcher v. Boston, &c. R. R. Co.*, 1 Allen (Mass.), 9. It seems that a company is liable to the passengers of another company running its train upon the first-named company's track, for an injury occasioned by its own negligence or that of its employés. *Keep v. Indianapolis & St. Louis R. R. Co.*, 10 Fed. Rep. 454. Whether the principles above laid down will apply where one company is authorized by statute to run its cars over the track of another, seems doubtful. It has been held in England that they will apply. *Thomas v. Rhymney Ry. Co.*, L. R., 5 Q. B. 226;

s. c. L. R. 6 Q. B. 266. But see *Wright v. Midland Ry. Co.*, L. R. 8 Exch. 137. Where the servant of one railroad company, running its trains over the track of another is injured by reason of the negligence of the servants of such other company, he is not debarred from bringing his action against the company employing him. The servant occasioning the injury is not to be regarded as a fellow-servant. *Catawissa R. R. Co. v. Armstrong*, 49 Penn. St. 186. In *Stetler v. Chicago, &c. R. R. Co.*, 46 Wis. 497, it was held that a railroad company, running its trains on the track of another company, is liable to its employés for an injury occasioned by a defect in the track. In *Clark v. Chicago, B., & Q. R. R. Co.*, 92 Ill. 43, it was held that where an engine-driver of one company, running upon the road of another, was injured in a collision occasioned by the negligence of the servants of such other company, he was not entitled to recover damages from the company employing him, the collision having been one of the risks of his employment which he undertook to run. Where actions are brought by the servant of the company using the track against the owners thereof, the same principles apply. In *Vose v. Lancashire, &c. Ry. Co.*, 2 H. & N. 728, where a station was jointly occupied by two railroad companies, a servant of one injured by the negligence of the servants of the other, was held entitled to recover damages from the company the employés of which were in fault. The employés were held not to be fellow-servants. To the same effect is *Warburton Ry. Co.*, L. R. 2 Exch. 30, where the porter of a railroad company, using the station of another company, was allowed to recover damages for an injury occasioned by the negligence of the servants of the latter. In *Swainson v. North-Eastern Ry. Co.*, L. R. 3 Exch. Div. 341, it appeared that the stations of two railroad companies closely abutted. The plaintiff was a signal-man, employed by but one of the companies, and in its uniform. He discharged his duties, however, in connection with the trains of both roads, and was injured by

although the State furnishes the motive power, and the injury was

the negligence of the employés of the other company. He brought an action against said company, and it was strenuously argued that the negligence in question was that of a fellow-servant. The court, however, decided the contrary, and the plaintiff recovered. *Smith v. New York & Harlem R. R. Co.*, 6 Duer (N. Y.), 225; *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.), 441; *Cruty v. Erie R. R. Co.*, 3 Thompson & C. (N. Y.) 244. Where there is a partnership agreement between two roads, or any arrangement in the nature of that, the servants of either road will become co-employés, and cannot of course recover for the negligent acts of each other. *Swainson v. North-Eastern Ry. Co.*, L. R. 3 Exch. Div. 341. But an agreement between two roads to connect at their respective termini, and to sell through tickets and charge through rates, is not such an arrangement, at least where the fare and freight remain distinct on each line. In such case the servants of the respective companies are not to be considered as co-employés. *Carroll v. Minnesota Valley R. R. Co.*, 13 Minn. 30. The defendant was a railway company, chartered by the State of Virginia, and used the track of a Washington R. R. Co. by agreement. The plaintiff, while flagging the defendant's train over the road of the Washington company, was for the time considered the servant of the defendant, and therefore not entitled to recover for any injury occasioned by the negligence of another servant, without showing that the defendant was guilty of negligence in selecting the servant by whose fault the accident happened. *Mills v. Orange, Alexandria, & Manassas R. R. Co.*, 2 MacA. (D. C.) 314. An employé of a railway company lawfully using its tracks, over which another company has a right of way, has a right to act upon the presumption that the latter company will conform to the rules, as to giving signals, etc., prescribed by the company by permission from which it uses such tracks. *Roll v. Northern Central R. R. Co.*, 15 Hun (N. Y.), 496. A railway company is liable in damages for injuries caused by the fault of a signal-man in its employment

to the guard of a train belonging to another company, while passing over a portion of the line of the former company. *Calder v. Caledonian Ry. Co.*, 9 Sc. Sess. Cas. (3d series) 833. If a train of cars of one railroad company, running on the road of another company, be under the exclusive control of the servants of the latter, the latter is liable for all damages occurring through negligence. But if the servants of both companies jointly control the train, both companies are liable. *Nashville, &c. R. R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347. When one railway company has a right, by contract, to run its trains over the track of another company, the latter company is liable for injuries caused solely by the negligence of its own switchman, in not properly attending to his duty, to an engineer of the former company while operating his engine on said track; and also to the other company for damage to its property. *Merrill v. Central Vt. R. R. Co.*, 54 Vt. 200. Where a main trunk railway company furnishes the motive power, engineers, and conductors to transport the cars of another intersecting railway company on its road, it is responsible for an injury done to a brakeman employed by and on the cars of the intersecting company, through the negligence of its engineer. Such brakeman is not a servant or employé of the first-named company so as to protect it from responsibility. The proper test of service is to consider who employs, pays, and has the right to discharge such brakeman. *Smith v. Northern Central R. R. Co.*, 1 Pearson (Pa.), 243. Two companies were occupying the same line. The deceased, a fireman, was injured by the neglect of the station-master of the other company. The engine-driver on the same train with the deceased, and also another co-employé of the deceased, were guilty of contributory negligence. It was held that the representatives of the deceased had a valid cause of action against the company whose station-master caused the accident, and that the action was not barred by the contributory negligence of his own co-employés. *Hobbs v. Glasgow & South-West*

in fact caused by the negligence of the servants of the State.¹ But where a railway company runs its cars over another road, it having

ern Ry. Co., 3 Sc. Sess. Cas. (4th Series) 215. Where two or more persons or corporations are operating a railway, their liability to an employé for an injury resulting from defective machinery furnished by them for use in the course of his employment is several as well as joint. An action is maintainable against one of them. *Kain v. Smith*, 80 N. Y. 458.

¹ *Ryland v. Peters*, 20 Penn. St. 497. One carrier is not liable for an injury to a passenger upon one of its cars, of which another carrier is the exclusive bailee. *Smith v. St. Louis, &c. R. R. Co.*, 9 Mo. App., 598. A train of the defendant, whilst stationary on its railway, was run into by another train. The train in fault was the moving, and not the stationary train. Several railway companies had "running powers" over the part of the defendant's line on which the collision occurred, and no evidence was given as to whether the moving train belonged to or was under the control of the defendant. It was held that in the absence of evidence to the contrary, it must be presumed that the train which caused the accident belonged to or was under the control of the defendant. *Ayles v. South-Eastern Ry. Co.*, L. R. 3 Exchq. 146. Where a railway company leases to another company the right to pass over a portion of its line, the lessor company controlling the trains and motive power on such leased line, the lessor is liable for an injury to a passenger of the lessee who is injured by the negligence of the employés of the lessor. *Wabash, &c. R. R. Co. v. Peyton*, 106 Ill. 534. The N. Co. had statutory authority to run over a portion of the defendant's line, paying a certain toll to defendant. The signals at the point of junction between the two lines were under the control of the defendant. Owing to the servants of the N. Co. negligently disobeying these signals, a train of the N. Co. ran into a train of the defendant in which the plaintiff was, causing him damage. There was no negligence on the part of any of the defendant's servants. In an action for injuries sustained, brought by the

plaintiff against the defendant, it was held that he was not entitled to recover. *Wright v. Midland Ry. Co.*, L. R. 3 Exchq. 137. Where a railway company, operating its own road in its own name, contracts with another company to make up its train in the depot of the latter, the former company is liable for an injury to a passenger occurring on its train while being made up by the servants of the latter, and it makes no difference that the servants were employed and paid by the latter company. *Hannibal, &c. R. R. Co. v. Martin*, 11 Bradwell (Ill.), 386. The plaintiff was a passenger by the defendant's railway, to be carried from Y. to T. To reach T. it was necessary to travel over a line belonging to another company. While passing over the latter line the train in which the plaintiff was came into collision with a bullock, which had strayed on to the line from an adjoining field by breaking through the fence. The fence was in fact defective, but had been lately repaired, and was in apparently good condition. The plaintiff, being injured by the collision, sought to recover damages from the defendant. It was held that the contract having been made with the defendant, it was the proper party to be sued. *Buxton v. North-Eastern Ry. Co.*, L. R. 3 Q. B. 549; *Thomas v. Rhymney Ry. Co.*, L. R. 5 Q. B. 226. Where two or more companies establish a connecting line and contract to carry a passenger to the terminus of said line, the terminal carrier is liable to him as a common carrier, although his injury may have arisen from the neglect of another with whom it has contracted for motive power. A corporation furnishing motive power to a railway company, but not acting or chartered to act as a common carrier, is not bound to use more than the ordinary skill and diligence which its employment needs, and is only liable for direct negligence and unskilfulness. A common carrier is liable to a passenger whom it has contracted to convey to a particular point, if he is injured while being so conveyed, through the negligence or unskilfulness of employés of

no control over the same, the company owning the road furnishing the motive power and servants, the company owning the cars will not be liable for an injury directly caused, without its fault, by the misconduct or negligence of the operators of the other road, — as, in the case of a collision produced by the carelessness of the company owning the road.¹ So, where a company run their cars over part of another's road, under such an arrangement, they will not be liable to the owner of cattle destroyed by one of their locomotives, but without any negligence on the part of their servants, in consequence of an omission on the part of the other company to erect cattle-guards, as required by statute;² though it will be different where they are in fact the lessees of the road, for, in that case, the control and management of the road are vested in them, and they are, within the meaning of such a statute, the agents of the company owning the road.³

How far the company owning the road is liable, under such circumstances, to the party injured, is not clearly settled;⁴ but the better opinion seems to be that only the company which is in the exclusive control of the cars is liable.⁵ The want of privity of

a corporation with which such carrier has contracted for motive power. In such cases the corporation furnishing the motive power is also liable to the passenger if the injury is sustained through the direct negligence or unskilfulness of its employes. *Keep v. Indianapolis, &c. R. Co.*, 10 Fed. Rep. 454.

¹ *Sprague v. Smith*, 29 Vt. 421.

² *Parker v. Rensselaer, &c. R. Co.*, 16 Barb. (N. Y.) 315.

³ *Clement v. Canfield*, 28 Vt. 302. See *Sprague v. Smith*, 29 Vt. 425.

⁴ *McElroy v. Nashua, &c. R. Co.*, 4 Cush. (Mass.) 400.

⁵ *Smith v. St. Louis, &c. R. R. Co.*, 9 Mo. App. 598. In an English case, — *Great Western Ry. Co. v. Blake*, 7 H. & N. 987, — the plaintiff purchased a ticket at the Paddington station of the Great Western Railway Company, and paid one fare for his conveyance from thence to Milford, in Pembrokeshire. The line of the Great Western Railway Company terminates a short distance beyond Gloucester, and the line from thence to Milford belongs to the South Wales Railway Company. By arrangement between the two

companies the lines are worked, and the fares paid by the passengers apportioned between them. The plaintiff was conveyed in the same carriage which he entered at Paddington towards Milford, and after the train had passed on to the line of the South Wales Railway Company it came into collision with a locomotive engine left on that line by the servants of the South Wales Railway Company. There was no negligence on the part of the driver of the train. It was held, in the Exchequer Chamber, that the Great Western Railway Company were responsible to the plaintiff, since, under the circumstances, there was an implied contract on their part that they would use reasonable care to maintain the whole line from Paddington to Milford in a condition fit for traffic. But in this country the rule generally adopted is that the sale of a ticket over several different lines does not make the company selling the ticket liable for the negligence of other companies over whose line the passenger is to be carried. The company selling the ticket is treated as the agent merely, of the connecting lines. *Nashville, &c. R. R. Co. v. Sprayberry*, 8 Bort. (Tenn.) 341.

contract has been pointed out as an objection, and in a case before cited,¹ it was said that a railroad company, by giving permission to another company to use a part of its track, does not bind itself to make its track safe, nor to put it in repair, nor to make any change in its existing state, — in particular, by furnishing proper landing-places for the convenience of the other company. In that case, the company owning the road had left open spaces in the track near its freight-depot at one of its termini, where the track passed over a common road, which were intended to act as a cattle-guard. A passenger in a freight-train belonging to the other company, attempting to get in the train at night, went too far and fell through one of these spaces. It was held that the company which owned the road was not liable. There were other elements of decision in the case, however, and it may perhaps be doubted whether some of the doctrines advanced in the opinion were necessary to its determination. It is true that in such a case there is no technical privity of contract between the passenger and the company owning the road; but to support an action on the case for negligence, there need not be any such privity. It cannot be doubted that, where one person, being on the land of another with his license and consent, express or implied, suffers an injury through the negligence of the latter or his servants, — as, for instance, by falling into a pit carelessly left open, — the owner of the land is liable in case, though there is no question of any contract.²

The first company may, by contract, bind itself for the entire route, but the sale of the ticket is not sufficient to establish such a contract. *Harlan v. Eastern R. Co.*, 114 Mass. 44; *Knight v. Portland, &c. R. Co.*, 56 Me. 234. See this subject elaborated, *post*, § 359.

¹ *Murch v. Concord R. Co.*, 29 N. H. 1.

² *Corby v. Hill*, 4 C. B. N. s. 556; *Frees v. Cameron*, 4 Rich. (S. C.) 228; *Phila., &c. R. Co. v. Derby*, 14 How. (U. S.) 468; *Godley v. Haggerty*, 20 Penn. St. 387. The decision on this subject in *Sawyer v. Rutland, &c. R. Co.*, 27 Vt. 370, seems to be of a more satisfactory character. There, two railroad companies had agreed for their mutual convenience that the cars and engines of the one, the R. & W. Co., might run over a portion of the road of the other, the R. & B. Co. Upon this part of the road there was a switch and side track under the exclusive management and control of the latter. In consequence of this switch being misplaced, through the gross negligence of the servants of the R. & B. Co., a locomotive of the R. & W. Co., of which the plaintiff, who was an employé of that company, was the engineer, was thrown from the track, and he was seriously injured. It was held that the R. & B. Co., the owners of the road, were liable. So, where a railroad company had actually leased its road to another, the former was held liable for the negligent acts of the latter, of a similar character. *Nelson v. Vermont, &c. R. Co.*, 26 Vt. 416. See, however, *Biggs v. Terrell*, 12 Ired. (N. C.) 1. In *Railroad Co. v. Norton*, 24 Penn. St. 465, one company having, by contract, such a right to use the road of another, the plaintiff had, with the authority of

A company operating its trains over the track of another is liable for all the consequences of its own negligence. The mere fact that it was on some other line does not affect its liability for injuries of which its own negligence was the proximate cause.¹ It is therefore bound to exercise the same care to prevent injury to travellers at crossings which would be required of the company owning the road in running its trains.²

Where a passenger is injured by reason of a defect in the car in which he is being carried, clearly the carrier cannot claim any exemption from liability on the ground that the car was the property of another company.³ "The rule of law in regard to passenger carriers who run over other roads than their own seems now to be pretty well established that the first company is responsible for the entire route, and must take the risk of the negligence of the employees of the other companies."⁴

Where a passenger or other person is injured by the concurrent negligence of two companies in causing a collision, or otherwise, he may recover of both jointly, or of either. A company does not escape liability merely because the negligence of some other person or corporation concurred with its own wrongful act in causing the injury.⁵ The rule upon this point is most excellently expressed by MARSTON, J., in a Michigan case,⁶ where he said: "An act wrongfully done by the joint agency or co-operation of several persons will

one of the servants of the latter, placed on the track a sawing-machine; and, while engaged with it, was injured by a passing train of the former. It was held that his own negligence precluded his recovering, though there was negligence on the part of the company running the train.

¹ *Fletcher v. Boston, &c. R. Co.*, 1 Allen (Mass.), 9; 79 Am. Dec. 695; *Murch v. Concord R. Co.*, 29 N. H. 9; 61 Am. Dec. 631; *Illinois Central R. Co. v. Kanouse*, 39 Ill. 272; 89 Am. Dec. 307; *Mills v. Orange, &c. R. Co.*, 1 McArthur (D. C.), 285; *Hanover R. Co. v. Boyle*, 55 Penn. St. 396; *Webb v. Portland, &c. R. Co.*, 57 Me. 117; *Mulherrin v. Delaware, &c. R. Co.*, 81 Penn. St. 366; *Burchfield v. Northern Central R. Co.*, 57 Barb. (N. Y.) 589; *Eaton v. Boston, &c. R. Co.*, 11 Allen (Mass.), 500. Where two companies operate trains over the same road, each is liable for stock killed by its

own trains, or for fires or other injuries which they cause. *Stephens v. Davenport, &c. R. Co.*, 36 Iowa, 327.

² *Webb v. Portland, &c. R. Co.*, 57 Me. 117.

³ *Jetter v. New York, &c. R. Co.*, 2 Abb. App. Dec. (N. Y.) 458; *Fletcher v. Boston, &c. R. Co.*, 1 Allen (Mass.), 9; 79 Am. Dec. 695.

⁴ *Redfield on Ry's*, p. 303, approved in *Stettler v. Chicago, &c. R. Co.*, 46 Wis. 497.

⁵ *Wabash, &c. R. Co. v. Shacklet*, 105 Ill. 364; 12 Am. & Eng. R. Cas. 166; 44 Am. Rep. 791; *Cuddy v. Horn*, 46 Mich. 596; 41 Am. Rep. 178; *Transfer Co. v. Kelley*, 86 Ohio St. 86; 38 Am. Rep. 558; *Pittsburgh, &c. R. Co. v. Spencer*, 98 Ind. 186.

⁶ *Cuddy v. Horn*, 46 Mich. 596; 41 Am. Rep. 178.

render them liable jointly or severally. The injury done in this case resulted from a collision caused by the contemporaneous act of two separate wrong-doers, who, though not acting in concert, yet by their simultaneous wrongful acts put in motion the agencies which together caused a single injury; and for this the injured party could receive but a single compensation. 'It is the fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed, that renders them jointly liable to the person injured. Whether the act was done by the procurement of one person or of many, and if by many, whether they acted with a common purpose and design in which they all shared, or from separate and distinct motive, and without any knowledge of the intentions of each other, the nature of the injury is not in any degree changed, or the damages increased which the party injured has a right to recover.'¹ The same principle has been applied in similar cases in other jurisdictions.²

SEC. 325 a. Presumption of Negligence : Burden of Proof. — Properly speaking there is no presumption of negligence arising from the fact of injury; negligence, like all other wrong-doing, is not to be presumed but must be proven.³ As said in a leading case, "There is

¹ In this case it appeared that a Catholic priest chartered a steam yacht, "The Momie," to carry a party of altar boys from Detroit to Monroe and back, the owners furnishing the necessary hands for the voyage and having control of the yacht. While upon the trip the yacht was run down by the defendant's vessel, "The Garland." The plaintiff's intestate was a passenger on "The Momie," and the latter vessel being sunk in consequence of the collision, he was drowned. The action was against the owners of both vessels, which seemed to be mutually negligent; a recovery by the plaintiff was allowed. *Cuddy v. Horn*, 46 Mich. 596; 41 Am. Rep. 178.

² *Colegrove v. New York, &c. R. Co.*, 20 N. Y. 492, 75 Am. Dec. 418; *Stone v. Dickinson*, 5 Allen (Mass.), 31; 81 Am. Dec. 727; *Cooper v. E. T. Co.*, 75 N. Y. 116 (collision of two vessels); *Holland v. Brown*, 35 Fed. Rep. 43. See also *Hillman v. Newington*, 57 Cal. 56; 23 Alb. L. Jour. 294; *Masterson v. N. Y. Central R. Co.*, 84 N. Y. 247; 38 Am. Rep. 510; *Philadelphia, &c. R. Co. v. Boyer*, 97

Penn. St. 91; *Walter v. Chicago, &c. R. Co.*, 39 Iowa, 33.

In the case of *Eaton v. Boston, &c. R. Co.*, 11 Allen (Mass.), 500; 87 Am. Dec. 730, in an action by a passenger for injuries sustained from a collision, the company defended on the ground that the proximate cause of the accident was that another train over which defendant had no control, ran into that on which plaintiff was being carried. It appearing, however, that defendant had been guilty of negligence, the court held that the defence could not avail; the fact that a third party contributed to cause the injury could not release defendant whose negligence was one of the concurring causes.

³ That the fact of damage does not create any presumption of negligence, see *East Tennessee, &c. R. Co. v. Stewart*, 13 Lea (Tenn.), 432; 21 Am. & Eng. R. Cas. 614; *Louisville, &c. R. Co. v. Allen*, 78 Ala. 494; 28 Am. & Eng. R. Cas. 514; *Case v. Chicago, &c. R. Co.*, 64 Iowa, 762; *Terre Haute, &c. R. Co. v. Clem*, 123 Ind. 15; 42 Am. & Eng. R. Cas. 229; *Philadelphia, &c. R. Co. v. Stebbin*, 62 Md.

no presumption of negligence as against either party except such as arises from the facts proved. Indeed, the presumption of law is that neither party was guilty of negligence, and such presumption must prevail until overcome by proof."¹ But there are cases in which the maxim *res ipsa loquitur* applies, and from the essential character of the injury, or the admitted circumstances attending it, a presumption of negligence is created.² Thus, where experience has demonstrated that a particular business can be carried on, and certain machinery used, without causing injury, then the mere fact of damage may be sufficient under such circumstances to create a presumption of negligence which the defendant must overcome.³ This

504; 19 Am. & Eng. R. Cas. 36; Barnard v. Philadelphia, &c. R. Co., 60 Md. 555; 15 Am. & Eng. R. Cas. 484; Blanchette v. Border City Mfg. Co., 148 Mass. 21; Holbrook v. Utica, &c. R. Co., 12 N. Y. 236; 64 Am. Dec. 502, *n.*; Huff v. Austin, 46 Ohio St. 386; Higgs v. Maynard, 12 Jur. N. S. 707; 14 Week. Rep. 610; 2 Thompson on Neg., p. 1227, § 3. See also State v. Baltimore, &c. R. Co., 58 Md. 221 (dead body found lying under a car, no presumption that negligence of the company caused his death); Sorenson v. Menasha Paper Mfg. Co., 56 Wis. 338; 16 Am. & Eng. Ency. Law, pp. 448 *et seq.*

¹ Cleveland, &c. R. Co. v. Crawford, 24 Ohio St. 631; 15 Am. Rep. 633. See also Smith v. Memphis, &c. R. Co., 18 Fed. Rep. 304; Lyman v. Boston, &c. R. Co. (N. H.), 20 Atl. Rep. 976; 45 Am. & Eng. R. Cas. 169; Bundy v. Hyde, 50 N. H. 116; State v. Hodge, 50 N. H. 510; Gray v. Jackson, 51 N. H. 9; Bickford v. Dane, 58 N. H. 185.

² See Holbrook v. Utica, &c. R. Co., 12 N. Y. 236; 64 Am. Dec. 502, *n.*; Kearney v. London, &c. R. Co., L. R. 6 Q. B. 759; Bigelow on Torts, 596; 2 Thompson on Neg., 1227-1235; Cooley on Torts, § 796 *et seq.* "There must be some reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from a want of care." Scott v.

London, &c. Docks Co., 3 Hurl. & Colt. 596. See also remarks of POLLOCK, C. B., in Byrne v. Boadle, 2 Hurl. & Colt. 722, and of COCKBURN, C. J., in Kearney v. London, &c. Ry. Co., L. R. 5 Q. B. 411; 6 Q. B. 759.

In Scott v. London, &c. Dock Co., 3 H. & C. 596, the plaintiff, as he was passing by a warehouse of the defendant, was injured by bags of sugar falling from a crane by which they were lowered to the ground. The court said there must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. This case is cited, with approbation, in Transportation Co. v. Downer, 11 Wall. (U. S.) 129. In Mullen v. St. John, 57 N. Y. 567, the plaintiff, who was upon a street sidewalk, was injured by the fall of an unoccupied building owned by the defendant; and it was held that from the happening of such an accident, in the absence of explanatory circumstances, negligence should be presumed and the burden cast upon the owner to disapprove it. Rose v. Stephens, &c. Trans. Co., 20 Blatchf. (U. S.) 411.

³ Mulcairns v. Janesville, 67 Wis. 24; Piggott v. Eastern, &c. Ry. Co., 3 C. B. 229; Cooley on Torts (2d ed.), [592], 703, 794. See also, for cases involving the application of the maxim, Texas, &c. R.

principle is frequently applied in cases involving loss by fire caused by sparks thereon from a railroad engine. The rule is well established that where property is damaged by the escape of fire from a passing engine, mere proof of the damage creates a presumption that the company using the engine has not discharged its duty.¹

In some jurisdictions it is provided by statute that a presumption of negligence shall arise from the fact of injury. In Mississippi and Georgia, the presumption applies to all injuries caused by the operation of a railroad;² but in most of the States it is confined to injuries resulting from the spread of fire from the engines.³ The violation of a statutory duty on the part of a railroad company is always some evidence of negligence,⁴ and may in some cases create a presumption

Co. v. Suggs, 62 Tex. 323; Kearney v. London, &c. R. Co., 5 Q. B. 411; Lowery v. Manhattan R. Co., 99 N. Y. 158, 52 Am. Rep. 12 (fire falling from engine on elevated road, whereby horse was made to run away); Wiedmer v. New York El. R. Co., 41 Hun (N. Y.), 284; Cummings v. National Furnace Co., 60 Wis. 603; Robinson v. N. Y. Central R. Co., 20 Blatchf. (U. S.) 338.

¹ Galveston, &c. R. Co. v. Home, 69 Tex. 643; 35 Am. & Eng. R. Cas. 242; Louisville, &c. R. Co. v. Reese, 85 Ala. 497; 38 Am. & Eng. R. Cas. 342, 345, *n.*; Tilley v. St. Louis, &c. R. Co., 49 Ark. 535; 32 Am. & Eng. R. Cas. 324; White v. Chicago, &c. R. Co. (S. Dak.), 45 Am. & Eng. R. Cas. 565; 47 N. W. Rep. 146; Cleavelands v. Grand Trunk R. Co., 42 Vt. 449; Spaulding v. Chicago, &c. R. Co., 30 Wis. 110; 11 Am. Rep. 550. Compare Ruffner v. Cincinnati, &c. R. Co., 34 Ohio St. 96. But proof of proper construction of the engine, and use of proper appliances and careful management, rebuts the presumption arising from escape of fire. Koontz v. Oregon, &c. R. Co., (Oreg.), 43 Am. & Eng. R. Cas. 11; 23 Pac. Rep. 820. Compare, however, Chicago, &c. R. Co. v. Goyette, 133 Ill. 21; 43 Am. & Eng. R. Cas. 36.

² Columbus, &c. R. Co. v. Kennedy, 78 Ga. 646; 31 Am. & Eng. R. Cas. 92; Central R. Co. v. Brinson, 64 Ga. 475; Vickers v. Atlanta, &c. R. Co., 64 Ga. 306; 8 Am. & Eng. R. Cas. 337, 343; East Tennessee, &c. R. Co. v. Hartley, 73 Ga. 5; Brunswick, &c. R. Co. v. Hoover,

74 Ga. 426; Code of Miss. (1892), § 1808. The fact that a precedent wrong on the part of the injured party produced the conditions which resulted in the injury does not prevent the application of the statute. Vicksburgh, &c. R. Co. v. Phillips, 64 Miss. 693; 30 Am. & Eng. R. Cas. 587. Nor is the presumption overcome by proof that the whistle was heard blowing, etc., at the time of the accident. Mobile, &c. R. Co. v. Dale, 61 Miss. 206; 20 Am. & Eng. R. Cas. 651. Compare Jones v. Bond, 40 Fed Rep. 281. The presumption does not apply in an action by a shipper for goods lost. Chicago, &c. R. Co. v. Trotter, 60 Miss. 442.

³ See Karsen v. Milwaukee, &c. R. Co., 29 Minn. 12; 7 Am. & Eng. R. Cas. 501; 16 Am. & Eng. Ency. Law, p. 451; *post*, Chapter XIX.

⁴ Faber v. St. Paul, &c. R. Co., 29 Minn. 465; 8 Am. & Eng. R. Cas. 277; Philadelphia, &c. R. Co. v. Stebbins, 62 Md. 504; 19 Am. & Eng. R. Cas. 36; 2 Thompson on Neg., 904; 1 Shear. & Red. on Neg. (4th ed.), § 13. Negligence is not necessarily to be presumed from the speed at which a train is going. Thus the fact that a railroad train was run at an unlawful rate of speed within a city is no ground for imputing negligence to the railway company, as between it and its employé, where there is no evidence that the injury to the latter was caused by collision with any object. Maher v. Railroad Co., 64 Mo. 267; Holman v. Railroad Co., 62 Mo. 562; De Graff v. Railroad Co., 76 N. Y. 125. The statute limit-

of negligence which defendant must overcome by proof.¹ But where there is no other evidence in the case, in order to fix the liability of the company, it must be made to appear that the violation of the statute was the proximate cause of the injury,² unless of course the statute plainly provides that such a violation shall be conclusive proof of negligence and of the liability of the company.³

In view of the high duty owing by carriers of passengers, and the character of the undertaking assumed by them, it is generally held that in case of an injury to a passenger a presumption of negligence arises and the burden of proof rests upon the carrier to show that it exercised the care required by law in the discharge of its duty.⁴

ing the rate of speed at which railroad trains are to be run within a city is a limitation made for the protection of those crossing the streets of such city, and not so much for the protection of the employes on the trains, although it might indirectly be for their protection also. *Ewen v. Railway Co.*, 38 Wis. 633; *Lockwood v. Chicago, &c. R. Co.*, 55 Wis. 50. In *Burlington, &c. R. Co. v. Wendt*, 12 Neb. 76, the fact that a railroad train ran at a speed of eighteen miles an hour within the corporate limits of a city was held, in an action for killing an animal, not to be alone sufficient to show gross negligence. No arbitrary rule as to the rate of speed at which a train of cars may be run, with due regard to the safety of persons and property, can be applicable to all portions of a town or city alike. Evidently a rate which in one portion, or under certain circumstances, might be entirely reasonable, in another and more thickly inhabited portion, or under different circumstances, would very justly be deemed unwarrantable, and evince a most reckless disregard for the rights both of persons and property. As showing that speed alone, even although it be at an unlawful rate, is not sufficient to fix a liability for an injury, the case of *Brown v. Buffalo, &c. R. Co.*, 22 N. Y. 191, is in point. That was an action for damages caused by the killing of the plaintiff's intestate at a street crossing in the city of Buffalo. It appeared that there was an ordinance prohibiting the running of trains within the city faster than a certain rate, with a fixed penalty for exceed-

ing it. On the occasion of the injury complained of, the speed of the train was greater than the ordinance permitted, and the court charged the jury that this fact alone constituted negligence on the part of the railroad company, for which it was liable if the intestate were himself without fault. This instruction the Court of Appeals held to be erroneous, and ordered a new trial. See also on this point, *Cincinnati, &c. R. Co. v. Lawrence*, 13 Ohio St. 66.

¹ 1 Shear. & Red. on Neg. (4th ed.), §§ 11, 13; 2 Thompson on Neg., p. 1231, § 5; *Knuffle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Karle v. Kansas City, &c. R. Co.*, 55 Mo. 476.

² *Pennsylvania R. Co. v. Hensil*, 70 Ind. 569; 36 Am. Rep. 188; *Hayes v. Michigan Central R. Co.*, 111 U. S. 228, 240; 13 Am. & Eng. R. Cas. 394; *Quincy, &c. R. Co. v. Wellhoener*, 72 Ill. 60; *Billing v. Breinig*, 45 Mich. 65.

³ The only cases which appear to construe such statutes so that proof of a violation of the statute at the time of the injury is conclusive as defendant's liability, are found in Tennessee. See *Tennessee, &c. R. Co. v. Walker*, 11 Heisk. (Tenn.) 383; *Nashville, &c. R. Co. v. Thomas*, 5 Heisk. (Tenn.) 262; *Collins v. East Tenn. &c. R. Co.*, 9 Heisk. (Tenn.) 841.

⁴ *Bedford, &c. R. Co. v. Rainbolt*, 99 Ind. 551; 21 Am. & Eng. R. Cas. 466 (giving way of a bridge); *Miller v. Ocean Steamship Co.*, 118 N. Y. 199; *Dougherty v. Missouri R. Co.*, 81 Mo. 325; 51 Am. Rep. 239; 21 Am. & Eng. R. Cas. 497 (sudden starting of car); *Texas, &c. R.*

This presumption, however, is limited to cases where it is shown that the injury complained of resulted from the breaking of

Co. v. Suggs, 62 Tex. 323 (derailment of car); White v. Boston, &c. R. Co., 144 Mass. 404; 30 Am. & Eng. R. Cas. 615 (passenger injured by falling of a car fixture); Seybolt v. New York, &c. R. Co., 95 N. Y. 562; 18 Am. & Eng. R. Cas. 162.

According to the weight of authority in this country negligence is presumed when an injury results from the breakage or defective condition of any of the appliances of a railway used in the carrying of passengers, or in the method of their use. *Carpue v. London, &c. Ry. Co.*, 5 Q. B. 747; *Gee v. Metropolitan Ry. Co.*, L. R. 8 Q. B. 161; *Sawyer v. Hannibal, &c. R. Co.*, 37 Mo. 240; *Galena, &c. R. Co. v. Yarwood*, 15 Ill. 468; *Bowen v. N. Y. &c. R. Co.*, 18 N. Y. 408; *Curtis v. Rochester, &c. R. Co.*, 18 N. Y. 434; *Ware v. Gay*, 11 Pick. (Mass.) 106; *Young v. Kinney*, 28 Ga. 111; *McLean v. Burbank*, 11 Minn. 277; *Baltimore, &c. R. Co. v. Whitman*, 29 Gratt. (Va.) 431; *Baltimore, &c. R. Co. v. Noell*, 32 Gratt. (Va.) 394; *Peoria, &c. R. Co. v. Reynolds*, 88 Ill. 418; *Stevens v. European, &c. R. Co.*, 66 Me. 74; *Flannery v. Waterford & Limerick Ry. Co.*, 11 Ir. Rep. C. L. 30; *Bird v. Great Northern Ry. Co.*, 4 H. & N. 842; *George v. St. Louis, &c. R. Co.*, 34 Ark. 613; *Denver, &c. R. Co. v. Woodward*, 4 Col. 1. The breaking of a paddle-wheel on a steamer raises a presumption of negligence. *Yerkes v. Keokuk, &c. Packet Co.*, 7 Mo. App. 265. So where a person was injured while leaving a steamer by the falling of a stage plank. *Eagle Packet Co. v. Defries*, 94 Ill. 598. So an injury resulting from the washing away of a railway embankment by a flood, — *Philadelphia, &c. R. Co. v. Anderson*, 94 Penn. St. 351, 39 Am. Rep. 787; *Brehm v. Gt. Western R. Co.*, 34 Barb. (N. Y.) 256; *Gt. Western Ry. Co. v. Braid*, 1 Moo. P. C. 101, — or where an injury results from a car being thrown from the track, — *Pittsburgh, &c. R. Co. v. William*, 74 Ind. 462; *Carpue v. London, &c. Ry. Co.*, 5 Q. B. 749; *Zemp v. Wilmington, &c. R. Co.*, 9 Rich. (S. C.) L. 84; *Sullivan v. Phila., &c. R.*

Co., 30 Penn. St. 234; *Texas, &c. R. Co. v. Suggs*, 62 Tex. 323; 37 Am. & Eng. R. Cas. 475, — from a collision of trains, — *New Orleans, &c. R. Co. v. Allbritton*; 38 Miss. 242; *Skinner v. London, &c. Ry. Co.*, 5 Exch. 786, — where the train breaks down, — *Toledo, &c. R. Co. v. Baggs*, 85 Ill. 80; *Meier v. Penn. R. Co.*, 64 Penn. St. 225, — and generally, where the injury results from the defective condition of its roadway, bridges, rails, cars, or other appliances of the business, or its mode of operating them. *Pittsburgh, &c. R. Co. v. Thompson*, 56 Ill. 138; *Edgerton v. New York, &c. R. Co.*, 35 Barb. (N. Y.) 389; *Dawson v. Manchester, &c. Ry. Co.*, 7 H. & N. 1037; *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282; *Railroad Co. v. Pollard*, 22 Wall. (U. S.) 341; *Ware v. Gay*, 11 Pick. (Mass.) 106; *Holbrook v. Utica, &c. R. Co.*, 12 N. Y. 236; *Roberts v. Johnson*, 58 N. Y. 613; *Simpson v. London, &c. Omnibus Co.*, L. R. 8 C. P. 390; *Fairchild v. California Stage Co.*, 13 Cal. 599; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181. Negligence may be inferred from the fact of the explosion of a boiler, whether there be any relation between the owner of the boiler and the party injured or not. The presumption originates from the nature of the act, and not from the nature of the relations between the parties. Where an accident happens, as in the bursting of a boiler, in the absence of explanatory circumstances, negligence will be presumed, and the burden is cast upon the owner to disprove it. *Rose v. Stephens & Condit Transp. Co.*, 20 Blatch. (U. S.) 411; 11 Fed. Rep. 438; *The Reliance*, 4 Woods (U. S.), 420; 2 Fed. Rep. 249; *Posey v. Seoville*, 10 Fed. Rep. 140; *Robinson v. N. Y. Central R. Co.*, 20 Blatch. (U. S.) 338. No presumption of negligence ordinarily arises from the mere fact that an accident has occurred. But such a presumption arises whenever it appears that an accident has resulted from a defect in the road or any part of the apparatus employed in operating it, — *Curtis v. Rochester & Syracuse R. Co.*, 18 N. Y. 534, — or from circumstances attending the in-

machinery, from a collision or the derailment of cars, or from some defect in the appliances or means of transportation, or in the conduct

jury; and whenever such a state of things exists, the *onus* is upon the company to show that the injury did not result from any negligence on its part. *Brehm v. Great Western R. Co.*, 34 Barb. (N. Y.) 256. When the presumption of negligence has been once established against a carrier of passengers, in an action for damages resulting from an accident, it can only be rebutted by proving that the accident resulted from circumstances against which human prudence and foresight could not guard. *Bowen v. New York Central R. Co.*, 18 N. Y. 408.

But the presumption of negligence only applies when the wrongful act was that of the carrier himself, or of some one for whose conduct he is responsible, and does not exist where it was the act of a stranger. The case of *Curtis v. Rochester, &c. R. Co.*, 18 N. Y. 534, is a leading one in this connection. The court, speaking through GROVER, J., said: "The plaintiff took passage in the defendants' cars at Geneva for Auburn. As the train was passing Waterloo, it ran off the track, and the plaintiff was injured. The court, among other things, charged the jury that the fact of this accident occurring was of itself presumptive evidence of negligence on the part of the defendants, and it lay with them to explain it and to prove that they were not negligent, in order to discharge them from liability to the plaintiff; to which the defendants excepted. The plaintiff was bound to prove her cause of action. That was that she had received an injury caused by the negligence of the defendants. The negligence of the defendants must be proved by the plaintiff, as well as the reception of the injury. It was not enough for her to prove that while a passenger upon the defendants' cars she was injured. In this case, proof was given that the cars ran off the track, and that this occasioned the injury. It was in reference to this evidence that the judge charged the jury that the fact of this accident occurring was presumptive evidence of negligence on the part of the defendants. The question is, whether the plaintiff was bound to go

further, and show the particular cause of the cars being thrown from the track, or whether it was for the defendants to show that it was accidental, and without neglect upon their part. The question may be determined upon principles applicable to all modes of carrying passengers. It is the duty of all engaged in this business, in any mode, to use care to secure the safety of the passenger, proportioned to the danger incident to the mode of conveyance. In case this care is applied, as a general result the safety of the passenger will be secured, so far as that safety depends upon the state or condition of any of the means provided by the carrier and used in the business; if there is no imperfection in any of these, and suitable caution is employed by those engaged in their application, everything dependent thereon will accomplish the end in view. This is as certain as the laws of mechanics. When, therefore, an injury is received from a derangement of anything employed by the carrier, the presumption necessarily arises that there existed somewhere an imperfection in the machinery employed, or negligence in its application. It is the duty of the carrier to provide perfect machinery, and if he has failed in this, it devolves upon him to show the excuse, if any. This is the rule applicable to all cases where a party seeks exoneration from a duty imposed upon him by law or incurred by contract. The plaintiff has established his cause of action when he has shown a failure to perform the duty from which he has sustained an injury. It is for the defendant, then, to show the facts relieving him from responsibility in the particular case. This imposes no hardship upon the defendant in this class of cases. The whole management is exclusively under his control. He has ample means to show the true cause of the difficulty. The plaintiff knows nothing about it. He takes passage with the carrier, who, instead of conveying him safely, inflicts an injury upon him by the failure of some part of the machinery employed by him. In many cases, it would be impossible for the plaintiff to ascertain the particular de-

of the business. This cannot apply to a case where a passenger while sitting at a car-window is injured by being struck on the arm

fact, and I think no such obligation is imposed upon him by the rules of evidence. The authorities are uniform in favor of the rule held by the judge. *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181; *Carpue v. London, &c. Ry. Co.*, 5 Q. B. 747; *Holbrook v. Utica, &c. R. Co.*, 16 Barb. (N. Y.) 113. The defendants' counsel cites the case of *Holbrook v. Utica, &c. R. Co.*, 12 N. Y. 236, in opposition to the rule. I understand that case as substantially sustaining the rule as laid down by the judge in his charge in this case. *RUGGLES, J.*, says that if the witness who swears to the injury testifies also that it was caused by a crush in a collision with another train of cars belonging to the same carriers, the presumption of negligence immediately arises. Just so when it is proved that the injury arose from any derangement, crush, or displacement of the track or cars." In the same case, *SELDEN, J.*, said: "Whenever it appears that the accident was caused by any deficiency in the road itself, the cars, or a portion of the apparatus belonging to the company and used in connection with its business, a presumption of negligence on the part of those whose duty it was to see that everything was in order immediately arises, it being extremely unlikely that any defect should exist of so hidden a nature that no degree of skill or care could have foreseen or discovered it. If it be said that upon the same principle upon which negligence is presumed in such a case it should be presumed in every case, on account of the high degree of improbability that a serious accident of any kind should occur without some degree of negligence, the answer is plain; and to present this distinction is the object of most that has been said. There may be a presumption of negligence in every case; but where nothing is known in regard to the cause of the accident, the negligence may as well have been that of some one residing in the vicinity of the road, or of some stranger, of whom numbers come in contact with it every day, as of any of the employés of the company; while if it appears that the mischief has resulted from a defect in

some part of the apparatus of the company, the negligence, if any, must have been that of some one for whose acts and omissions the company is liable, — it being well settled that the carrier is responsible for the negligence or want of skill of every one who has been concerned in the manufacture of any portion of its apparatus. *Hegeman v. Western R. Co.*, 13 N. Y. 9; *Ware v. Gay*, 11 Pick. (Mass.) 106; *Ingalls v. Bills*, 9 Met. (Mass.) 1. The cases in which it has been said that a presumption of negligence arises from the mere proof that an accident has occurred will appear, if examined, not to conflict materially with these principles; and some of them are, I think, illustrative of the distinction just suggested. The leading cases on the subject are those of *Christie v. Griggs*, 2 Camp. 79; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 192; *Carpue v. London, &c. Ry. Co.*, 5 Q. B. 747; *Laing v. Colder*, 8 Penn. St. 479. In *Christie v. Griggs*, where Sir JAMES MANSFIELD is supposed to have laid down the proposition in question, it was proved that the injury was caused by the breaking of the axle-tree of the coach, upon the top of which the plaintiff was seated; and it was in view of this proof that the Chief Justice made the remark that 'the plaintiff had made a *prima facie* case by proving his going on the coach, the accident, and the damage he had suffered.' There is no doubt that in such a case negligence should be presumed, for the reasons which have been given. In the case of *Stokes v. Saltonstall*, *ante*, which was also an action against the proprietors of a line of stage-coaches, the court instructed the jury that the 'facts that the carriage was upset and the plaintiff's wife injured were *prima facie* evidence that there was carelessness, or negligence, or want of skill, on the part of the driver; and threw upon the defendant the burden of proving that the accident was not occasioned by the driver's fault.' Taken abstractly, this instruction, which was sustained by the court, might seem to be in conflict with the principles here contended for; but if understood in reference to the proof, it is otherwise.

by some hard substance just as another train is passing,¹ or to similar injuries which are not the result of a negligent or improper construction, maintenance, or operation of the road.² The true rule is that announced in a case before the Kentucky Supreme Court, where it is said: "*Prima facie*, where a passenger being carried on a train is injured by an accident occurring to the train, the legal presumption arises that the accident and consequent injury was caused by the negligence of the carriers; and the *onus* of disproving the presumption of negligence by showing that the injury arose from an accident which the utmost care, diligence, and skill could not prevent, is on them; or that, in actions for ordinary neglect, although negli-

The plaintiff has proved not only the accident and the injury, but that the passengers had remarked that the driver appeared intoxicated, and so told the agent of the proprietors; that the road was perfectly level, and not dangerous or difficult; and that the reckless conduct of the driver had called out repeated remonstrances from the passengers, which were wholly unattended to. Here was ample proof of negligence, and the judge must have had these circumstances in view when he made his remarks to the jury. The happening of the accident, under the circumstances proved, was undoubtedly *prima facie* evidence of negligence. The other two cases were actions for injuries upon railroads. In that of *Carpue v. London, &c. Ry. Co.*, 5 Q. B. 747, it appeared that the position of the rails had been somewhat deranged at the spot where the injury took place; and the Chief Justice charged the jury that it having been shown that the exclusive management both of the machinery and the railway was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced. This is in perfect accordance with the principles which have been here advanced. *Laing v. Colder*, 8 Penn. St. 479, is perhaps the strongest case in support of the doctrine against which we contend. When that case was heard *in banco*, BELL, J., said: 'the mere happening of an injurious accident raises, *prima facie*, a presumption of neglect, and throws upon the carrier the *onus* of showing it did not exist.'

But the charge of the judge at the circuit upon which the question arose was not so broad. He instructed the jury that 'in the *present* case the presumption was there had been negligence,'—a charge fully justified by the proof, which was that the accident occurred while the car was crossing a bridge, which was so narrow that the plaintiff's hand, lying outside the car-window, was caught by the bridge and his arm broken. It was palpable negligence on the part of the company so to construct the bridge. In no instance that I am aware of has it been said by any judge that negligence, on the part of the carrier, was to be presumed from the mere happening of an accident, *except where the facts proved in the particular case fully warranted the presumption upon the principles here insisted upon.*"

¹ *Pennsylvania R. Co. v. McKinney*, 124 Penn. St. 462; 37 Am. & Eng. R. Cas. 153.

² In the case of *Stimson v. Milwaukee, &c. R. Co.*, 75 Wis. 381; 44 Am. & Eng. R. Cas. 381, the plaintiff, while walking down the aisle of the car, carrying a satchel in her hand and looking for a seat, stumbled over two satchels which had been left in the aisle and was injured. None of the company's employes were in the car at the time; the car was well lighted and one could easily see the obstructions by looking. It was held that there was no evidence of negligence on the part of the company; the presence of the satchels in the aisle could not, under the circumstances, create any presumption of negligence. See also for a similar case, *Sherman v. Delaware, &c. R. Co.*, 106 N. Y. 542.

gent themselves, the injury to the passenger would not have occurred but for his own negligence." ¹

The burden of proof properly and naturally falls upon the plaintiff in actions for negligent injury. And in the absence of any presumption of defendant's negligence the plaintiff must establish by fair preponderance of the evidence the negligence of the defendant as the proximate cause of the injury.² Mr. Justice STRONG has stated the rule in this connection very clearly: "In actions for negligence the burden of proof is upon the plaintiff; the law will not presume it for him. And in cases like this, where all the evidence must be considered in order to ascertain whether negligence existed, it is a mistake to suppose that a court may be required to single out some of the facts proved, and declare that they remove the burden of proof from the shoulders of the plaintiff and cast it on the defendant. That can only be done where a court can determine what constitutes guilt. It is the province of the jury to balance the probabilities and determine where the preponderance lies."³ But when evidence has been introduced which is sufficient as a matter of law to hold defendant liable, or to create a presumption of negligence, the burden of proof shifts to the defendant.⁴ Proof of defendant's negligence as a proximate cause of the injury is sufficient to entitle plaintiff to a recovery, except in those jurisdictions where it is held that he must also assume the burden of negating contributory negligence on his own part.⁵ Even in such jurisdictions however, it is sufficient, if, having

¹ BENNETT, J., in *Louisville, &c. R. Co. v. Ritter*, 85 Ky. 368; 28 Am. & Eng. R. Cas. 168, citing *Jamison v. San José, &c. R. Co.*, 55 Cal. 597; *New Orleans, &c. R. Co. v. Albritton*, 38 Miss. 274; *Baltimore, &c. R. Co. v. Worthington*, 21 Md. 284.

² *Brown v. Congress, &c. R. Co.*, 49 Mich. 153; 8 Am. & Eng. R. Cas. 383; *Mymning v. Detroit, &c. R. Co.*, 67 Mich. 67; *Quaife v. Chicago, &c. R. Co.*, 48 Wis. 513; *Seybolt v. New York, &c. R. Co.*, 95 N. Y. 562; 47 Am. Rep. 75; 18 Am. & Eng. R. Cas. 162; *Crandall v. Goodrich Transp. Co.*, 16 Fed. Rep. 75; *McCaig v. Erie R. Co.*, 8 Hun (N. Y.), 599; *McCully v. Clarke*, 40 Penn. St. 399; 80 Am. Dec. 584. The rule in regard to civil cases is that plaintiff is bound to prove his case only by a preponderance of the evidence; he is not bound to prove it beyond a reasonable doubt, and this rule is not changed

by the fact that defendant's wrongful act was a crime. *Welch v. Juggenheimer*, 56 Iowa, 11; 41 Am. Rep. 77 (*overruling*, *Barton v. Thompson*, 46 Iowa, 30); 26 Am. Rep. 131; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697; 23 Am. Rep. 239; *Blaeser v. Milwaukee Ins. Co.*, 37 Wis. 31; 19 Am. Rep. 747; 16 Am. & Eng. Ency. Law, p. 454 and numerous cases cited.

³ *McCully v. Clarke*, 40 Penn. St. 407, 408; 80 Am. Dec. 584.

⁴ *Pennsylvania Canal Co. v. Bentley*, 66 Penn. St. 30; *Missouri Pac. R. Co. v. Foreman*, 73 Tex. 311; 2 *Thomp. on Neg.*, p. 1235, § 8.

⁵ The better rule is that there is no presumption of contributory negligence on the part of the plaintiff; it is a matter of defence which need not be negated in the declaration or complaint, but which must be alleged and proved as a matter of

alleged in his declaration or complaint that he was without fault himself, he is able to establish the negligence of the defendant by

defence. *Thompson v. North Mo. R. Co.*, 51 Mo. 190; *Hough v. Railroad Co.*, 100 U. S. 213; *Railroad Co. v. Gladmon*, 15 Wall. (U. S.) 401; *Indianapolis, &c. R. Co. v. Horst*, 93 U. S. 291; *Mobile, &c. R. Co. v. Crenshaw*, 65 Ala. 569; 8 Am. & Eng. R. Cas. 541; *Thompson v. Duncan*, 76 Ala. 334; *Texas, &c. R. Co. v. Orr*, 46 Ark. 182, 423; *McDougall v. Central R. Co.*, 63 Cal. 431; 12 Am. & Eng. R. Cas. 143; *May v. Hanson*, 5 Cal. 360; 63 Am. Dec. 135; *Sanderson v. Frazier*, 8 Col. 79; 54 Am. Rep. 544; *St. Louis, &c. R. Co. v. Weaver*, 35 Kan. 412; 28 Am. & Eng. R. Cas. 341; *Louisville, &c. R. Co. v. Goetz*, 79 Ky. 160; 42 Am. Rep. 227; 14 Am. & Eng. R. Cas. 627; *Thompson v. Central R. Co.*, 54 Ga. 509; *Bacon v. Baltimore, &c. R. Co.*, 58 Md. 482; 15 Am. & Eng. R. Cas. 409; *Hocum v. Wetherick*, 22 Minn. 152; *Stapp v. Chicago, &c. R. Co.*, 85 Mo. 225; *Warmington v. Atchison, &c. R. Co.*, 46 Mo. App. 159; *Buesching v. St. Louis Gas Co.*, 73 Mo. 219; 39 Am. Rep. 503; *Baltimore, &c. R. Co. v. Whitacre*, 35 Ohio St. 627; *Cleveland, &c. R. Co. v. Crawford*, 24 Ohio St. 631; 15 Am. Rep. 633; *Cleveland, &c. R. Co. v. Rowan*, 66 Penn. St. 393 (love of life and the instinct of preservation being the highest motive for care, they will stand for proof of it till the contrary appear); *Cassidy v. Angell*, 12 R. I. 447; 34 Am. Rep. 690; *Carter v. Columbia, &c. R. Co.*, 19 S. C. 20; 45 Am. Rep. 754; 15 Am. & Eng. R. Cas. 414; *Dallas, &c. R. Co. v. Spicker*, 61 Tex. 427; 48 Am. Rep. 297; 21 Am. & Eng. R. Cas. 160; *Prideaux v. Mineral Point*, 43 Wis. 513; 28 Am. Rep. 558; *Fowler v. Baltimore, &c. R. Co.*, 18 W. Va. 579; 8 Am. & Eng. R. Cas. 480; *Bridge v. Grand Junction Ry. Co.*, 3 M. & W. 244; *Martin v. Great Northern Ry. Co.*, 16 C. B. 179. See 4 Am. & Eng. Ency. Law, pp. 91 *et seq.* where this question is discussed with great clearness and a very large number of authorities collected.

There is respectable authority, however, holding that the burden rests upon the plaintiff to prove himself free from contributory negligence. *Missouri Furnace Co.*

v. Abend, 107 Ill. 44; 47 Am. Rep. 425; *Cincinnati, &c. R. Co. v. Butler*, 103 Ind. 81; 23 Am. & Eng. R. Cas. 262; *Patterson v. Burlington, &c. R. Co.*, 38 Iowa, 279; *Nelson v. Chicago, &c. R. Co.*, 38 Iowa, 564; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *State v. Maine Central R. Co.*, 76 Me. 357; 49 Am. Rep. 622; *Mitchell v. Chicago, &c. R. Co.*, 51 Mich. 236; 47 Am. Rep. 566; 12 Am. & Eng. R. Cas. 163; *Walsh v. Oregon R., &c. Co.*, 10 Oreg. 250; *Button v. Frink*, 51 Conn. 342; 4 Am. & Eng. Ency. Law, p. 90. See also *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622. And it is said that the complaint must expressly allege that the injury occurred without the fault or negligence of the plaintiff. *Maxfield v. Cincinnati, &c. R. Co.*, 41 Ind. 269; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228. The fact that the complaint showed that plaintiff's intestate knew of a dangerous place in the highway, into which he fell and was killed, is not sufficient to overcome, or make nugatory, the explicit averment that he exercised reasonable care and prudence. But in such case, in order to entitle the plaintiff to recover, he must offer evidence to show that deceased was free from contributory negligence. *Toledo, &c. R. Co. v. Brannagan*, 75 Ind. 490. The rule is thus laid down in the case of *Tolman v. Syracuse, &c. R. Co.*, 98 N. Y. 198: In an action for negligence causing death, the burden of establishing affirmatively freedom from contributory negligence is upon the plaintiff, and while although there were no eye-witnesses of the accident, and although its precise cause and manner of occurrence are unknown, absence of contributory negligence may be established, sufficiently to make it a question of fact for the jury, by proof of such facts and surrounding circumstances as reasonably indicate or tend to establish that the accident might have occurred without negligence on the part of the deceased; yet if the facts and circumstances, coupled with the occurrence of the accident, do not indicate or tend to establish the existence of some cause or occasion therefor which is consistent with proper care and prudence,

evidence which at the same time shows no default on his own part, and *prima facie* proves him to have been in the exercise of due care.¹ The true doctrine is, as already stated, that there is no presumption of negligence against either party, and the burden of proof should properly rest upon the party alleging the want of care. The plaintiff establishes his case upon showing the want of care on the part of the defendant with nothing in the facts proved to show negligence on his own part or create a presumption against him, and if there was any contributory negligence it rests on the defendant to prove it.²

The elements which plaintiff must establish in every case are : 1. A want of ordinary care on the part of defendant. 2. A duty owing to himself from defendant. 3. Damage to himself. 4. That the defendant's want of ordinary care in the discharge of this duty was the proximate cause of the damage complained of.³ A failure to establish any one of these elements, from the very definition of negligence, entitles the defendant to a verdict.

SEC. 325 b. **Evidence.**—In the many cases involving actions for negligent injury, innumerable questions as to the propriety and admissibility of evidence have been raised and decided, even a small

the inference of negligence is the only one to be drawn, and defendant is entitled to a non-suit. See also *Robinson v. N. Y. Central R. Co.*, 65 Barb. 146; *Greany v. Long Island R. Co.*, 101 N. Y. 419; *Jones v. N. Y. Central R. Co.*, 10 Abb. N. Cas. (N. Y.) 200.

¹ Wharton on Neg., §§ 423, 426; *Cleveland, &c. R. Co. v. Crawford*, 24 Ohio St. 631; 15 Am. Rep. 633; *Adams v. Young*, 44 Ohio St. 80; 58 Am. Rep. 789; *Chicago, &c. R. Co. v. Carey*, 115 Ill. 115; *Pennsylvania R. Co. v. Goodman*, 62 Penn. St. 329; *Pennsylvania R. Co. v. Weber*, 76 Penn. St. 157; 18 Am. Rep. 407; *Cooley on Torts*, p. 673. If the facts are undisputed, and fail to show that the plaintiff was in the exercise of due and reasonable care at the time of receiving the injuries, the court should instruct the jury that he cannot recover. *Gavett v. Manchester, &c. R. Co.*, 6 Gray (Mass.), 501.

² Wharton on Neg., §§ 423, 426; *Burns v. Chicago, &c. R. Co.*, 69 Iowa, 450; 58 Am. Rep. 227; *Pennsylvania R. Co. v. Goodman*, 62 Penn. St. 329; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; 75

Am. Dec. 375; *Beach on Contrib. Neg.*, 446; *Hutchinson on Carriers* (2d ed.), §§ 802, 803. See also *Carter v. Columbia, &c. R. Co.*, 19 S. C. 20; *Pittsburgh, &c. R. Co. v. Noel*, 77 Ind. 110; *Central R. Co. v. Brinson*, 64 Ga. 475; *Randall v. Northwestern Telegraph Co.*, 54 Wis. 140; *Paducah, &c. R. Co. v. Hoehl*, 12 Bush (Ky.), 41; *Kentucky Central R. Co. v. Thomas*, 79 Ky. 160; *Robinson v. Western Pacific R. Co.*, 48 Cal. 409; *MacDougal v. Central R. Co.*, 12 Am. & Eng. R. Cas. (Cal.) 143; *Chadbourn v. Delaware R. Co.*, 6 Daly (N. Y. C. P.), 215; *Penn. R. Co. v. Weber*, 76 Penn. St. 157; *Savannah, &c. R. Co. v. Shearer*, 58 Ala. 672; *Kansas Pacific R. Co. v. Pointer*, 14 Kan. 37.

³ *Delaware, &c. R. Co. v. Napheys*, 90 Penn. St. 141; 1 Am. & Eng. R. Cas. 52; *Pennsylvania R. Co. v. Hensil*, 70 Ind. 569; 36 Am. Rep. 188; *Joy v. Winisimet Co.*, 114 Mass. 63; *Philadelphia, &c. R. Co. v. Boyer*, 97 Penn. St. 91; 2 Am. & Eng. R. Cas. 172; *Crandall v. Goodrich Transp. Co.*, 16 Fed. Rep. 75.

part of which it would be impossible to review.¹ Such questions belong rather to the domain of the law of evidence than to that of railroad law, and no effort is therefore made to discuss them here. A single question of some importance may, however, be noticed, — that relative to the compulsory physical examination of the injured person.

Where the plaintiff, in an action for injuries sustained through the negligence of the railroad company, alleges as an element of damage that he has suffered internal injuries, and there is reasonable ground for doubt as to the correctness of his statements and of the diagnosis of his private physician, it seems to be the general doctrine that the court may, in its discretion, direct an examination of plaintiff's person by disinterested and competent physicians, and compel plaintiff to submit.² The propriety and justice of such a

¹ See 16 Am. & Eng. Law, Article "Negligence," where some general rules are stated. Ordinarily in an action for an injury to a passenger the evidence should be confined to the condition of the road at the time of the accident. See *Hipley v. Kansas City, &c. R. Co.*, 88 Mo. 348; 27 Am. & Eng. R. Cas. 287; *Sidekum v. Wabash, &c. R. Co.*, 93 Mo. 400; 30 Am. Eng. R. Cas. 640; *Pittsburgh, &c. R. Co. v. Williams*, 74 Ind. 462; *Stewart v. Everts*, 76 Wis. 35; 41 Am. & Eng. R. Cas. 224; *Missouri Pacific R. Co. v. Mitchell*, 75 Tex. 77; 41 Am. & Eng. R. Cas. 224. Compare *Vicksburg, &c. R. Co. v. Putnam*, 118 U. S. 545; 27 Am. & Eng. R. Cas. 291; *Missouri Pacific R. Co. v. Collier*, 62 Tex. 318, and in actions for negligence generally the evidence should be limited to the time when the injury occurred. *Southern R. Co. v. Kendrick*, 40 Miss. 374. In an action by a passenger to recover damages for personal injuries occasioned by running off the track, evidence that the train on which the accident occurred, and of which witness was conductor, had run off the track seven or eight times within a month before the accident is admissible. *Mobile, &c. R. Co. v. Ashcraft*, 48 Ala. 15; 49 Ala. 305. In an action to recover damages for the death of a postal agent caused by the car in which he was working being thrown from the track and demolished, evidence as to the making an inspection of cars generally and not confined to the car

in question is inadmissible. *Ohio, &c. R. Co. v. Voight*, 122 Ind. 288. In an action for injuries sustained in a collision, evidence as to the age of the car in which the plaintiff was riding is held to be inadmissible. If the cars are suitable it makes no difference whether they are old or new. *Wormsdorf v. Detroit City R. Co.*, 75 Mich. 472; 40 Am. & Eng. R. Cas. 271. The error in admitting improper evidence, clearly calculated to arouse the sympathy and excite the prejudices of the jury so as to influence their verdict, is not cured by afterwards striking it out. *Gulf, &c. R. Co. v. Levy*, 59 Tex. 542; 46 Am. Rep. 269.

² The power of the court to direct such an examination is upheld in a very strong opinion in Alabama, *&c. R. Co. v. Hill*, 90 Ala. 75, where the court reviews a large number of cases, and holds that a refusal of the order is a reversible error. The same principle is recognized and applied in *Anonymous*, 89 Ala. 291, 7 So. Rep. 100; *McGuff v. State*, 88 Ala. 147. Such a power is also recognized in Missouri. *Shepard v. Missouri Pac. R. Co.*, 85 Mo. 629; 55 Am. Rep. 300 (practically overruling *Loyd v. Hannibal, &c. R. Co.*, 53 Mo. 509); *Sidekum v. Wabash, &c. R. Co.*, 93 Mo. 400; *Owens v. Kansas City, &c. R. Co.*, 95 Mo. 165. So also in Arkansas. *Sibley v. Smith*, 46 Ark. 275; 55 Am. Rep. 584. And in other jurisdictions. *White v. Milwaukee City R. Co.*, 61 Wis. 536; 50 Am. Rep. 154;

rule does not appear to admit of much question; it is always easy for a plaintiff to allege serious internal injuries (a favorite expe-

Atchison, &c. R. Co. v. Thul, 29 Kan. 466; 44 Am. Rep. 659 (plaintiff compelled to allow expert to examine his eyes); *Miami, &c. R. Co. v. Bailey*, 37 Ohio St. 104 (on plaintiff's refusal to submit the court may dismiss his action); *Hess v. Lake Shore, &c. R. Co.*, 7 Penn. Co. Ct. Rep. 765; *Richmond, &c. R. Co. v. Childress*, 82 Ga. 719; 9 S. E. Rep. 602; *Schroeder v. Chicago, &c. R. Co.*, 47 Iowa, 375. The case of *Stuart v. Havens*, 17 Neb. 211, does not deny the existence of such a power in the court. It merely holds that the order should not be granted where it is asked for during the trial by defendant, and defendant's physicians are requested to be named as examiners. If the examination is desired, the physicians to conduct it, say the court, "should be agreed upon by the parties, or appointed by the court, and the examination made before the trial begins, although the court may permit it to be made during the progress of the trial." See also *Dogge v. State*, 21 Neb. 272. In the case of *Roberts v. Ogdensburgh, &c. R. Co.*, 29 Hun (N. Y.), 154, the motion for an examination was denied on similar grounds. Defendant's motion was that plaintiff be required to submit her person to an examination by three physicians to be chosen by the company. It was held that the court had no power to grant such a motion. And it must be conceded that the New York lower courts have usually denied the power of the court to compel either party to submit to a physical examination, except in peculiar cases—as where, in an action for divorce, impotency is one of the grounds on which the divorce is sought. *Neuman v. Third Ave. R. Co.*, 50 N. Y. Super. Ct. 412; *McSwyny v. Broadway, &c. R. Co.*, 7 N. Y. Supp. 456; *Archer v. Sixth Ave. R. Co.*, 52 N. Y. Super. Ct. 378. *Contra*, *Walsh v. Sayre*, 52 How. Pr. (N. Y.) 334; *Shaw v. Van Rensselaer*, 60 How. Pr. (N. Y.) 143. In a case before the Supreme Court of the United States the question was squarely presented, and it was held that a court had no such power to compel plaintiff to submit his person to an examination by ap-

pointed physicians. The court, speaking through Mr. Justice GRAY, said: "No right is held more sacred or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass; and no order or process commanding such exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases based upon special reasons, and upon ancient practice coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country." This view has been adopted by the Indiana court. *Pennsylvania Co. v. Newmeyer*, 129 Ind. 411. See also *Terre Haute, &c. R. Co. v. Brunker*, 128 Ind. 553. In the case of *Parker v. Euslow*, 102 Ill. 272, the court in refusing to reverse the case on the ground that the trial court refused to order a compulsory examination of plaintiff's eyes, for an injury to which the action was brought, dismissed the matter with the single remark that "the court had no power to make or enforce such an order." But in subsequent cases, while the examination was not ordered, the court very clearly indicated that in a proper case such an order could be granted; that the power to make such an order resides in the trial court. See *St. Louis Bridge Co. v. Mills*, 138 Ill. 471; *Galesburgh, City of, v. Benedict*, 22 Ill. App. 111; *Chicago, &c. R. Co. v. Holland*, 122 Ill. 461. On the trial of an action for damages for personal injuries, the plaintiff may be permitted to show an injured member to the jury. *Louisville, &c. R. Co. v. Wood*, 113 Ind. 544; *Cunningham v. Union Pac. R. Co.*, 4 Utah, 206; 7 Pac. Rep. 795; *Barker v. Perry*,

dient with female plaintiffs), and corroborative medical testimony is equally easy to be obtained; to allow the defendant no opportunity to disprove such allegations would, in many cases, be harsh and unjust, particularly since the examination cannot ordinarily result in any injury to the plaintiff, but very materially aids in a fair investigation of the merits of the case.¹

The cases already cited establish the following propositions:

1. That trial courts have the power to order a physical examination by experts of the person of the plaintiff who seeks to recover in an action for physical injury.² 2. That the defendant has no absolute right to have an order made to that end and enforced, but that the matter rests in the sound discretion of the court,³ but that the exer-

67 Iowa, 146. In another case plaintiff claimed to be paralyzed on one side, the court held that his medical attendant, though not sworn, might be permitted to thrust a pin into the plaintiff's flesh to demonstrate to the jury the loss of the sense of feeling. *Osborne v. Detroit*, 32 Fed. Rep. 36. In an action for injuries where it was shown by the uncontradicted testimony of several witnesses that plaintiff was lamed so that she limped, it is no error to refuse to compel her to walk across the court-room in the presence of the jury. *Hatfield v. St. Paul, &c. R. Co.*, 33 Minn. 130; 53 Am. Rep. 14; 18 Am. & Eng. R. Cas. 292. But the court may refuse to allow medical works to be read to the jury. *State v. Winter*, 72 Iowa, 627; *Marshall v. Brown*, 50 Mich. 148. It may refuse to permit the location of the ribs to be shown by a section of the human body brought into court. *Knowles v. Crompton*, 55 Conn. 336. The court may refuse to order the plaintiff to submit to a physical examination by the defendant's medical witnesses, in private, it not appearing to be necessary, and plaintiff having already submitted to an examination by such witnesses in the presence of the jury. *Sioux City, &c. R. Co. v. Finlayson*, 16 Neb. 578; 49 Am. Rep. 724. See also *Stuart v. Havens*, 17 Neb. 211. And it is not error to refuse to compel plaintiff to submit to an examination by a physician to whom he objects, though not for lack of competency or integrity. *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95; 37 Am. & Eng. R. Cas. 129. But manifestly the ob-

jection must be a reasonable one else the plaintiff would thus practically acquire the power to appoint his own examiner, and the defendant's right to the examination would amount to a nullity.

¹ In the case of *Schroeder v. Chicago, &c. R. Co.*, 47 Iowa, 375, the court, by Beck, J., in upholding the view stated in the text, considered the reasons therefor at some length in a very able opinion. The holding was based on these grounds: 1. A party to an action has the right to demand the administration of exact justice, and, to this end, that evidence essential thereto and within the control of the court shall be produced. 2. It is within the power of the court to compel an examination, since the plaintiff is before it as a witness, and upon his refusal he may be treated as a recusant. 3. The power of the court to order a physical examination in actions for divorce, on the ground of impotency, has always been recognized. 4. In actions for personal injuries, plaintiffs are permitted to exhibit their wounds or injuries to the jury. See also *Thompson on Trials*, § 859.

² *White v. Milwaukee City R. Co.*, 61 Wis. 536; 50 Am. Rep. 154; *Miami, &c. R. Co. v. Bailey*, 37 Ohio St. 104, and numerous other cases in *n. 2*, pp. 1571, 1572.

³ *Shepard v. Missouri Pac. R. Co.*, 85 Mo. 629; 55 Rep. 300; *Gulf, &c. R. Co. v. Norfleet*, 78 Tex. 821. Generally, the examination should not be ordered unless the ends of justice require it. *International, &c. R. Co. v. Underwood*, 64 Tex. 463.

cise of this discretion will be reviewed on appeal and corrected in case of abuse, though not otherwise.¹ 3. That the examination should be ordered and had under the direction and control of the court, whenever it fairly appears that the ends of justice require the disclosure, or more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination, and that the examination may be made without danger to plaintiff's life or health; and without the infliction of serious pain.² 4. That the refusal of the motion where the circumstances present a reasonably clear case for the examination under the rule last stated, is such an abuse of the discretion lodged in the trial court as will justify a reversal of the judgment rendered in plaintiff's favor.³

It is a general rule that evidence tending to prove that after the occurrence of an injury caused by a structure alleged to be defective defendant repaired the place where the injury occurred, is inadmissible. Thus, where the company, after the injury has occurred, places safeguards to prevent the occurrence of such an injury in future, evidence of such fact is inadmissible, because the fact, if true, would not prove anything against the company, and would tend to create a prejudice on the part of the jury.⁴

¹ *Sibley v. Smith*, 46 Ark. 275; 55 Am. Rep. 584; *Miami, &c. R. Co. v. Bailey*, 37 Ohio St. 104.

² *Alabama, &c. R. Co., v. Hill*, 90 Ala. 75.

³ *Alabama, &c. R. Co. v. Hill*, 90 Ala. 75; *White v. Milwaukee City R. Co.*, 61 Wis. 536; 50 Am. Rep. 154; *Schroeder v. Chicago, &c. R. Co.*, 47 Iowa, 375; *Thompson on Trials*, § 859.

⁴ In the case of *Nalley v. Hartford, &c. Co.*, 51 Conn. 524; 50 Am. Rep. 47, the court observed: "A person may have exercised all the care the law required, and yet in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think that such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for con-

tinued negligence. . . . The fact that the accident has happened, and some person has been injured, immediately puts a party on a higher plane of diligence and duty, from which he acts with a view of preventing the possibility of a similar accident, which should operate to commend rather than to condemn the person so acting." See the rule of the text also upheld in *Henkel v. Murr*, 31 Hun (N. Y.), 28; *Martin v. Towle*, 59 N. H. 31; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *Sewell v. Cohoes*, 75 N. Y. 45; 31 Am. Rep. 418; *Hudson v. Chicago, &c. R. Co.*, 59 Iowa, 581; 44 Am. Rep. 694; 8 Am. & Eng. R. Cas. 464; *Morse v. Minneapolis, &c. R. Co.*, 30 Minn. 465; 11 Am. & Eng. R. Cas. 170. Compare *Weber Wagon Co. v. Kehl* (Ill.), 29 N. E. Rep. 714; *Readman v. Conway*, 126 Mass. 374; *St. Louis, &c. R. Co. v. Weaver*, 35 Kan. 412; 57 Am. Rep. 176; 28 Am. & Eng. R. Cas. 341; *Pennsylvania R. Co. v. Henderson*, 51 Penn. St. 351. See also 16 Am. & Eng. Ency. Law, pp. 457, 458 and notes, where the subject of such evidence is elaborated.

The weight of authority is in favor of the proposition that the plaintiff should be allowed to show that other persons had sustained injuries similar to his own at the same place at which his were received,¹ though it seems that the fact that other persons had passed the same place in safety cannot be considered any evidence of due care on the part of the defendant at the time plaintiff was injured.²

The opinion of a witness that certain acts do or do not amount to negligence is not admissible; it is a fundamental rule of evidence that the opinion of an ordinary witness on a question which it is for the jury to decide from the facts is incompetent.³

¹ *Wooley v. Grand Street, &c. R. Co.*, 83 N. Y. 121; 3 Am. & Eng. R. Cas. 398; *Phelps v. Winona, &c. R. Co.*, 37 Minn. 485; 32 Am. & Eng. R. Cas. 56; *Lewis v. Eastern R. Co.*, 60 N. H. 187; *Darling v. Westmoreland*, 52 N. H. 401; 13 Am. Rep. 55; *Hill v. Portland, &c. R. Co.*, 55 Me. 439. Compare, however, *Hubbard v. Concord*, 35 N. H. 52; 69 Am. Dec. 520; *Collins v. Dorchester*, 6 Cush. (Mass.) 397.

² *Branch v. Libbey*, 78 Me. 321; 57 Am. Rep. 810; *Hudson v. Chicago, &c. R. Co.*, 59 Iowa, 581; 44 Am. Rep. 692; *Aldrich v. Pelham*, 1 Gray (Mass.), 511; *Temperance Hall Assoc. v. Giles*, 38 N. J. L. 260.

³ *Lawson on Expert and Opinion Evidence*, 507; *Crane v. Northfield*, 33 Vt. 124; *Oleson v. Tolford*, 37 Wis. 327; *Stillwater Tp. Co. v. Coover*, 26 Ohio St. 520.

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